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18 UNITED STATES OF AMERICA

19 BEFORE THE NATIONAL LABOR RELATIONS BOARD

20 COMMUNICATIONS WORKERS OF
21 AMERICA, LOCAL 9588, AFL-CIO

22 Union/Charging Party,

23 and

24 VERIZON CALIFORNIA, INC.

25 Employer/Respondent.

Case No. 21-CA-039382

**BRIEF OF CHARGING PARTY
IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

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NLRB v. Babcock & Wilcox, 697 F.2d 724 (6th Circ. 1983) 21

NLRB v. Owens Maintenance Corp., 581 F.2d 44, (Second Circ. 1978) 19

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United Cable Television, 299 NLRB 138, 142 (1990) 19

United States Postal Service, 332 NLRB 340 (2000)..... 19

Other Authorities

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Robert Gorman and Mathew Finkin, “Labor Law and Advocacy” (2013) 15

1 Webster's New Unabridged Dictionary, Deluxe Second Edition, 198324

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1 **I. INTRODUCTION**

2 Bryan Rodriguez was, and is, a technician employed by Verizon, California, Inc.
3 (“Verizon” or “Company”). His job entails repairing customer's telephone services assigned to
4 him on trouble tickets. On June 10, 2010, Verizon suspended Mr. Rodriguez for refusing to
5 answer his supervisor, Paula Cooper's, questions to him about a long-duration job on which he
6 worked the previous day, and where he did not call her. The Company had recently warned him
7 of discipline, including possible termination for working on such jobs without contacting his
8 supervisor. The Communications Workers of America, AFL-CIO, Local 9588 (“CWA” or
9 “Union”) filed an unfair labor practices charge asserting a violation of Mr. Rodriguez' Weingarten
10 rights, which was referred to the parties' grievance and arbitration process.
11

12 At the arbitration of Mr. Rodriguez' suspension grievance, the Company introduced its
13 own documents evidencing its 2010 previous warnings to Mr. Rodriguez for working long
14 duration jobs without calling his supervisor. The documents introduced by the Company and
15 containing explicit warnings of discipline, up to and including termination, consisted of its
16 January 2010 “Gateway Rules”, two Performance Improvement Plan (PIP) documents given to
17 Mr. Rodriguez in 2009 and on June 2, 2010, and the contemporaneous notes of Ms. Cooper
18 describing her June 3, 2010 verbal counseling to Mr. Rodriguez for working on a long duration
19 job without calling her. The documents, which the Company gave to Mr. Rodriguez formed the
20 objective basis of his reasonable belief that a violation of the rule prohibiting him from working
21 long duration jobs without calling his supervisor could lead to discipline.
22

23 At the arbitration hearing, the parties introduced evidence that, on June 9, 2010, Mr.
24 Rodriguez worked on a case of trouble for over 5 1/2 hours and did not call Ms. Cooper.as the
25 Company had directed him to do in the Gateway rules, in his PIP documents and in Ms. Cooper's
26 recent verbal counseling. At the hearing the Company introduced evidence that, on June 10,
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1 2010, Ms. Cooper called Mr. Rodriguez to discuss the long duration job of the previous day,
2 where he did not call her, a violation of the rule about which he had recently been warned. The
3 evidence introduced by the Company that Ms. Cooper's interview with Mr. Rodriguez was about
4 the previous day's long duration job, included the contemporaneous notes of Ms. Cooper about
5 the conversation, the notes made by Ms. Cooper after the conversation, the testimony of Ms.
6 Cooper, the testimony of her manager, Michael Birch and the testimony of Company Labor
7 Relations Manager, Dyann Johnston.

9 The Arbitrator, explicitly found that Ms. Cooper called Mr. Rodriguez to inquire about the
10 long duration trouble ticket of the previous day and that, when learning of the subject of the
11 inquiry, Mr. Rodriguez asked for Union representation. The Arbitrator, however, ignored the
12 objective impact and import of the Company's previous and proximate warnings to Mr. Rodriguez
13 for this conduct that was the subject of Ms. Cooper's interview. The Arbitrator, deciding that the
14 Company had just cause to suspend Mr. Rodriguez, also mischaracterized the Union's position as
15 to when *Weingarten* rights are triggered in order to argue against a position that the Union never
16 asserted. The Arbitrator's own enunciation of when *Weingarten* rights arise, misstate and
17 misapply the law. The Arbitrator also, improperly gave weight to Ms. Cooper's purported
18 subjective purpose in interviewing Mr. Rodriguez instead of basing his decision on the objective
19 circumstances, facts and statements made by Ms. Cooper to Mr. Rodriguez, as presented by the
20 Company itself at the arbitration hearing. It is the Company's documented warnings of discipline
21 to Mr. Rodriguez coupled with Ms. Cooper's expressed inquiries about the matter that was the
22 subject of these previous warnings, that gave rise to Mr. Rodriguez' reasonable belief that
23 discipline might ensue from the interview. The Arbitrator's opinion and award are contrary to the
24 evidence and the law, are palpably wrong and repugnant to the purposes and policies of the Act.
25 The Administrative Law Judge's decision, based upon the testimony and evidence presented at the
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1 Arbitration, to defer to the Arbitrator's opinion and award, is incorrect and cannot stand.

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3 **II. THE FACTS PRESENTED BY THE COMPANY AT THE ARBITRATION**
4 **HEARING ESTABLISH MR. RODRIGUEZ' REASONABLE BELIEF THAT**
5 **DISCIPLINE MIGHT RESULT FROM THE DISCUSSION WITH HIS**
6 **SUPERVISOR OVER A LONG DURATION JOB WHICH HAD OCCURRED**
7 **THE DAY BEFORE**

8 The following facts are entirely without dispute and, as to the most critical of these facts,
9 are evidenced by the Company's own documents presented at the arbitration hearing. The
10 exhibits bear the designation given at the arbitration hearing followed by the page number in the
11 Joint Stipulation of the Parties to the Administrative Law Judge, Exhibit 10. The transcript
12 citations are to the transcript in Exhibit 10 of the Parties' Joint Stipulation.

13 Bryan Rodriguez was (and is) a Field Technician II, employed by Verizon, California
14 since 2003. His job consists of installing and repairing customers' communications equipment
15 and systems "in the field". (See, COE-1, 654-657, Tr. Vol. I, p. 27). By 2005, Mr. Rodriguez
16 worked out of the Pomona California "yard" in Verizon's Gateway District.

