

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

800 River Road Operating Company LLC  
d/b/a Woodcrest Health Care Center

Employer

NLRB Case No. 22-RC-073078

and

1199 SEIU, United Healthcare Workers East

Petitioner

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**REPLY MEMORANDUM TO GENERAL COUNSEL'S  
BRIEF ANSWERING EMPLOYER'S EXCEPTIONS**

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Respondent 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center (“Woodcrest” or “Employer”) submits this Reply Memorandum in support of its Exceptions to the April 2, 2013 Decision and Order (“Decision”) of Administrative Law Judge William Nelson Cates (“ALJ”) and in reply to the Answering Brief of Counsel for the Acting General Counsel (“GC Brief”).

Although the Employer does not here restate its arguments as to why the Board and all of those to whom it delegated powers and responsibilities were and remain without power to prosecute or decide this case, the Employer incorporates by reference herein the arguments set forth in Point I of its Memorandum in Support of its Exceptions as well as any other arguments adopted by the courts in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and *NLRB v. New Vista Nursing and Rehabilitation*, 2013 U.S. App. LEXIS 9860 (3d Cir. 2013).

**I. COUNSEL FOR THE ACTING GENERAL COUNSEL HAS NOT REFUTED THE EMPLOYER’S POINT THAT THE ALJ MISAPPLIED *ROSSMORE HOUSE* AND SHOULD HAVE CONCLUDED THAT JANET LEWIS DID NOT UNLAWFULLY INTERROGATE DONNA DUGGAR.**

Nowhere in her brief does Counsel for the Acting General Counsel explain why the Employer is incorrect in pointing out that the instant facts fall squarely within the holding in *Rossmore House*, 269 NLRB 1176, 1177-78 (1984), that the company there did **not** conduct an unlawful interrogation despite asking an employee to confirm that he was supporting a union. Neither the ALJ nor Counsel for the Acting General Counsel addressed the significant parallels between the instant case and *Rossmore House*.

The fact that supervisor Janet Lewis and employee Donna Duggar were friends who spoke away from work socially once or twice weekly militates strongly in favor of the conclusion that under all the circumstances there was no coercion. Nothing in the record indicates that Duggar deemed Lewis’ isolated, one-time inquiry of her as to whether she

supported the Union to be anything other than part of the ordinary back-and-forth that comprised their off-hours socializing. The Board found no coercion in *Rossmore House*, where no such friendship existed, despite the manager having asked the employee whether it was true that he was supporting a union.

The fact that the employee in *Rossmore House* had been identified as a union organizer does not distinguish that case from the instant one. Although the record does not disclose whether Duggar supported the Union, the ALJ pointed out that some in management thought she did so (ALJD 12:16-17). That perception renders this fact pattern analogous to *Rossmore House*. Moreover, Lewis' conviction that Duggar could not possibly support the Union, her belief that she confirmed that conviction after securing Duggar's denial, and her communication of that denial to others within management supports, rather than undermines, the conclusion that Lewis' conduct was anything but coercive. So too, even more, does the fact that in the underlying representation case the Union won the election 122 to 81. *Woodcrest Health Care Center*, 359 NLRB No. 48 (2013). Simply put, there is nothing in the record that indicates that Lewis' conduct negatively affected Duggar or the Union's organizing effort one iota. When all the circumstances are assessed as is required under *Rossmore House*, the only possible conclusion is that Lewis did **not** coerce or unlawfully interrogate Duggar. It follows that the Board should reverse the ALJ's conclusion and dismiss this allegation.<sup>1</sup>

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<sup>1</sup>In the last paragraph of Point II of Counsel for the Acting General Counsel's brief (GC Brief at 13), her analysis of whether Lewis unlawfully interrogated Duggar morphs into a discussion of whether Lewis created an impression of surveillance. That is not the allegation that Counsel for the Acting General Counsel lodged with respect to Lewis and the Board should disregard that argument.

**II. COUNSEL FOR THE ACTING GENERAL COUNSEL HAS NOT ADDRESSED ANY OF THE EMPLOYER’S POINTS AS TO WHY THE ALJ ERRED IN CONCLUDING THAT VIJAYAN UNLAWFULLY INTERROGATED DOLCINE.**

In its May 22, 2013 Memorandum in support of its Exceptions (“Employer Memorandum”), the Employer identified 4 principal bases for reversing the ALJ’s conclusion that Vijayan unlawfully interrogated Dolcine, without regard for the ALJ’s credibility findings. Nowhere has Counsel for the Acting General Counsel addressed, let alone refuted, any of the points that the Employer made therein. All she did was restate the supposed support for the ALJ’s findings.

