

**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-CA-083628

and

1199 SEIU, United Healthcare Workers East

Petitioner

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**MEMORANDUM IN OPPOSITION TO THE CROSS-EXCEPTIONS OF  
COUNSEL FOR THE ACTING GENERAL COUNSEL AND CHARGING  
PARTY 1199 SEIU, UNITED HEALTHCARE WORKERS EAST**

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Respondent 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center (“Woodcrest” or “Employer”) submits this Memorandum in opposition to the Cross-Exceptions of Counsel for the Acting General Counsel and Charging Party 1199 SEIU, United Healthcare Workers East (“Union”), which challenge the conclusion of Administrative Law Judge William Nelson Cates (“ALJ”) in his April 2, 2013 Decision and Order (“Decision”), as well as several related findings, that the Employer did not create an impression of surveillance as alleged in ¶ 8 of the Complaint.

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 May 22, 2013 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).

**THE ALJ CORRECTLY DISMISSED THE ALLEGATION THAT SUPERVISOR DAVID GUERRO CREATED THE IMPRESSION OF SURVEILLANCE IN HIS DISCUSSIONS WITH JEFFREY JIMINEZ.**

The ALJ rejected the allegation that then-Assistant Director of Recreation Vladamir Guerra created an impression of surveillance for several reasons, each of which is examined in more detail below. First, at the time that Jeffrey Jiminez and Guerro engaged in the discussions that are the subject of this allegation, the ALJ found that Jiminez not only was overt in his support for the Union but was proud of his social activism and eager that it be noticed. Second, the ALJ found that Guerro’s remarks did not indicate that the Employer was monitoring Jiminez’s conduct so closely as to support the assertion that it was creating an impression of surveillance. More specifically, the ALJ found that the comments made by Guerra would

reasonably be interpreted by someone in Jiminez's position as giving rise to other than an inference that the Employer was monitoring the employee closely. (ALJD 10:28-11:8)

Counsel for the Acting General Counsel attacks the ALJ's conclusion on the ground that Board precedent establishes that an employer can create an impression of surveillance even when the employee in issue is an open union supporter [Brief of Acting General Counsel in Support of Cross-Exceptions ("GC Brief") at 6]. This challenge misses the mark because the fact that Jiminez was overtly supporting the Union at the time of his discussions with Guerro was only part of the factual foundation upon which the ALJ relied in reaching this conclusion. The ALJ underscored the fact that Jiminez saw himself as a social activist, was proud of his social activism, and was seeking visibility in connection with his activism (ALJD 10:34-36). As the ALJ noted, the illegality of conduct that creates an impression of surveillance lies in its effect in deterring union activity and support: "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways" (ALJD 10:19-23). The circumstances presented do not admit to the possible conclusion that an employee in the position of Jiminez would be susceptible to such fear or otherwise deterred.

Jiminez wanted to draw attention to the Union's organizing effort and was pleased to have done so (Tr. 44:14-46:21; 56:9-57:22). Nothing that Guerro said to him caused Jiminez concern or would have caused someone in Jiminez's position concern that management was monitoring his activity on behalf of the Union or otherwise closely or unusually. By way of example, the fact that Guerro mentioned that someone within management had gathered and removed from the lobby copies of a publication that contained an article concerning the Union's drive to organize the Employer which, as it happened, included the interview with Jiminez (Tr.

65:2-3) is neither shocking nor something that would or should have alarmed Jiminez. (It is easy to conclude that the manager might have decided that she did not think that the article or interview were appropriate fodder for residents in the facility or their families. *Cf.* Tr. 162:8-21.) The point is that the ALJ recognized that the information that Guerro related was not of such substance or tone that Jiminez (or someone in his position) had cause for concern and reasonably would have concluded that he should alter his behavior. Jiminez intended for his actions to draw notoriety and Guerro's discussion with him confirmed that they did.

It is well-settled that when a supervisor references conduct of an employee that is generally known, the Board rejects an "impression of surveillance" claim. *Clark Equipment Co.*, 278 NLRB 498, 503 (1986). An employee cannot reasonably conclude that the company was conducting surveillance of his or her union activity when the conduct the supervisor references is generally known. Here, Jiminez's specific conduct is not at issue. The "impression of surveillance" claim is bound up in Guerro stating that he believed that Jiminez was too outspoken and public and should "tone it down". Since Guerro's remarks to Jiminez concern Jiminez's openness and public behavior, the conduct is generally known and, as such, the kind of conduct that is not normally the basis for a creation of impression of surveillance finding.