17 In January 2010, Verizon issued Mr. Rodriguez (and other technicians) a copy of the
18 "Gateway District Policies and Procedures" (COE-2, 658-661), which, as Company manager,
19 Paula Cooper testified, set forth Verizon's specific "work rules" which employees in the Gateway
20 District were required to follow (Tr. Vol. I, p. 34-37).

21 Verizon's Gateway District work rules include rules for "long duration jobs," and
22 establish the requirement that, "All jobs that take over 1.8 hours to complete require a call to a
23 Local Manager" (COE-2, p. 1, 659, Tr. Vol. I, p. 35, testimony of Manager Cooper). In addition,
24 the Gateway Rules explicitly provide in bold print:

25
26 **"All the above work rules are to be followed by all employees**
27 **in the Gateway District. Failure to adhere to these rules could**
28 **subject you to disciplinary action up to and including**
termination." (COE-2, p. 3, 661)

Company Manager Cooper testified that this emboldened admonition and warning of discipline,

1 applies to the rule concerning the requirement that technicians call a Local Manager on jobs that
2 take over 1.8 hours (Tr. Vol. I, p. 94-96).

3 On June 2, 2010, Manager Cooper placed Bryan Rodriguez on a “Performance
4 Improvement Plan” (PIP) because he was not meeting Verizon’s objectives for jobs-per-day
5 (JPD) and other issues (Tr. Vol.1, p. 104, 105). The seriousness of this action is evidenced by a
6 previous 2009 PIP wherein Mr. Rodriguez was warned that the Company would “move to steps
7 of discipline if required improvements [in JPD’s] not met” (See right hand column p. 2, COE-7A,
8 716-718, Tr. Vol. I, p. 103, 104). Long duration jobs inevitably decrease the jobs-per-day an
9 employee can complete. In addition, the Company on June 2, 2010, called in the Union while
10 Manager Cooper administered the requirements for Mr. Rodriguez’s new PIP plan (See Manager
11 Cooper’s notes of this meeting (COE-8, p. R for 6/2 entry, 739)).

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14 The PIP document (COE-7B, 719, 720), that Manager Cooper gave to Mr. Rodriguez on
15 June 2, 2010, contained the specific “Action item” setting expectations: “Technician
16 Responsibilities: Follow all of Gateway Work Rules, Contact LCOM [Local Manager] on long
17 duration tickets (call at 2.0 hours on the job).” According to the PIP document, this expectation
18 will be measured “Daily” with the “Improvement Time Period - Immediate”.

19 Further, the PIP document which Manager Cooper gave to Mr. Rodriguez states:

20
21 “Upon discontinuation of the Performance Improvement Plan, the
22 employee must maintain acceptable performance for the next 12
23 months. If future performance falls below expectations, the
employee may be subject to further corrective action up to and
including dismissal.” (COE-7B, 720, emphasis added.)

24 The following day, on June 3, 2010, Manager Cooper, according to her own notes, called
25 Mr. Rodriguez and “counseled Bryan” on his failure to call her when he was working on a long
26 duration job the previous day. She told him that he was required to call her on long duration
27 tickets. She specifically told Mr. Rodriguez that this expectation and directive was written in the
28 Gateway Work Rules and written on the PIP document given to Mr. Rodriguez the previous day,

1 both of which provide for discipline up to and including dismissal for failure to follow these
2 directives (Testimony of Manager Cooper, Tr. Vol. I, p. 112-113; Manager Cooper's
3 contemporaneous notes, COE 8-R, 6/3 entry, 739). The counseling session on June 3, was
4 recounted by Manager Cooper in her testimony. When she was asked to recall this session and
5 explain her notes (COE-8, p. R, 739) she testified as follows:

7 "Q: And then it says, 'Counseled Bryan on LCOM.' And then I
8 can't read the next words.

9 A: That would be 'contact,' 'C/T.'

10 Q: '2.0 hours on the job.' And is that in reference to the fact that
11 you were counseling Bryan on his need to contact the local manager
12 if he was on a job more than two hours?

13 A: Yes.

14 Q: 'And it is an expectation/directive to do so;' is that correct?

15 A: Correct.

16 Q: And are you referring to the directive that was on his PIP given
17 to him the previous day?

18 A: That and the work rules.

19 Q: And the work rules?

20 A: Yes.

21 Q: And both of those provide that an employee who does not meet
22 these directives may be subject to discipline up to and including
23 dismissal; is that right?

24 A: It is documented in the documents." (Tr. Vol. I, p. 112, 113)

25 Thus as of June 3, 2010, Mr. Rodriguez had been subject to an explicit threat of
26 discipline, for exactly the conduct which was the subject of the June 9 interview where Ms.
27 Cooper refused to allow Mr. Rodriguez to have a union representative present.

28 On June 8, six (6) days after Verizon's issuance of the PIP to Mr. Rodriguez and five (5)
days after his being counseled by Manger Cooper for failing to call her on "long duration jobs as

1 required in work rules and PIP” (Ms. Cooper’s notes, COE-8, p. R, 739), Manager Cooper met
2 with Mr. Rodriguez in the yard before his first job. This meeting lasted over an hour and
3 included Manager Cooper again discussing Mr. Rodriguez’s PIP (Manager Cooper’s testimony,
4 Tr. Vol. 1, p. 123-125). Mr. Rodriguez then went into the field to do his work.
5

6 His June 8th day included working on a long job, one that took over five and one half
7 hours to complete. He did not call Manager Cooper at any time during this job (Tr. Vol. II, p.
8 243, 244). With the Manager’s recent explicit and multiple warnings of discipline in his mind,
9 and worried that he would have to eventually answer to Manager Cooper for the June 8 long
10 duration job and his failure to call her, Bryan Rodriguez, at the end of his shift contacted the
11 Union (Testimony of Mr. Rodriguez, Tr. Vol. II, p. 244-245, 258, 294, 297).
12

