

**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

**REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS  
AND IN OPPOSITION TO CHARGING PARTY'S ANSWERING BRIEF**

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CSC Holdings LLC and its subsidiary Cablevision Systems New York City Corporation (collectively, “Cablevision” or “Respondent”) respectfully submit this reply brief in further support of their exceptions to the December 4, 2014 decision of Administrative Law Judge Steven Fish (“the ALJ”) and in opposition to the answering brief filed by the Charging Party Communication Workers of America, AFL-CIO (“CWA”).<sup>1</sup>

## INTRODUCTION

Cablevision has already explained how the record in this case makes clear that Cablevision lawfully replaced 22 Brooklyn employees who refused to report to work and engaged in a strike over the terms of their employment. Cablevision has further explained how Cablevision lawfully rescinded employee training on the new “smart meters” by restoring the status quo in a timely and unambiguous manner. After hundreds of pages of briefing, neither the CWA nor the General Counsel (“GC”) have offered any reason to question—much less reconsider—those conclusions.

Without conceding any other argument, this brief focuses on several arguments raised in the CWA’s Answering Brief.<sup>2</sup> First, this brief refutes certain claims regarding the alleged discharge (in fact, it was a permanent replacement) of 22 economic strikers on January 30, 2013, and explains why Cablevision’s good faith attempt to permanently replace the strikers—even if its execution might have been flawed—belies any argument that it engaged in unfair labor practices, or exhibited animus toward the workers for their union activities. Next, this brief also debunks certain CWA arguments regarding Cablevision’s rescission of its decision to issue

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<sup>1</sup> Local 1109, Communications Workers of America, the certified and recognized bargaining representative of the unit involved in this matter is referred to herein as the “Union” or “Local 1109.”

<sup>2</sup> Although Respondent is filing a separate Reply Brief in opposition to the GC’s Answering Brief, insofar as certain points in the CWA’s Answering Brief mirror or echo arguments contained in the GC’s Answering Brief, the arguments herein pertain to both.

“smart meters” to its Technical Operations employees in Brooklyn, particularly the suggestion that an employer commits a second unfair labor practice when it restores the status quo by rescinding a unilaterally imposed condition of employment. And finally, this brief answers the CWA’s additional “predictably unacceptable” arguments.

For all of the reasons below—and based on the entire record in this case—Respondent’s exceptions to the ALJ’s decision should be granted.<sup>3</sup>

**I. The ALJ Erred in Finding that Cablevision Violated the Act By Permanently Replacing the Strikers (Exceptions 38-58, 152-72)**

Cablevision acted in full compliance with the Act when it permanently replaced 22 strikers on January 30, 2013. Nothing in the CWA’s Answering Brief alters that conclusion. Furthermore, insofar as the CWA has claimed that Respondent’s conduct toward the strikers is evidence of its alleged bad faith during bargaining (*see* CWA Exceptions Brief at 1-2, 21, 49), its Answering Brief offers no legal or factual justification for that position.

**A. Cablevision Has Not Waived Its Right To Dispute the ALJ’s *Non-Findings***

The CWA asserts that Cablevision somehow waived the right ask the Board to make certain determinations concerning the events of January 30, 2013 by failing to except to the ALJ’s *lack* of findings on these issues. Specifically, the CWA argues that “Cablevision does not except to the ALJ’s failure to decide the issue of the nature of the employee activity on the morning in question,” yet “improperly raises that issue in its supporting brief and calls on the Board to decide that they were on an economic strike.” (CWA’s Answering Brief 3.) Similarly,

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<sup>3</sup> The CWA’s Answering Brief opens with the specious assertion that Cablevision’s Exceptions Brief is “rife with facts not in evidence”—an apparent reference to the parties’ collective bargaining agreement—as well as unspecified “misstatements and misrepresentations.” (CWA’s Answering Br. 1; *see* GC’s Answering Br. 3.) But contrary to the CWA’s assertion, Cablevision has never claimed that the fact that the parties have successfully reached a collective bargaining agreement “cure[s]” any alleged violations of the Act. (CWA’s Answering Br. 1.) Instead, Cablevision has followed proper post-hearing procedure by moving the Board to add the collective bargaining agreement to the record.

the CWA argues that “although Respondent does not except to the ALJ’s failure to explicitly find or reach the question of whether the replacements were permanent, it nonetheless argues in its brief that the Board should make an explicit finding on this matter.” (*Id.*) This argument is baseless.