In the absence of any analysis of the Employer’s arguments by Counsel for the Acting General Counsel, the Employer summarizes its arguments below:

1. Vijayan did not **ask** Dolcine whether she was a Union member or supporter (Tr. 94:21-96:13). She **volunteered** that information. The record suggests that she volunteered her support for and membership in the Union because she was comfortable speaking with Vijayan (i.e., she did not feel coerced) and her language difficulties resulted in her misunderstanding what he was asking her. (Employer Memorandum at 6-7) The Board’s decision in *Phillips-Van Heusen Corp.*, 165 NLRB 1, 9 (1967), confirms that when, as here, the employee volunteers to her supervisor that she supports the union, the supervisor is permitted to discuss the matter with her. Nothing in the instant record indicates that Vijayan spoke to Dolcine coercively.

The ALJ recognized that Vijayan did not ask Dolcine whether she supported the Union and that Dolcine responded to the more limited inquiry put to her by telling Vijayan that she supported the Union (ALJD 4:43-45). However, the ALJ wrongly **failed** to ascribe significance to the fact that Vijayan did not ask Dolcine to indicate whether she supported the Union. It follows that the Board should reverse the ALJ’s conclusion that Vijayan unlawfully interrogated her.

2. The ALJ grounded his conclusion in part on the finding that Vijayan imposed himself upon Dolcine, taking her away from her work duties (ALJD 4:40). Nothing in the record supports that finding: it is as probable as not that Dolcine was merely standing near the nursing station awaiting something to do as that Vijayan drew her away from work duties. (Employer Memorandum at 7)

3. The ALJ grounded his conclusion in part on the finding that Vijayan's encounter with Dolcine "is one, among other unlawful actions by supervisors and agents of the Company at about the same timeframe" (ALJD 5:4-5)(emphasis added). As underscored in the Employer Memorandum (at 8), this finding by the ALJ is mistaken since the ALJ put the Vijayan-Dolcine encounter in February 2012 and the **single** other instance at issue in February (as distinct from "other unlawful actions" in the plural) was that involving Lewis and Duggar. It follows that the ALJ 's linkage of the Vijayan-Dolcine encounter to "other unlawful actions" (emphasis added) was erroneous and another basis for reversing the ALJ's conclusion.

4. The ALJ remarked on the fact that Dolcine was discharged after the March 9, 2012 election (ALJD 3:27-28) even though (a) the only reason the Employer adduced that information was to attempt to establish what transpired in connection with an unfair labor practice charge the Union had filed in connection with that discharge and (b) the Employer abandoned that effort when Dolcine indicated she did not have such knowledge (Tr. 110:18-25).<sup>2</sup> In the absence of the development of record evidence relating to Dolcine's discharge, the Employer has submitted and now respectfully renews its point that the Board should consider

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<sup>2</sup> It bears mention that before commencement of the hearing the Employer had no knowledge of the identity of the witnesses that Counsel for the Acting General Counsel and Union intended to call. Accordingly, when Dolcine appeared as a witness, the Employer was not necessarily in a position to establish what had transpired in the Region's investigation of an unfair labor practice charge involving her in the event, as proved to be the case, she denied knowing what had happened with that charge.

whether the ALJ inadvertently but improperly permitted the fact that Dolcine was discharged to lead him to the improper conclusion that Vijayan unlawfully interrogated her.

**III. COUNSEL FOR THE ACTING GENERAL COUNSEL FAILED TO ADDRESS, LET ALONE REFUTE, THE DEFICIENCIES THE EMPLOYER IDENTIFIED IN THE ALJ'S CONCLUSION THAT ATTORNEY MONICA UNLAWFULLY INTERROGATED JIMINEZ.**

Nowhere in her brief did Counsel for the Acting General Counsel grapple with several arguments in the Employer Memorandum explaining why the ALJ erred in concluding that attorney James Monica unlawfully interrogated employee Jeffrey Jiminez. The simple reality is that those arguments are compelling and there is no satisfactory rebuttal to them.