13 The Union representative told Mr. Rodriguez to meet him the next morning at the Pomona
14 yard prior to the start of Mr. Rodriguez’s shift (Tr. Vol. II, p. 244, 245). On the morning of June
15 9, Mr. Rodriguez met with Union representative Rene Bonilla at the Pomona yard, prior to the
16 start of Mr. Rodriguez’s shift. Mr. Rodriguez told Mr. Bonilla about his worries of “getting into
17 trouble” for his previous day’s infractions of the rules. Mr. Rodriguez told Mr. Bonilla of his PIP
18 warnings and of the counseling he had received a few days before. Mr. Bonilla told Mr.
19 Rodriguez of his *Weingarten* rights because Mr. Bonilla believed that, based on the explicit
20 warnings given to Mr. Rodriguez, he had good reason to be worried that he may be disciplined if
21 interviewed about his previous day’s long duration job coupled with his failure to contact his
22 Local Manager (Tr. Vol. II, p. 339-344).
23

24 On the same day, June 9, 2010, Manager Cooper called Mr. Rodriguez in the field at
25 approximately 1:45 p.m. and left word for him to call her. He returned her call at 1:50 (Manager
26 Cooper’s contemporaneous notes, COE-8, p. W, 744). Manager Cooper’s 6/9 entry on her own
27 notes (COE-8, p. T, 741) evidence that she, in fact, “called Bryan to review 6/8 JPD (1) ticket 5.7
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1 hr.” When Mr. Rodriguez told her he didn’t feel comfortable talking about this without union
2 representation, Manager Cooper referenced the PIP document and told him that, “he needs to
3 explain long duration tickets as stated on PIP/work rules.” Mr. Rodriguez again said that the
4 Union told him not to talk about this without Union representation. Manager Cooper then,
5 “denied to involve the Union when getting details of long ticket - just normal conversation.”
6 Manager Cooper was thus insisting on an investigatory interview without the presence of a Union
7 representative. When Mr. Rodriguez again said that the Union told him not to answer without
8 Union representation, Manager Cooper told Mr. Rodriguez that she would consider his refusal to
9 answer these questions about the previous day’s long-duration job, insubordination. Manager
10 Cooper told Mr. Rodriguez to complete his job and report back to the yard where she would have
11 the Union person present (See Manager Cooper’s notes, COE-8 p. T, 741 and her testimony, Tr.
12 Vol. I, p. 69-76, 135, 136).

15 Mr. Rodriguez testified under oath, and Manager Cooper’s own notes and testimony
16 reveal, that Manager Cooper never during the telephone interview, mentioned or otherwise
17 assured Mr. Rodriguez that no discipline would result from his answering her questions about the
18 previous days’ long duration job coupled with his failure to call her (Manager Cooper’s
19 testimony, Vol. I, p. 136) (Mr. Rodriguez’s testimony, Tr. Vol. II, p. 247, COE-8, p. T, W, 741,
20 744). When questioned at the arbitration hearing, Manager Cooper testified as follows:

22 “Q: At no time in this conversation did you ever say to Mr.
23 Rodriguez this will not involve any discipline? Did you ever tell
24 him that there was no discipline that would be forth coming or no
25 possibility of discipline? You never mentioned anything like that,
26 did you?

26 A: I have no reason to say that.

27 The Arbitrator: You didn’t say it?

28 A: No, I did not.” (Tr. Vol. I, p. 135, 136)

1 Ms. Cooper did, in fact, have a reason to assure Mr. Rodriguez that no discipline would result
2 from the interview if that, in fact was the truth. Her silence constituted an implicit threat and
3 strengthened Mr. Rodriguez' reasonable belief that discipline was likely.

4
5 Mr. Rodriguez came to the yard at about 3:30 p.m. after completing his job, about an hour
6 and a half after his telephone interview with Manager Cooper. Although the Union was now
7 present and Mr. Rodriguez would have then answered questions about the previous day's long
8 job, the Company did not then, or ever again ask Mr. Rodriguez to explain these events. (Tr. Vol.
9 I, p. 141, 146, 147). The manager apparently did not need the information about Mr. Rodriguez's
10 work, enough to ask him about it an hour and a half after her telephone interview. Instead,
11 Manager Cooper immediately suspended Mr. Rodriguez, not for his long duration job, nor for his
12 failure to call his Local Manager, but rather for "insubordination" for refusing to answer
13 questions about the June 8 events. COE-10, 763, 764, Manager Cooper's contemporaneous notes
14 of this meeting set forth that Verizon suspended Mr. Rodriguez solely for refusing to answer her
15 questions about the long-duration job of the previous day. The Company suspended Mr.
16 Rodriguez solely because he had demanded to have his Union representative present before
17 answering his Manager's questions about a matter that he reasonably believed might result in
18 discipline.
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21 The evidence presented by the Company demonstrates that Verizon explicitly warned Mr.
22 Rodriguez on multiple occasions shortly before June 8, 2010, that working on long-duration calls
23 without calling his Local Manager was a violation of the work rules and could result in discipline
24 up to termination. No employee could reasonably doubt the real possibility that the Company
25 would make good on its admonitions. There is no dispute that on June 8, 2010, Mr. Rodriguez
26 worked on a long-duration job without calling his Local Manager. The evidence shows that
27 Manager Cooper, on June 9, contacted Mr. Rodriguez to specifically discuss this June 8, 2010,
28

1 long duration job. There is no dispute that Verizon had previously warned Mr. Rodriguez of
2 discipline for this conduct. Under these circumstances, Mr. Rodriguez's reasonable belief that he
3 needed Union representation before answering his Manager's questions was predicated on the
4 Company's own clear and repeated warnings of potential discipline. If the Company does not
5 want employees to believe its warnings, it should so tell them.
6

7 The Administrative Law Judge, in her decision, described Ms. Cooper's conversation with
8 Mr. Rodriguez as pertaining only to GPS-reported stops that Mr. Rodriguez made before the
9 long-duration job. If this was true, it would tend to negate the impact of the Company's previous
10 warnings to Mr. Rodriguez. The arbitral evidence presented by the Company concerning the
11 actual conversation on June 9 is to the contrary proving that Ms. Cooper was asking about the
12 long duration job and not GPS. In addition to Ms. Cooper's contemporaneous notes, specified
13 above, on the afternoon of June 9, 2010, she wrote: "6/9 3:50 Suspend Bryan Rodriguez/
14 insubordination-refused to explain 5.7 long duration ticket LWTC V. Brown/ M. Birch.....Bryan
15 refused to answer without union rep explained I needed info on job....I explained I considered this
16 insubordination if he would not explain job...". (COE-10) (emphasis added)
17

18 Company Manager Michael Birch, Area Manager to whom Ms. Cooper reported, testified
19 that he supported her decision to suspend Mr. Rodriguez, and also testified as follows when
20 questioned by the Company:
21

22 "Q: Do you know what led to Mr. Rodriguez's discipline?