Nothing in the Board’s Rules requires a party to except to the *non*-findings of an ALJ. That is particularly true where, as here, the ALJ issues a ruling on one issue, while consciously sidestepping an alternative theory or argument. Under Section 102.46(b)(2) of the Board’s Rules, “the failure of a party to urge an exception to a judge’s ruling” generally constitutes waiver—but that rule does not apply where the judge “found it *unnecessary to rule*” on an “alternative contention.” *Pay Less Drug Stores Northwest*, 312 NLRB 972, 973 (1993) (emphasis in original), *enf. denied on other grounds*, 57 F.3d 1077 (9th Cir. 1995). Instead, “failure to except to the judge’s *nonruling* does not fall within the ambit of Section 142.46(b)(2) and is thus not a waiver of the . . . alternative position.” *Id.* (emphasis in original).

Here, because the ALJ ruled against Cablevision on the alternative issue of when the permanent replacements were hired, he found it unnecessary to determine whether the work stoppage on January 30, 2013 was an economic strike. (ALJ Op. 263.) Cablevision is thus entitled to ask the Board to determine explicitly that the 22 employees discharged on January 30, 2013 were economic strikers, and that they were lawfully permanently replaced.

## **B. The Strikers Were Legitimately Replaced**

As Cablevision has previously explained, the permanent replacement of the 22 strikers did not violate Section 8(a)(1) or (3) of the Act. (Cablevision’s Exceptions Br. 71-86.) It is well settled that an employer has the right to permanently replace economic strikers in order to continue its business operations. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 33, 345 (1938). Moreover, Cablevision has amply demonstrated that it had “a roster of people ready to

serve as replacements” at the time that it informed the strikers that they had been permanently replaced. *Noel Food v. NLRB*, 82 F.3d 1113, 1119-20 (D.C. Cir. 1996). That is all the law requires. (*See* Cablevision’s Exceptions Br. 71-74.)

The CWA asserts that Cablevision effectively disciplined the 22 strikers for insubordination—and in so doing, sought to punish them for their activity in support of the Union. (CWA’s Answering Br. 31.) But even assuming, strictly for argument’s sake, that Cablevision prematurely announced that it had permanently replaced the 22 employees, there is no evidence whatsoever that Cablevision took action out of “anti-union animus” or otherwise committed any additional unfair labor practices. Cablevision acknowledged from the outset of the strike that the 22 workers were protected by Section 7, and it repeatedly and explicitly stated that they were not being disciplined or terminated, but were being permanently replaced—meaning that they could reclaim their jobs later. Indeed, the CWA itself emphasizes that Cablevision Vice President Rick Levesque denied that the workers were being “insubordinate.” (CWA’s Answering Br. 42.)

The CWA’s only apparent argument regarding animus is that Levesque allegedly “held” the 22 employees “in the conference room until they were all past their start times, even though they had started to go to work twice, to enable the Employer to attempt to hire permanent replacement workers.” (CWA’s Answering Br. 55.) This claim is belied by the plain facts. The employees repeatedly refused to go to work when asked to do so. (Cablevision’s Exceptions Br. 62-65.) Moreover, the CWA freely admits that many or most of their co-workers abandoned the strike and returned to work when they concluded that Levesque was too busy to “meet” with them. (CWA’s Answering Br. 38, 44.)

**C. Cablevision Had No Obligation To Explain What “Permanent Replacement” Means, Or To Contact the Union Before Permanently Replacing Strikers**

The CWA—backpedaling furiously from its own text message calling on workers to “demand a Fair Wage” (JX 1 ¶ 195)—now insists that its members were not on strike at all. To bolster this argument, the CWA resorts to inventing new employer obligations that find no support in Board law.

First, the CWA complains that “[t]he workers were confused. They did not know what ‘permanently replaced’ meant—although they knew it did not sound good. Lakesia Johnson and some others asked what permanently replaced meant. They asked if they were fired and were told no, that they were permanently replaced. No one explained exactly what it meant.” (CWA’s Answering Brief 41.) But “an employer need not fully explain to employees the nature and scope of the Act’s protections for replaced strikers,” and “employer statements about job status after a strike are acceptable so long as they are consistent with the law.” *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982). In this case, there is no credible evidence—nor even any allegation—that Cablevision misled the strikers or misstated the relevant law to them.