Counsel for the Acting General Counsel failed to address the record evidence, which the ALJ ignored, that shows that Jiminez **initiated** the very exchanges that the ALJ found unlawful (Employer Memorandum at 9-11). In recounting their second interview during his testimony, Jiminez detailed his statements about why the Union was necessary at Woodcrest without indicating that Monica had asked anything to elicit those remarks (Tr. 74:6-76:13; 79:21-80:5; 82:23-83:18). The substance of the remarks makes clear that these were not responses to questions Monica asked but statements that Jiminez volunteered. Jiminez acknowledged this when he testified that he “volunteered those statements” to Monica (Tr. 75:11-13) and clarified which interview it was during which they occurred with the unprompted statement that they were “my voluntary talking to [Monica]” (Tr. 76:4-8). As the Employer Memorandum argues more extensively, Jiminez verbalized his thoughts to Monica readily because, as Jiminez conceded (Tr. 75:14-76:13; 82:23-83:18; 80:2-5), he was comfortable with Monica and enjoyed the opportunity to tell a representative of management who had asked to speak with him why the Union had succeeded.

Counsel for the Acting General Counsel also did not address the point the Employer underscored that on cross-examination Jiminez answered that he “did not recall” to 5 specific questions for which he should have had clear responses if his direct testimony was accurate and truthful. Significantly, Jiminez’s direct examination on several of these points was the basis for the ALJ’s conclusion that Monica unlawfully interrogated him:

- The ALJ found that Monica asked Jiminez whether other employees passed out authorization cards or were otherwise involved with the Union (ALJD 8:5-7) even though Jiminez testified that he “did not recall” when asked if it was correct “that Mr. Monica told you that he was not interested in your telling him the names of any other employees who might have been engaged in conduct supportive of the union?” (Tr. 72:11-16).
- The ALJ found that Monica asked Jiminez whether Jiminez had signed an authorization card (ALJD 8:8) even though Jiminez testified that he “did not recall” when asked if it was correct “that Mr. Monica told you that he was not interested in whether you had engaged in any conduct supportive of the union?” (Tr. 72:7-10).
- The ALJ found that Monica asked Jiminez why he wanted to form a union (ALJD 8:21-23) even though Jiminez testified that he “did not recall” when asked if it was correct “that...after Mr. Monica...gave you his speech about your rights, you told him that he could ask you anything he wanted?” (Tr. 85:14-17).

The Board can and should reverse the ALJ’s conclusion that Monica interrogated Jiminez solely on Jiminez’s inability to respond whether Monica asked or told him the very same things that Jiminez testified about on direct examination that were the underpinnings of the ALJ’s interrogation conclusion. However, there is much more beyond this that undermines the ALJ’s conclusion that Counsel for the Acting General Counsel failed to address.

Jiminez also did not recall whether it was correct that Monica “told you that he was not interested in how you had voted in the election” (Tr. 71:25-72:2) and “that he was not interested in your telling him how anyone else had voted in the election” (Tr. 72:3-6). Yet, in a Board affidavit he stated that “[n]o one from management has ever asked me if I voted for the Union” (Tr. 86:10-15; 87:14-19). Counsel for the Acting General Counsel has tried to maintain that

those responses are not irreconcilable on the theory that Jiminez did not see Monica as part of management since he was outside counsel to the Employer. However, that explanation is fanciful. Jiminez had no understanding of Monica's identity other than that he was a representative of management and only was able to identify him when Counsel for the Acting General Counsel showed him photographs on outside counsel's website.

The ALJ's reliance upon Jiminez's testimony over that of Monica is difficult to understand in view of a record that reveals Monica's clear recollection of events, which starkly contrasts Jiminez's fragmentary recollection as well as absence of understanding regarding some of what was happening around him. By way of example, Monica denied asking Jiminez whether he or anyone circulated authorization cards (Tr. 173:14-174:10), whereas Jiminez could not recall (as discussed earlier) whether Monica told him that he was not interested in whether Jiminez or any other nonsupervisory employee engaged in conduct supportive of the Union, which would include passing out authorization cards (Tr. 72:7-16). Jiminez might have been confused because, as he acknowledged, Monica asked him whether supervisors circulated authorization cards.

Counsel for the Acting General Counsel characterizes Monica's testimony as "vague and conclusory", but Monica was quite precise in recounting his exchanges with Jiminez. Monica's recollection of the questions that he posed to employees he interviewed was clear: he recalled asking about supervisory conduct supportive of the Union as well as whether representatives of the Union harassed employees with excessive or extreme conduct at their homes or sought to deter employees from voting (Tr. 177:4-18; 178:2-19; 179:3-6; 180:16-181:9). Counsel for the Acting General Counsel's "issue" with Monica's testimony emanated from Monica's uncertainty whether there were other topics that he might have reviewed during these interviews (Tr. 177:19-

178:1). The fact that Monica was cautious, not discounting the possibility that he could have covered other subjects or included within the subjects that he recalled other substance, is not a basis for attacking his credibility or recollection and most certainly is not a reason to credit Jiminez over Monica as to the exchanges between them.