23 A. I believe I do understand, yes.

24 Q: What's your understanding?

25 A: Mr. Rodriguez was asked to provide information relative to a particular job
26 and he refused to do so."(Tr. Vol. 1, p. 179: 24-25, 180:1-4)
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28 On cross examination, Company Area Manager Birch testified:

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“Q: ... did you know that there was an issue with respect to the length of time that Mr. Rodriguez was on a job on the 8th of June? Did you know that was an issue?”

A: That was the reason that led to the suspension as I understand it, yes

Q: Is what?

A: The length of time that he was on the job.

Q: All right. And that--who told you that?

A: Paula.

Q: Ms. Cooper told you that?

A: That would be correct.

Q: That was the reason she was inquiring?

A: At my direction, yes. I directed Paula to find out why Mr. Rodriguez was on that job so long, just as I did with other managers that day.” (Tr. Vol. I, p. 201:21-25, 201:1-10).

Mr. Birch’s testimony reveals that Ms. Cooper could not answer Mr. Birch’s questions about the long duration job because she did not know about it until she called Mr. Rodriguez at Mr. Birch’s direction. This is consistent with Mr. Rogriguez’ testimony that he did not call Ms. Cooper on June 9 as well as the fact that Ms. Cooper was indeed seeking information from Mr. Rodriguez about this job when she called him.

Company witness, Labor Relations Manager, Dyann Johnston testified on direct examination about her conversation with Paula Cooper about Ms. Cooper's decision to suspend Mr. Rodriguez as follows:

“A: ... on June 10, I spoke to Paula Cooper. She called looking for labor relations advice regarding an incident that had occurred the previous day, a day when labor relations was in off-site meetings. She contacted me to find out if labor relations

1 would support her decision that she had made at the time. So she provided me
2 with the evidence--we discussed the incident as it occurred the day before and her
3 attempts to get the employee to cooperate with her request to give her information.

4 Q: Do you recall what she told you about the day before the incident?

5 A: Yes.

6 Q: And what was that?

7 A: She told me that she had contacted Bryan Rodriguez to obtain information
8 about a long ticket so that she could get on a ---what I called a POD callto
9 discuss work tickets that are longer in duration or just any work tickets where there
10 might be some question about the length of time it took or anything else associated
11 with it so they could try and remove some roadblocks that might be impeding the
12 technicians from getting the jobs done in a timely fashion." (Tr. Vol. I p. 208:25,
13 209:1-23).

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16 Based upon the above testimony and documentary evidence that Ms. Cooper's June 9,
17 2010 questions to Mr. Rodriguez were about the long duration job of the previous day, the
18 Arbitrator expressly found that:

19 "On June 9, Supervisor Cooper called Employee/Grievant to inquire about a long
20 duration work ticket...When Cooper told him the subject of the inquiry, Rodriguez
21 responded that he would not comment without a Union representative present,"
22 (Arbitrator's Decision, page 2) (emphasis added)

23 and further:

24 "the Undersigned believes that the Company exercised its rights reasonably in
25 denying Rodriguez Union representation when Cooper was soliciting information
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from him regarding his long duration job".(Arbitrator's Decision, page 6)(emphasis added).

The entire record establishes that Manager Cooper was interviewing Mr. Rodriguez about a matter that might reasonably have led to his being disciplined. There is nothing in Ms. Cooper's contemporaneous notes of her interview with Mr. Rodriguez, nor in her notes concerning her suspending Mr. Rodriguez, nor in her discussions with the two managers detailed above, nor in the Arbitrator's opinion that support any conclusion that Ms. Cooper told Mr. Rodriguez that the subject of the interview was GPS data, as opposed to the long duration job of the previous day.

The evidence, presented by the Company, and as detailed above, establishes that supervisor Cooper was asking Mr. Rodriguez to answer questions about the long-duration job of the previous day, when he did not call her. (The fact that supervisor Cooper did not, on June 9 know these details, as requested by Manager Birch and set forth in his testimony, establishes that, Mr. Rodriguez did not call her and inform her about this job while he was working on it.) The Administrative Law Judge's failure to correctly understand the actual subject of Ms. Cooper's inquiries, renders the Administrative Law Judge's conclusions about this conversation in error. The Administrative Law Judge's erroneous characterization of the content of Supervisor Cooper's questions incorrectly serves to wrongly uncouple this inquiry from the Company's warnings of discipline that preceded it.

The Company's documented and proximate warnings of discipline, up to termination, if Mr. Rodriguez worked on long duration jobs without calling his supervisor, coupled with the fact that such a job was the specific subject of his supervisor's inquiry, objectively establish the requisite nexus between the Company's previous warnings and this investigation, to create Mr. Rodriguez's reasonable belief that this inquiry might lead to discipline. That this belief was more

1 than reasonable is further buttressed by the Company's attempts, counter to all the evidence, to
2 deny the actual substance of Ms. Cooper's inquiry, an attempt not even the Arbitrator found to be
3 successful. The Company's assertions that Ms. Cooper was asking Mr. Rodriguez for information
4 about GPS stops, information that she needed for a telephone report to her manager, is also
5 undermined by the undisputed fact that she never asked again for this supposedly crucial
6 information, though Mr. Rodriguez appeared in her office with his Union representative a few
7 hours after the telephone call. Suspending Mr. Rodriguez for insubordination was apparently the
8 only real outcome Ms. Cooper actually needed as a result of her June 9 investigation. Mr.
9 Rodriguez's fear of discipline from his supervisor was reasonable and then some.

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12 **III. THE DECISION TO DEFER TO THE ARBITRATOR'S DECISION MUST BE**
13 **SET ASIDE BECAUSE THE UNCONTROVERTED EVIDENCE**
14 **DEMONSTRATES THAT THE ARBITRATOR'S DECISION IS PALPABLY**
15 **WRONG AND REPUGNANT TO THE ACT**

16 The facts as evidenced by the Company's documents and arbitral testimony, establish that
17 Verizon violated sections 8(a)(1) and 8(a)(3) when it suspended Bryan Rodriguez for engaging in
18 protected concerted activities pursuant to Section 7 of the National Labor Relations Act, when he
19 requested Union representation during an interview which he reasonably believed might lead to
20 discipline. Verizon violated 8(a)(3) by disciplining Mr. Rodriguez for insisting on having his
21 Union representative present at this meeting. Deferral to the Arbitrator's decision is unwarranted
22 and contrary to the Board's mandate under the Act to protect the Section 7 rights of employees.
23 The Arbitrator's Opinion and Award are palpably wrong and repugnant to the Act. There is no
24 possible interpretation of the facts or of the Arbitrator's decision, in light of all the evidence, that
25 is consistent with the provisions and protections of the Act.

