

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CSC HOLDINGS, LLC and CABLEVISION SYSTEMS
NEW YORK CITY CORPORATION, a Single
Employer**

Respondent,

-and-

**COMMUNICATION WORKERS OF AMERICA,
AFL-CIO,**

Charging Party.

Case 02-CA-085811
Case 02-CA-090823

Case 29-CA-097013
Case 29-CA-097557
Case 29-CA-100175
Case 29-CA-110974

**RESPONDENT'S REPLY IN SUPPORT OF ITS
MOTION TO SUBMIT POST-TRIAL EXHIBIT**

CABLEVISION SYSTEMS NEW YORK CITY CORPORATION and CSC HOLDINGS, LLC (hereinafter, "Respondent"), by its undersigned attorneys, respectfully submit this reply in further support of its motion to submit as after-acquired evidence the February 14, 2015 collective bargaining agreement entered into between Local 1109, Communication Workers of America, AFL-CIO ("the Union") and Cablevision Systems New York City Corporation ("Cablevision"), and in response to the opposition to the same submitted by Counsel for the General Counsel ("the GC").

Legal Analysis and Argument

Respondent's motion explained (at pages 3-4) that since the Board has recognized tentative agreements reached during negotiations as strong evidence that a respondent bargained in good faith, a complete agreement incorporating those tentative agreements (and others) must logically also be evidence of the respondent's good faith bargaining. The GC's response fails to address this argument and instead advances a cramped and inaccurate view of federal evidence law.

First, the GC conflates merely “relevant” evidence with that which is “conclusive” or “dispositive.” The GC cites Federal Rule of Evidence 401 and quotes its broad definition of relevant evidence as that “having *any tendency* to make the existence of *any fact* that is *of consequence* to the determination of the action *more probable*.” (GC Op’n Brief at 2 (emphases added).) Yet the GC argues that the existence of a signed collective bargaining agreement between the parties to a surface bargaining claim is “not relevant.” (GC Op’n Brief at 1.)

The Board, like the federal courts, has long drawn a distinction between relevant and dispositive evidence. *See, e.g., Flannery Motors, Inc.*, 321 NLRB 931, 931 (1996) (“Although the proximity between discharges and protected activities is a relevant analytic factor, it is not dispositive.”); *Gossen Co.*, 254 NLRB 339, 366 (1981) (affirming ALJ that “Although these statistics are not dispositive I consider them relevant . . .”); *and Birmingham Slag Division of the Vulcan Materials Co.*, 137 NLRB 612, 616 (1962) (“the considerations above recited are not conclusive in our kind of inquiry, but are relevant . . .”). Respondent does not need to show that the collective bargaining agreement conclusively proves that it did not engage in surface bargaining. Under the “totality of the circumstances” test for evaluating surface bargaining claims, *see, e.g., Hardesty Co.*, 336 NLRB 258, 260-61 (2001), the collective bargaining agreement need only be – and undeniably is – a *relevant* fact for the Board’s consideration.

The GC further complains that the collective bargaining agreement is “self-serving” and only offered “to create a revisionist spin” on what occurred during bargaining. (GC Op’n Brief at 2.) As an initial matter, the agreement is obviously not “self-serving” in the way in which that term is typically used – to connote a document *created by one party for purposes of litigation*. *See, e.g., Marmon Transmotive, a*

Division of the Marmon Group, Inc., 219 NLRB 102, 107 (1975) (document “prepared solely for the purpose of the hearing herein” is “somewhat suspect as a self-serving document”); and *Ga., Fla., Ala. Transp. Co.*, 219 NLRB 894, 900 (1975) (“There can be no question that the memorandum was prepared after the event as ‘self-serving’ record evidence.”). That was also the context in *Phelps Dodge Mining Co.*, 308 NLRB 985, n.4 (1992), where, as the GC notes, a respondent “offered affidavits which revised its own witness testimony and corrected its witnesses’ omissions.” (GC Op’n Brief at 2.)

The contract here was reached months *after* the hearing before Judge Fish and can in no way be said to have been “created” for purposes of litigation. Indeed, it was not created by Respondent at all. It is self-evidently a document negotiated and then signed by *both* the Respondent *and* the Union. Insofar as the GC is contending that this evidence is “self-serving” in the mere sense that it tends to help the Respondent – that is a truism and no reason to exclude plainly probative evidence. Parties introduce evidence to advance their position in litigation all the time; that is how our adversarial legal system works.