The CWA also suggests that Cablevision owed the strikers or Local 1109 some sort of courtesy telephone call to confirm whether they intended to strike, before taking any action to permanently replace the strikers. The CWA argues that because Local 1109’s text message on the eve of the strike “told employees that if they had questions they should call their steward,” Cablevision “could have done the same.” (CWA’s Answering Br. 53.) The reason, the CWA asserts, is because that is “what professional labor relations people operating in good faith do,” and because its managers “knew Calabrese, they knew Gallagher, and they knew how to reach them.” (*Id.*) The CWA cites no authority or precedent whatsoever for its suggestion that an employer waives its right to permanently replace economic strikers if it fails to reach out to the

organizers of the strike in advance. By its own logic, the CWA just as easily could have—and should have—reached out to Cablevision in advance to explain how it intended to proceed. Thus, Cablevision’s good faith attempts to lawfully permanently replace economic strikers are not undermined or disproven by its failure to question or warn Local 1199’s leaders about their impending plans for a strike to “demand a Fair Wage.”

## **II. Cablevision Did Not Violate the Act by Rescinding Smart Meter Training (Exceptions 36-37, 141-47, 171-72)**

Cablevision’s initial exceptions brief explained that its rescission of smart meter training was not unlawful because the Company was merely restoring the status quo in order to cure the violation that arose from its initiation of the training. Cablevision further explained that the ALJ erred in relying on *Albuquerque Phoenix Express*, 153 NLRB 430 (1965), to support his conclusion that Cablevision “was obligated to notify and bargain with the Union about its decision to cancel the training before it instituted the change.” (ALJ Op. 208.)

The CWA’s answering brief nonetheless doubles down on *Albuquerque Phoenix Express*,<sup>4</sup> insisting that “[w]here a term or condition is established, even unlawfully, the employer must give the union notice and an opportunity to bargain before rescinding that change.” (CWA’s Answering Br. 73.) The CWA further contends that “when the unlawful change may have benefitted unit employees,” the employer “[may] rescind the change only upon the union’s request.” (CWA’s Answering Br. 73.) The CWA’s argument relies on a serious distortion of the cases it cites for support.

As an initial matter, *Albuquerque Phoenix Express* is *not a precedential opinion* on the subject of rescinding an unfair labor practice. In that case, the employer unilaterally withdrew

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<sup>4</sup> The GC’s Answering Brief does the same on page 50, n.12.

certain wage benefits that had earlier been implemented on a unilateral basis. The Board's decision concludes as follows:

[I]nasmuch as Respondent has reimbursed the employees for any loss they may have suffered as a result of its September 20 action [unilaterally withdrawing the benefits], and as we are finding and remedying 8(a)(5) violations based on other conduct, *we deem it unnecessary*, in order to adequately effectuate the policies of the Act, *to decide whether*, on September 20, *Respondent further violated the Act* as found by the Trial Examiner.

153 NLRB at 431 (emphases added). In other words, the Board expressly declined to decide whether the unilateral rescission of wage benefits violated the Act—and the Tenth Circuit decision enforcing the Board's order did not address the rescission issue at all.<sup>5</sup> 368 F.2d 451 (10th Cir. 1966).

Furthermore, the CWA's own argument—and the cases it cites—demonstrate only that rescission of a *benefit* to employees cannot be made unilaterally. For example, in *Albuquerque Phoenix Express*, the issue was the rescission of “wage benefits.” 153 NLRB at 437. Similarly, in *Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 16 (Apr. 24, 2013) (a case that was later set aside on *Noel Canning* grounds, *see* 2014 NLRB LEXIS 507; 199 LRRM 2086), the employer unilaterally implemented and then rescinded incentive wage increases. Thus, in the CWA's own words, the law only prohibits employers from “implement[ing] a positive condition of employment without bargaining and then strip[ping] that benefit away from employees,” in order to “undermine any union's status.” (CWA Answering Brief at 73.)

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<sup>5</sup> In the fifty years since *Albuquerque Phoenix Express* was decided, it had been cited exactly twice until the present case. First, a footnote in a 1967 decision cited the Tenth Circuit's opinion for the unremarkable proposition that “[t]he timing of economic benefits is . . . a significant factor in determining whether an employer is making use of them to defeat or thwart union organization.” *Burkley Envelope Co.*, 165 NLRB 43, 49 n.26 (1967). Second, the case was used as a “*cf.*” cite in a factually inapposite 1966 decision, to support the conclusion that the “the Company did not rescind [wage] increases in an attempt to remedy an alleged unfair labor practice but instead seized upon the charge as an excuse to rescind the increases which had failed to prevent the employees from voting to strike.” *May Aluminum, Inc.*, 160 NLRB 575, 616 (1966).