26 “The Board consistently has held that it would not defer to an arbitrator's decision that
27 fails to protect employees' rights to engage in concerted activities because of a misinterpretation
28 or misapplication of the principles and policy of the Act” (*Mobil Exploration and Producing U.S.*

1 *Inc. v. National Labor Relations Board*, 200 F. 3d 230, 246 (Fifth Cir.) (1999), citing *110*
2 *Greenwich*, 319 NLRB 331, 334-335 (1995), *Garland Coal and Mining*, 276 NLRB 963, 965
3 (1985).

4 "An arbitrator's award is clearly repugnant to the Act when it upholds an employer's
5 decision to discipline an employee on the basis of the employee's exercise of protected concerted
6 activity", (*Cargill Salt Division Opinion of Advice*, 2013 WL 6146109 (N.L.R.B. G.C.)
7

8 **A. THE ARBITRATOR ENUNCIATED AN INCORRECT UNDERSTANDING**
9 **OF THE WEINGARTEN STANDARDS**

10 The long-established enunciation of an employee's legal rights under *Weingarten* is clear
11 and settled. In *NLRB v. Weingarten*, 420 U.S 251 (1975), the United States Supreme Court, in
12 upholding the Board's construction stated:

13 "...section 7 creates a statutory right in an employee to refuse to submit without
14 union representation to an interview which the employee reasonably fears may
15 result in his discipline". *Id.* at 256, 261

16 And further:

17 "First, the right adheres in Section 7's guarantee of the right of employees to act in
18 concert for mutual aid and protection... Second, the right arises only in situations
19 where the employee requests representation... Third, the employee's right to
20 request representation as a condition of participation in an interview is limited to
21 situations where the *employee reasonably believes the investigation will result in*
22 *disciplinary action...* (Emphasis added). Fourth, exercise of this right may not
23 interfere with legitimate employer prerogatives. Fifth, the employer may carry on
24 its inquiry without interviewing the employee, thus leaving to the employee the
25 choice between having an interview unaccompanied by his or her representative,
26 or having no interview and forgoing any benefits that might be derived from one.
27 Sixth, the employer has no duty to bargain with any union representative who may
28 be permitted to attend the investigatory interview." *Id.* at 256-259

29 There is no dispute that it is the third prong of the above standards, i.e. the reasonableness
30 of Mr. Rodriguez's belief in possible discipline, that is at issue herein. It is well settled that
31 "reasonableness will be measured by objective standards under all the circumstances of the case
32 and the courts will reject any rule that requires a probe of the employee's subjective motivation."
33 (*Id.* at fn. 5 (citations omitted))

1 In *Quality Mfg. Co.* 195 NLRB 197,199 (1972), cited with approval in *Weingarten*, the
2 Board made clear that, "This seems to be the proper rule where, as here, the interview, whether or
3 not purely investigative, *concerns a subject matter related to disciplinary offenses*" (emphasis
4 added).

5 "Even a conversation between a supervisor and an employee about improving the
6 employee's production may trigger *Weingarten* rights if sufficiently linked to a real prospect of
7 discipline for poor production". *El Paso Healthcare Systems, LTD.*, 358 NLRB No. 54 (2012),
8 citing *Quazite Corp.*, 315 NLRB 1068 (1994).

9 Further, the Board and courts have unequivocally made clear that:

11 "Weingarten entitles an employee to union representation on request at an
12 investigatory interview which the *employee reasonably believes* might result in his
13 being disciplined. *Weingarten* therefore requires an employer to evaluate an
14 investigatory interview situation from an objective standpoint---i.e. whether an
15 employee would reasonably believe that discipline might result from the interview.
16 Consequently, it is no answer to the allegation of a *Weingarten* violation that the
17 Respondent's supervisors were only engaged in fact finding, or they had no
18 intention of imposing discipline on [the employee] at the time of the interview.
19 Neither of those conditions is inconsistent with [the employee's] reasonable belief
20 that discipline could result from the interview". *Consolidated Edison*, 323 NLRB
21 910, 910 (1997), (Emphasis in original), (See also, e.g. *General Die Casters, Inc.*,
22 358 NLRB No. 85 (2012), (See generally Robert Gorman and Mathew Finkin,
23 "Labor Law and Advocacy" (2013) at Chapter 19.7).

24 The Arbitrator's enunciation and application of *Weingarten* standards, is completely
25 contrary to this established law.

26 First, the Arbitrator, while purporting to consider the statutory violations, completely
27 ignored and failed to incorporate the employer's multiple and proximate warnings of discipline,
28 supporting Mr. Rodriguez's reasonable belief that such discipline might ensue from the interview.
This omission violates the *Weingarten* requirements that the reasonableness of an employee's
belief be measured by "objective standards under all the circumstances of the case". (*Weingarten*,
supra at fn 5).

1 Next, the Arbitrator, wrote that "Cooper's testimony was too credible and believable
2 regarding her attempt to obtain objective information with regard to her report-writing
3 responsibilities" (Page 6 of his decision, Exhibit 11 to the Parties' Joint Stipulation). This
4 rationale for the Arbitrator's decision impermissibly focuses on Manager Cooper's purported
5 goals. The Arbitrator's stated reliance on Manager Cooper's motivation for her interview is in
6 derogation of the *Weingarten* standards. Manager Cooper's subjective intentions in interviewing
7 Mr. Rodriguez about his long-duration job on the previous day are wholly irrelevant, in light of
8 her previous multiple and explicit warning of discipline for conduct that was the subject of the
9 interview. Manager Cooper's credibility, and any purported lack of credibility by Mr. Rodriguez,
10 are also irrelevant, because it is the "objective" evidence of the prior warnings and the "objective"
11 evidence of the content of the interview, "objectively related" to the previous warnings of
12 discipline that lead to Mr. Rodriguez's concerns that such discipline might result from the
13 interview. Ms. Cooper had it within her power to disabuse Mr. Rodriguez of any belief that
14 discipline might result from her questions concerning the previous day's long duration job. Her
15 decision not to do so, further contributed to Mr. Rodriguez' reasonable belief that such discipline
16 was likely to ensue.