The claim that the contract amounts to “revisionism” is transparently specious as well; as noted in Respondent’s motion, the document speaks for itself. The fact that it was created and signed is a simple fact,¹ and introducing it to demonstrate the further simple fact that the parties reached an agreement is not “spin.”

¹ The GC also mentions that the collective bargaining agreement “has not been authenticated.” The GC’s implication, that Respondent would fabricate or forge a collective bargaining agreement governing hundreds of workers and signed by a local affiliate of the Charging Party, is ludicrous. If the Charging Party actually thinks that Respondent failed to attach what is actually a true and correct copy of the contract to its motion, it should come forward and say so. Moreover, if the General Counsel or Charging Party wishes to dispute the authenticity of the collective bargaining agreement executed by CWA Local 1109, or offer testimony or other evidence regarding the negotiations after the December 17, 2013 close of the record before Judge Fish, the proper procedural mechanism is to seek a remand of the matter for further hearing. They have not done so here, and therefore cannot complain if the Board were to admit the document into evidence.

The GC suggests in a footnote that if post-trial entrance into a collective bargaining agreement with a union were admissible, Respondent “can take actions or create evidence after the fact to suggest that [it] did not commit an unfair labor practice.” (GC Op’n Brief at 3, n.1.) However, the GC distorts the point of the cases it cites. In *Farmers Grain Elevator*, 226 NLRB 564, n.2 (1976) the Board denied a motion to reopen a hearing record “[i]n view of the fact that Respondent does not contend that such evidence is newly discovered or that it was unavailable at the time of the hearing.” In *Wisconsin Rubber Products Co., Inc.*, 160 NLRB 166, 167 n.1 (1966), the Board denied the addition of post-trial evidence after determining “that the evidence sought to be adduced is not newly discovered”; in fact, the respondent there “made no effort to subpoena” a witness before trial, and then sought to submit his affidavit after trial. In both *Washington Street Foundry*, 268 NLRB 338, n.1 (1983) and *Together We Stand Women’s Guild*, 256 NLRB 393, n.2 (1981), the Board simply noted “we are unable to consider such evidence absent a showing that such facts were newly discovered or not previously available.” None of these cases can possibly apply to a collective bargaining agreement that was indisputably “created” well *after* the trial and thus indisputably unavailable during trial.

Indeed, it is the GC’s position that would create perverse incentives. Under the GC’s view, reaching a collective bargaining agreement — the very outcome that the Act is designed to facilitate — would effectively be a nullity in deciding whether an employer negotiated that contract lawfully. Such agreements could not be admitted into evidence, despite the fact that such agreements plainly show an employer’s willingness to reach mutually agreeable terms and enter into a contractual relationship. The GC would, it seems, prefer that the Board instead consider past bargaining conduct in isolation,

without the benefit of knowing that negotiations ultimately resulted in an agreement.

Finally, the GC asserts that admission of the collective bargaining agreement would deny it and the Charging Party due process. (GC Op'n Brief at 3.) However, the GC notably fails to cite a single case or other authority on this point – and Respondent is unaware of any, for that matter. Respondent respectfully submits that, as a matter of common sense and basic fairness, in a case alleging that Cablevision was bargaining with no intention to reach a collective bargaining agreement, it should have the opportunity to introduce into the record the collective bargaining agreement resulting from that bargaining, which reflects that it intended to reach and actually reached an agreement. Denying Respondent that opportunity flies in the face of such common sense and would itself be a denial of due process.

Conclusion

For all of the foregoing reasons, and the reasons contained in its initial Motion and exhibit, Respondent respectfully requests that the collective bargaining agreement be received in evidence and considered by the Board in adjudicating the parties' Exceptions to the decision in this case by Judge Fish dismissing the surface bargaining allegations of the Second Consolidated Complaint.

Dated: May 4, 2015, at New York, New York.

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CERTIFICATION OF SERVICE BY ELECTRONIC MAIL

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on May 4, 2015, he caused a true and correct copy of the attached RESPONDENTS' REPLY IN SUPPORT OF ITS MOTION TO SUBMIT POST-TRIAL EXHIBIT on behalf of Cablevision Systems New York City Corporation and CSC Holdings, LLC, to be served upon counsel for the General Counsel and counsel for the Charging Party by electronic mail, pursuant to the Board's e-filing rules at the following addresses designated by each attorney for this purpose, respectively:

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