But there is no such rule for unilateral, if inadvertent, changes to working conditions that cannot fairly be characterized as “benefits” to the employees. In *EPE, Inc.*, 284 NLRB 191 (1987), for example, the Board affirmed an ALJ’s findings that the employer “unilaterally changed working conditions by imposing a new attendance policy on members of the bargaining unit,” and then fired employees for violating it. *Id.* at 191, 193. But the Board simply ordered the employer to “[r]escind the new attendance policy” and reinstate the terminated employees—without any mention of the union consenting to the change. *Id.* at 191. Likewise, in *Gaska Tape, Inc.*, 241 NLRB 686 (1979), the Board ordered the employer to simply “[r]escind its unilaterally instituted 6-day-work-week rule involving mandatory Saturday work.” *Id.* at 687. Once again, the Board made no reference to any requirement that the employer consult with the union prior to rescission. *See also Briar Crest Nursing Home*, 333 NLRB 935, 938 (2001) (ordering employer to “Rescind the unilateral change in work schedules of the employees in the activities department.”).

In this case, the smart meter training that Cablevision rescinded cannot be characterized as a “benefit” to the affected employee. Cablevision technicians use meters to analyze service-related problems and measure signal strength; the smart meters electronically record and transfer those data to supervisors, who can review the results in real time and download related reports. (Respondent Exceptions Brief at 95, citing Tr. Vol. 13, pp. 1924-29.) The data are used, among other things, for performance evaluations that may result in discipline and lack of career progression. (*Id.* at 95-96, citing Tr. Vol. 13, pp. 1927-30.)

Thus, the smart meters upgrade is not a “benefit” to the affected employee. In fact, by enabling management to more easily track and monitor employees’ work pace and quality, the smart meters are an imposition of the type that the Board orders employers to rescind

immediately without waiting for union approval. *See, e.g., Nortech Waste*, 336 NLRB 554, 574 (2001) (affirming ALJ order to employer to “[r]escind the changes in working conditions which it made unilaterally without notifying the Union, including the installation of surveillance cameras in the workplace, [and] the safety equipment replacement policy . . .”); *and Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001) (ordering employer to “[r]escind the unilateral changes it has made in the terms and conditions of employment of unit employees by instituting and enforcing new timeclock rules and enforcing previously unenforced timeclock rules”).

At its root, the CWA’s argument implies that once an employer makes a unilateral change it is helpless to remedy that apparent violation without committing a further unfair labor practice – and must bargain its way out of that statutory liability. Such a rule would establish an untenable, damned-if-you-do-damned-if-you-don’t situation for the employer.

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Here, Cablevision has admitted that it inadvertently instituted a change in employment conditions that should have been bargained over. Yet when it attempted to fix the problem promptly, it was charged with committing yet another ULP. While the CWA’s eagerness to pile accusations upon accusations at Cablevision’s expense is predictable, the Board should not endorse such a Kafkaesque reading of the Act and its own case law.

### **III. Cablevision Did Not Rigidly Adhere To “Predictably Unacceptable” Demands**

Finally, in an effort to bolster its surface bargaining allegations, the CWA clings to the “predictably unacceptable” doctrine, which is at odds with the Act and with Board law. (CWA’s Answering Br. 23-26.)

As Cablevision has previously explained, Section 8(d) of the Act expressly provides that the collective bargaining obligation “does not compel either party to agree to a proposal or require the making of a concession.” (Respondent Answering Br. 18-25 (citing 29 U.S.C.

§158(d.) Consistent with that provision, the Supreme Court has long held that “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395, 404 (1952); *see also NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 488 (1960) (“parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences”).

From these principles, it follows that the Board’s role is not to “decide that particular proposals are either ‘acceptable’ or ‘unacceptable’ to a party.” *Reichhold Chemicals, Inc.*, 288 NLRB 69, 69 (1988) (“*Reichhold II*”) (emphasis added), *enf. denied in part on other grounds*, 906 F.2d 719 (D.C. Cir. 1990). The Board “will not,” therefore, “attempt to evaluate the reasonableness of a party’s bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith.” *Id.* The Board should reject the CWA’s attempt to do the same.

### CONCLUSION

For all of these reasons, and the reasons contained in its prior briefs, Respondent respectfully requests that the Board sustain its exceptions to the ALJ’s decision and dismiss the Consolidated Complaint in this case in its entirety.

Dated: May 8, 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 8, 2015, he caused a true and correct copy of the attached Brief in Support of Respondent's Exceptions to the Administrative Law Judge's Decision 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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