17
18
19 The Company presented no evidence, substantial or otherwise, to negate the objective
20 import of Verizon's explicit January 1, June 2 and June 3, 2010 warnings of discipline for conduct
21 that was the subject of the June 9 interview.

22
23 The Arbitrator, then incorrectly set up a false premise that he attributed to the Union. He
24 wrote:

25 "Here, the Union's argument is that whenever an employee subjectively believes
26 that a discussion with management could result in discipline, then he has a right to
27 Union representation" (Page 6 of the Arbitrator's Decision, Exhibit 11 to the
28 Parties' Joint Stipulation).

Though, the Union never made any such argument, the Arbitrator proceeds to offer his

1 view of the dire consequences that would flow from this illusory premise. The Arbitrator
2 proposes a scenario where employees "have such a 'guilt' complex that they unreasonably believe
3 the discussion could result in discipline" *Id.* at page 6. The Arbitrator's apparent concerns that
4 weight may be given to an employee's subjective but unreasonable fear of discipline, lead him to
5 completely and erroneously eliminate from his *Weingarten* analysis, the requirement that
6 management must provide Union representation when the employee *reasonably* believes that
7 discipline might result. The Arbitrator set forth his misunderstanding of the law and *Weingarten*
8 rights, stating:

9
10 "While in fact, discipline can result in [sic] discussions with employees, that does
11 not give rise to an obligation by Management or a right by employees to have
12 Union representation", *Id.*

13 The Arbitrator's statement that "in fact discipline can result [and we assume he intended to
14 write "from"] discussions with employees," but that this possibility does *not give rise to*
15 *Weingarten* obligations and rights, is contrary to the express provisions of *Weingarten*. Under
16 *Weingarten* and all case law since, such rights *do in fact* attach once an employee has a
17 reasonable belief that such discipline can result from the discussion (provided that the other
18 *Weingarten* criteria, not at issue herein, are met).

19 The Administrative Law Judge erroneously adopted this view of *Weingarten* rights from
20 the Arbitrator, including his completely incorrect enunciation of *Weingarten* standards. The
21 Administrative Law Judge cited this argument as a purported rebuttal to the Union and General
22 Counsel's assertions that the Arbitrator improperly injected subjective considerations into his
23 *Weingarten* analysis. It was, of course, the Arbitrator's inappropriate reliance on the subjective
24 goals of supervisor Cooper, not any subjective beliefs by an employee, to which the Union and
25 General Counsel objected.
26

27 As detailed above, the overwhelming evidence demonstrates, that whatever supervisor
28

1 Cooper's motives were in questioning Mr. Rodriguez, her express questions concerned the subject
2 about which he had received recent and explicit warnings of discipline. Any reliance by the
3 Arbitrator on supervisor Cooper's subjective intentions, as opposed to Mr. Rodriguez's reasonable
4 concerns, is palpably wrong and in derogation of established law. The Arbitrator's reasoning is
5 particularly suspect when considering that supervisor Cooper could have conveyed to Mr.
6 Rodriguez, during the interview, that no discipline would flow from his answering her questions.
7 She did not do so, lending further support to his belief that discipline might well be the result of
8 the interview. Her silence under these circumstances was in effect an adoption and reminder of
9 the recent prior warnings.
10

11 The Arbitrator's misapplication of the *Weingarten* standards, by failing to include any
12 evaluation of the employee's reasonable beliefs (and the objective grounds for these beliefs) in his
13 analysis, renders his opinion and award palpably wrong.
14

15 This same incorrect application of the law has been institutionalized by Verizon. The
16 situation facing Bryan Rodriguez was not unique. At the arbitration hearing, Verizon's Labor
17 Relations Manager, Dyann Johnston, introduced, COE-12, which she described as, "a document
18 that labor relations used to train the field regarding *Weingarten* rights." (Tr. Vol. I, p. 210). This
19 document sets forth numerous examples detailing when these rights do not attach. Significantly,
20 absent from this document and, contrary to the law, is any mention of the requirement that the
21 managers must consider the reasonable beliefs of possible discipline from the employees
22 perspective, as triggering *Weingarten* rights. This document proves the company is incorrectly
23 applying *Weingarten*. Verizon's management cannot be permitted to continue denying employees
24 their *Weingarten* rights after threatening to discipline them, calling them in to discuss the matters
25 which were the subjects of the warnings and then argue, after the fact, that the managers had no
26 intent to administer the threatened discipline.
27
28

1 **B. DEFERRAL TO THE ARBITRATOR'S OPINION AND AWARD IS**
2 **UNWARRANTED WHERE NO SUBSTANTIAL EVIDENCE SUPPORTS**
3 **THE ARBITRATOR'S DECISION**

4 It is well settled that under *Spielberg Manufacturing, Co.*, 112 NLRB 1080 (1955), *Olin*
5 *Corp.*, 268 NLRB 573 (1984) and General Counsel Memo 11-05, that the Board may not defer to
6 an arbitrator's award that is repugnant to the Act and palpably wrong, i.e. not susceptible to an
7 interpretation consistent with the Act, *United Cable Television*, 299 NLRB 138, 142 (1990), *Cone*
8 *Mills Corp.*, 298 NLRB 661, 665 (1990).