The Employer did not examine Monica about every granular aspect of Jiminez's testimony, nor did it need to do so, because on cross-examination Jiminez backtracked from his direct examination and revealed, both through his admissions as well as his "do not recall" responses, that Monica did not unlawfully interrogate him. The atmosphere surrounding their interviews was not coercive. Indeed, Jiminez's acknowledgement that Monica returned his "contract" (i.e., the *Johnnies' Poultry* statement that he had signed) and tore it up in front of Monica underscores the absence of coercion in their exchanges. Relatedly, Counsel for the Acting General Counsel mischaracterized the Employer's point that "[p]ost-election investigations by outside counsel into possible objectionable conduct are inherently non-coercive". She omitted the very next sentence in the Employer's Memorandum (at 9), which stated that the reason post-election investigations are so non-coercive is that "[t]he election has already occurred and it is unclear what benefit would accrue from any alleged coercion". With that Employer statement (made by counsel) placed in context--coupled with the observation that Jiminez was comfortable with Monica, volunteered the various remarks he made about Union activity, and was so far from worried about the impact of his conduct and statements that he insisted upon the return of his *Johnnies' Poultry* statement and destroyed it right in front of Monica--the Employer submits that the only conclusion that the Board can reach is that the ALJ erred in concluding that Monica unlawfully interrogated Jiminez.

**IV. COUNSEL FOR THE ACTING GENERAL COUNSEL RESTS HER ARGUMENT THAT THE EMPLOYER CANNOT RELY UPON *EXCHANGE PARTS* ON THE ERRONEOUS CONTENTION THAT THE EMPLOYER DID NOT SCRUPULOUSLY REFRAIN FROM INSTITUTING OR EVEN DISCUSSING CHANGES IN THE *STATUS QUO* WITH RESPECT TO THE VOTING UNIT.**

Counsel for the Acting General Counsel challenges the Employer's reliance upon *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), on the ground that the Employer did not scrupulously preserve the *status quo*. However, the only evidence to which Counsel for the General Counsel points is the Employer's announcement and implementation of the reduction in employee health insurance costs as to employees outside the voting unit. (GC Brief at 11) Counsel for the Acting General Counsel misses the mark with that challenge. The Employer's sole contention is and has been that prior to the election it maintained the *status quo* with respect to voting unit personnel. The Employer was not obligated to refrain from changing terms and conditions of employment of employees outside the voting unit. *Exchange Parts*, 375 U.S. at 407 and 409 n. 3, concerned only the impact of changed terms and conditions of employment of **voters**. Counsel for the Acting General Counsel misapprehends *Exchange Parts* in contending that it stands for the proposition that the Employer was precluded from reducing employee health insurance costs for employees outside the voting unit.

The Employer does not dispute that *Exchange Parts* reaches both the grant and withholding of benefits. However, the Employer's argument is that when, as here, a company not only refrains from instituting changes as to the voting unit but also builds its campaign on communicating to election eligible voters that it cannot even discuss changes in terms and conditions of employment before the election, a rule requiring it to announce and implement changes for **all** personnel undermines the integrity of its campaign as well as the principle established in *Exchange Parts* that an employer should preserve the *status quo* prior to the

election. To the extent existing Board law does not recognize, without more, that in this class of case *Exchange Parts* must control, the Board necessarily must adopt the principle espoused by the Employer herein. It may be the rare case in which a company can prove that it has strictly adhered to *Exchange Parts*, maintained the status quo, and refrained even from discussing possible changes in terms and conditions of employment before the election. Nonetheless, the record bears out that this is such a case, notwithstanding Counsel for the Acting General Counsel's protestations otherwise, and the Board should reverse the ALJ's conclusion that the Employer violated the Act by announcing and implementing the employee health care cost reductions in March 2012.<sup>3</sup>

### CONCLUSION

For the reasons set forth herein as well as the Employer's exceptions and Memorandum in support of its exceptions, the Employer requests that the Board reverse the ALJ's Decision and dismiss the Complaint herein.

Respectfully submitted,

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<sup>3</sup> The Employer's Reply Brief addresses the Union's argument on this point by examining the record and explaining the Employer's position that at no time did it discuss any possible change in terms and conditions of employment with election eligible voters or institute such changes within the voting unit.