Counsel for the Acting General Counsel also does not establish how the ALJ erred in concluding that Guerro's remarks to Jiminez did not indicate unusually close monitoring of Jiminez by management. In fact, the ALJ reasoned that Guerro's remarks would cause the reasonable listener in Jiminez's position to conclude other than that management was closely watching Jiminez because of his Union activity. The ALJ found that Guerro's remark that Jiminez's name was "popping up a lot" was a truism and could reasonably be understood to refer to Jiminez's name appearing in the publication that reported on the Union's organizing drive and

interviewed him as well as people talking about Jiminez engaging overtly in activity on behalf of the Union. [The ALJ's observed that Jiminez "could not deny" Guerro's statement (ALJD 10:46-11:1), and this finding derived from Jiminez's testimony that after Guerro told Jiminez that his name was 'popping up a lot', Jiminez replied "I told him I know" (Tr. 49:9-11)]. Even more, the ALJ understood Guerro's labeling of Jiminez as "the famous boy" to reference not that he was engaged in activity on behalf of the Union but, rather, that he was in the public eye as an activist who so drew the attention of the media that he was the subject of a published interview.

The ALJ's rejection of this allegation was largely grounded in his understanding that Guerro's comments were focused upon Jiminez calling attention to himself and becoming a prominent figure, not the fact that in doing so he was supporting the Union. While Counsel for the Acting General Counsel focuses upon Guerro urging Jiminez to "tone it down" and equates that with a supervisor discouraging a union activist from promoting the union, the ALJ correctly took such remarks to reflect Guerro's personal philosophy that in the workplace individuals should dedicate themselves to their job responsibilities, respect the obligation of others to do the same, and not make spectacles of themselves (Tr. 157:4-20; 160:12-161:8). Even accepting, *arguendo*, Counsel for the Acting General Counsel's argument that one could understand Guerro's remarks to suggest that Jiminez was setting himself up for retribution from management, the ALJ found that a reasonable person in Jiminez's position would understand Guerro to be conveying his concern that such retribution would be visited because managers believed that Jiminez's fixation with making a name for himself was casting the Employer in a bad light and injuring its image in the marketplace.

Counsel for the Acting General Counsel attempts to make much of the fact that Guerro did not "specifically deny Jiminez's account of an exchange in the hallway or telling Jiminez

that his name keeps popping up” (GC Brief at 4). The fact of the matter is that Guerro testified quite specifically about his recollection of his conversations with Jiminez. In doing so, Guerro effectively disputed portions of Jiminez’s version of events. (By way of example, Guerro and Jiminez had differing recollections of their first conversation: Guerro recalled it taking place outside the facility rather than in the hallway and Jiminez having initiated it by asking Guerro whether he should cross the street to join a Union organizer giving out tee shirts [Tr. 156:7-25]). In the end, though, their differing recollections do not matter since the ALJ rejected the allegations set forth in ¶ 8 of the Complaint despite apparently accepting significant portions of Jiminez’s testimony that Guerro did not confirm.

Finally, the record makes clear that **Jiminez** initiated both of the discussions with Guerro from which the “impression of surveillance” claim arises. Their first conversation began (according to Jiminez) after Jiminez mentioned to Guerro that the organizing drive would not have happened if management had merely listened to the employees (Tr. 48:25-49:15). Although their second conversation took place after Guerro called Jiminez “the famous boy” while walking past Jiminez and his sister, the record makes clear that the actual discussion unfolded only after Jiminez followed Guerro and entered Guerro’s office without having been invited (Tr. 52:3-14; 64:5-22). When an employee prompts a discussion about union activity upon which a supervisor comments, the Board has rejected “impression of surveillance” claims since in such circumstances no employee would reasonably conclude that management’s knowledge of the union activity is the result of company surveillance. *Heartshare Human Services of New York*, 339 NLRB 842, 844 (2003).

## CONCLUSION

For the reasons set forth herein, the Board should deny the cross-exceptions of Counsel for the Acting General Counsel and the Union and affirm the ALJ's findings and conclusions relating to the "impression of surveillance" allegations set forth in ¶ 8 of the Complaint.

Respectfully submitted,

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