9 The Board has specifically refused to defer to arbitrators' awards that uphold employers'
10 discipline or discharge of employees who exercise their Section 7 rights to protected concerted
11 activities. (See, e.g. *United States Postal Service*, 332 NLRB 340 (2000) (deferral inappropriate
12 where employees terminated for "insubordination" for refusing to work overtime as protected
13 concerted activity), *Cone Mills Corp.*, 298 NLRB 661 (1990) (deferral inappropriate where,
14 employee was "insubordinate" and terminated for union activities where arbitrator measured
15 employee's conduct against a standard that conflicts with Board law), *Mobil Oil Exploration*,
16 325 NLRB 176 (1997) (Arbitration award palpably wrong where precipitating event causing
17 employees' termination was his exercise of protected concerted activities), *110 Greenwich Street*
18 *Corp.*, 319 NLRB 331 (1995) (deferral inappropriate when discipline attributable to conduct
19 protected under the Act), *Key Food Stores*, 286 NLRB 1056 (1987) (deferral inappropriate where
20 arbitrator discounted relevant evidence that employee terminated for protected activities),
21 *Garland Coal & Mining*, 276 NLRB 963 (1985) (deferral inappropriate where employee
22 disciplined for "insubordination" for conduct that was protected activity under the Act)). (*NLRB*
23 *v. Owens Maintenance Corp.*, 581 F.2d 44, (Second Circ. 1978) (Board properly rejects arbitral
24 award which condoned unfair labor practice as repugnant to the Act and where arbitrator's
25 findings facially unsound)
26
27
28

1 Under the Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievant
2 Settlements in Section 8(a)(1) and 8(a)(3) cases, GC-11-05, the General Counsel makes clear that,

3 “The Board’s deferral policy is one of discretion rather than an
4 ouster of jurisdiction, this difference only heightens the Board’s
5 obligation to ensure the protection of employees’ statutory rights
6 prior to exercising its discretion to defer to an arbitrator’s award.”
7 (*Id.*, at p. 4)

8 And further as to the burden of proving that deferral is appropriate:

9 “We believe that the party urging deferral should have the burden
10 of showing that the deferral standards articulated above [the
11 *Spielberg* and *Olin* standards for deferral] have been met . . . thus
12 the party urging deferral must demonstrate that” (1) the contract
13 had the statutory right incorporated in it or the parties presented the
14 statutory issue to the arbitrator; and (2) the arbitrator correctly
15 enunciated the applicable statutory principles and applied them in
16 deciding the issue. If the party urging deferral makes that showing,
17 the Board should, as now, defer unless the award is clearly
18 repugnant to the Act. The award should be considered clearly
19 repugnant if it reached a result that is “palpably wrong,” i.e., the
20 arbitrator’s decision or award is not susceptible to an interpretation
21 consistent with the Act.” (GC, 11-05, p. 6, 7) (Emphasis added)

22 In the instant case, the Arbitrator did not correctly enunciate or apply the applicable
23 statutory principles in his decision.

24 The Arbitrator in the instant case, while purporting to consider the statutory claims of Mr.
25 Rodriguez, completely ignored and failed to incorporate the Employer’s multiple and proximate
26 warnings of discipline which supported Mr. Rodriguez’s reasonable belief.

27 The Arbitrator’s decision as detailed above, contradicted by the undisputed evidence
28 presented by the Company, is also unsupported by any credible evidence. The findings of the
Administrative Law Judge that supervisor Cooper was questioning Mr. Rodriguez about GPS
stops unrelated to his prior warnings of discipline is, likewise, unsupported by any credible
evidence and contradicted by the documents created by supervisor Cooper, as well as the
testimony of two other Company managers and the findings of the Arbitrator. In addition to the
incorrect enunciation and misapplication of the applicable *Weingarten* law, the decision of the
Arbitrator, and subsequent deferral by the Administrative Law judge is not supported by any

1 credible evidence.

2 In *Illinois Bell Telephone Co.*, 221 NLRB 989 (1975), the Company suspended and
3 discharged an employee who refused to be interrogated by the Company concerning a theft,
4 without union representation. An arbitrator upheld the termination finding that the Company's
5 interrogation of the employee was not related to prospective discipline and that the employee had
6 no reasonable grounds to expect to be disciplined.

7
8 The Board, in refusing to defer to the arbitrator's decision, found that the arbitrator's
9 findings had no "substantial support" in the evidence and noted the "undisputed facts" that the
10 Company had previously accused the employee of theft, that his entry into the building was
11 unauthorized, and that he committed other acts prior to being detained by the police. The Board
12 stated:

13
14 "We find no substantial evidence to support the arbitrator's
15 'reasonable cause' [for termination] finding. The finding has
16 deprived [the employee] of a Section 7 right to which we hold he is
entitled. The award is thus 'repugnant to the purposes and policies
of the Act' and deferral would constitute an abdication of our
statutory responsibilities." (*Id.*, at p. 991)

17 In the instant case, as in *Illinois Bell Telephone, Co.*, the undisputed evidence and facts reveal that
18 the Arbitrator's decision is palpably wrong.

19 In *Babcock & Wilcox Co.*, 249 NLRB 739 (1980), (enfd. *NLRB v. Babcock & Wilcox*, 697
20 F.2d 724 (6th Circ. 1983), an employee, a union officer, was discharged for his failure to stop an
21 unauthorized strike. The arbitrator upheld the discharge based partly upon the employee's
22 purported "adoption" and "support" of the strike. The Board, in declining to defer to the
23 arbitrator's finding where no evidence existed to support it, stated:

24
25 "In the absence of the substantial evidence to support the arbitrator's finding in this
26 regard, it is not Board policy to defer to such a finding. For these reasons, the arbitrator's award
27 is repugnant to the purposes and policies of the Act and we shall not defer to it." (*Id.*, at p. 740)
28

1 In *Southwestern Bell Telephone Company*, 338 NLRB, 552, 552 (2002), the Board with
2 Member Liebman dissenting held that the employee did not have a reasonable expectation of
3 discipline when he was called into a meeting with management. The majority stated:
4

5 *“We adopt the judge's dismissal of the complaint's allegation of a*
6 *Weingarten violation based on the conclusion that Paz could not*
7 *have had a reasonable belief that the August 27, 2001 meeting*
8 *would result in discipline. As the judge found, there is no basis for*
9 *concluding that Paz could have reasonably believed that the August*
10 *meeting would result in discipline because of his low production*
11 *numbers. In so adopting, we note that, apart from references in the*
12 *hearing transcript to a “positive discipline” program, no evidence*
was introduced as to disciplinary measures or policies related to an
employee's low production performance. It would, therefore, be
entirely speculative to conclude that any employee with low
production performance would anticipate discipline. Thus, there
was a failure of proof in support of the assertion that Paz could
have reasonably believed that the August meeting would result in
discipline.”

13 The facts of the instant case are completely opposite to those in *Southwestern Bell*. In that
14 case the individual was called into a meeting to discuss his low production numbers but there was
15 no evidence of any history of discipline over low production numbers. Here, in contrast, the
16 undisputed evidence shows that the reverse was true. Mr. Rodriguez had been threatened with
17 discipline for precisely the subject of the interview with Manager Cooper: long-duration jobs and
18 the failure to call his manager.
19

20 In the instant case, as is detailed above, there is no evidence, substantial or otherwise, to
21 support the Arbitrator's finding that Mr. Rodriguez's belief in the possibility of discipline was not
22 reasonable. The undisputed evidence set forth in the Company's written and verbal
23 communications to Mr. Rodriguez establish the absolute reasonableness of his belief that
24 discipline might result from his interview with Manager Cooper. Moreover there is no reason
25 Manager Cooper, if she intended no discipline, could not have made that clear to Mr. Rodriguez.
26 She was in a perfectly unique position to make such assurances. Her failure to do so was a clear
27 signal that discipline was a strong possibility. (Compare, e.g. *NV Energy, Inc.* 355 NLRB 41
28

1 (2010) (manager assured employee that no discipline would arise from interview).

2
3 **C. DEFERRAL IS INAPPROPRIATE WHERE THE ARBITRATOR**
4 **SPECIFICALLY ADOPTED THE RATIONALE AND REASONING OF**
5 **ANOTHER ARBITRATOR WHO REASONED FROM A CONTRARY SET**
6 **OF FACTS**

7 The Arbitrator in his decision wrote:

8 “The Weingarten criteria and standards are laid out in the detailed
9 exposition of Arbitrator William Petrie in Grievance Number 2009
10 03 0068 (NLRB Deferral Case Number 31-CA-29411) **that the**
11 **Undersigned adopts his rationale and discussion specifically**
12 **regarding Weingarten and attaches it to this award so that the**
13 **reader, whether parties or NLRB representatives, can**
14 **incorporate his reasoning in their analysis as well”.** (Page 6 of
15 Arbitrator's Opinion and Award, (emphasis added).

16 The Opinion and Award of Arbitrator Petrie did set forth the *Weingarten* standards .In
17 addition to the *Weingarten* standards, Arbitrator Petrie set forth his rationale and reasons for
18 finding that the grievant in this previous arbitration did not have a reasonable belief that discipline
19 might follow from an interview with a manager. The rationale and reasons for his decision
20 included the grievant's belief that she had an unqualified right to Union representation whenever
21 she met with management, the testimony of two eye witnesses that contradicted the grievant's
22 perceptions of the manager's demeanor and "body language" prior to the meeting, this "body
23 language" being a factor upon which the grievant relied to justify her belief that she may be
24 disciplined , and, most significantly the fact that the manager, upon learning of the grievant's
25 request for a Union representative, specifically informed the grievant prior to the meeting that no
26 disciplinary action would be taken. Arbitrator Petrie wrote: “On the above described bases the
27 undersigned has concluded that when the Grievant refused management direction to meet with
28 [the managers] on March 9, 2009, she did not have a reasonable belief her participation in such a
meeting could result in disciplinary action.”

It is clear that the reasoning and rationale of Arbitrator Petrie took as premises, the above

1 facts ("the above described bases") which have no resemblance to the facts of the instant case.
2 The Administrative Law Judge chose to ignore the explicit words of Arbitrator Tamoush that he
3 adopted the "rationale" of Arbitrator Petrie and his direction to incorporate the "reasoning" of
4 Arbitrator Petrie in the analysis of the decision at issue. The Administrative Law Judge, instead,
5 found that Arbitrator Tamoush only adopted Arbitrator Petrie's statements of legal precedent
6 under *Weingarten*. Such a finding cannot be squared with the plain meaning and definition of
7 "reasoning--the drawing of inferences from known or assumed facts" and "rationale---the
8 fundamental reasons or fundamental basis of something" (Webster's New Unabridged Dictionary,
9 Deluxe Second Edition, 1983). The reasoning and rationale of Arbitrator Petrie were based on
10 the facts of his case. Arbitrator Tamoush's adoption and incorporation of this reasoning, based on
11 contrary facts, cannot be justified or supported as consistent with the requirements of the Act.
12

13
14 As detailed above, the Arbitrator in the instant case enunciated an incorrect understanding
15 of the *Weingarten* standards, also improperly credited the alleged subjective motives of
16 supervisor Cooper, ignored all the substantial evidence of prior warnings of discipline to the
17 grievant, and incorrectly incorporated the reasoning of another Arbitrator whose reasoning was
18 premised on entirely different facts than those before the Arbitrator in the instant matter.

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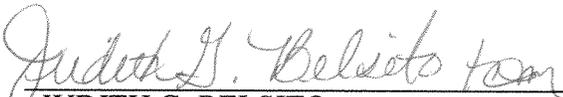
IV. CONCLUSION

For all the forgoing reasons, the Charging Party, Communications Workers of America, AFL-CIO, Local 9588 respectfully requests that the Decision of the Administrative Law Judge be overturned because the Arbitration Decision to which she has deferred is palpably wrong and repugnant to the policies and principles of the Act.

Respectfully submitted,

Dated: May 1, 2014

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO

By: 
JUDITH G. BELSITO
DAVID A. ROSENFELD
Attorneys for Union/Charging Party
Communications Workers of America, AFL-CIO

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age 18
3 and not a party to the within action. My business address is 12215 Telegraph Road, Suite 210,
4 Santa Fe Springs, California 90670.

5 On May/ 2014, I served the following documents in the manner described below:

6 **BRIEF OF CHARGING PARTY IN SUPPORT OF EXCEPTIONS TO THE**
7 **DECISION OF THE ADMINISTRATIVE LAW JUDGE**

- 8 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
9 collection and processing of correspondence for mailing with the United States Parcel
10 Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed
11 in the United States Postal Service at Alameda, California.
- 12 (BY FACSIMILE) I am personally and readily familiar with the business practice of
13 collection and processing of document(s) to be transmitted by facsimile and I caused
14 such document(s) on this date to be transmitted by facsimile to the offices of
15 addressee(s) at the numbers listed below.
- 16 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct to the
17 email addresses set forth below.

18 On the following part(ies) in this action:

19 William J. Dristas, Esq.
20 wdristas@seyfarth.com
21 Kamran Mirrafati, Esq.
22 KMirrafati@seyfarth.com
23 *FOR THE RESPONDENT*

Ami Silverman, Esq.
ami.silverman@NLRB.gov
FOR THE GENERAL COUNSEL

24 I declare under penalty of perjury under the laws of the United States of America that the
25 foregoing is true and correct. Executed on 5/1/14 at Santa Fe Springs, California.

26 

27 NATALIE MOORE