

**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 GENERAL COUNSEL'S ANSWERING BRIEF**

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CSC Holdings LLC and its subsidiary Cablevision Systems New York City Corporation (collectively, “Respondent,” “Cablevision,” or “the Company”) respectfully submit this Reply Brief in further support of their exceptions to Administrative Law Judge (“ALJ”) Steven Fish’s December 4, 2014 decision and in response to the General Counsel (GC) Answering Brief.

INTRODUCTION

Respondent has already explained how the record in this case makes clear that Cablevision implemented Company-wide wage and benefits improvements as part of a legitimate and systematic reform of its business, and *not* in response to a Union campaign. Respondent has further explained why statements made by Company CEO James Dolan were fully consistent with bedrock principles of labor law, and were protected speech under Section 8(c) of the National Labor Relations Act (the “Act”) and the First Amendment. Nothing in the GC’s Answering Brief alters the conclusion that the ALJ erred in finding that Cablevision’s wage and benefits increases and Dolan’s statements violated the Act.¹

I. Cablevision Did Not Violate Section 8(a)(1) by Promising and Implementing Company-Wide Wage and Benefits Improvements

None of the factual or legal arguments made by the GC in its Answering Brief (nor those made by the CWA) contradict the ample evidence that Cablevision’s decision to increase wages and benefits to market levels was a legitimate business decision that cannot give rise to liability under the Act. The record is clear that Cablevision’s plan to return to its core values—which included a renewed emphasis on employee compensation—was initiated in late 2011, long

¹ Given the limited space afforded in a Reply Brief, Respondent focuses below primarily on its exceptions to the ALJ’s rulings on the issues of the implementation of Company-wide wage and benefits improvements and the allegations that Company CEO James Dolan unlawfully solicited employee grievances and promised to remedy them. Respondent does not, however, concede any of the other issues raised in the GC’s Answering Brief. Respondent has filed a separate Reply Brief to the Answering Brief filed by Charging Party Communication Workers of America, AFL-CIO (“CWA”), which focuses primarily on Brooklyn-related issues of the 22 permanently replaced economic strikers and “smart meters.” To the extent that the GC and the CWA have made the same points in their Answering Briefs, both are addressed herein, to avoid needless repetition.

before Cablevision was aware that anyone in the small group of approximately 200 Bronx technicians was engaged in union organizing activity. The GC and the CWA have also failed to establish that the costly Company-wide wage increases—as well as benefit improvements for the approximately 12,000 to 13,000 employees who participated in Respondent’s medical plan at Cablevision and its affiliates—were made with the “intent to interfere” with the unionizing of Bronx technicians, who made up only a tiny fraction of the total population affected by these changes. The allegations that these changes violated the Act are based upon a flawed reading of both the evidence and the law.²

A. The ALJ Did Not Discredit Hildenbrand and Questell

The ALJ did not, as the GC asserts, make any credibility determination regarding the testimony of Wilton Hildenbrand and Lisa Questell, the two Cablevision managers who developed and implemented the plan to increase wages across the Cablevision footprint. (GC’s Answering Br. 4.) Instead, the ALJ discounted their testimony—regarding their intimate involvement in the development of the Company-wide wage increases—only because he erroneously concluded that Dolan controlled the entire process that led to the wage increases. (ALJ Op. 190.) But in fact it was Hildenbrand and Questell who developed and implemented the wage increase plan, subject only to final approval by Dolan. Indeed, the testimony that the GC cites to assert that the wage increase plan was “created” by Dolan *actually* says that Dolan had the ultimate authority to approve the plan put together by the Compensation Department, as both Hildenbrand and Questell testified.³ (Tr. Vol. 12, p. 1856; Tr. Vol. 16, pp. 2532, 2543.)

² As an initial matter, the GC’s assertion (at page 3 of its Answering Brief) that Respondent relied upon “extraneous matters that were not admitted into the record” is overblown, as the only post-hearing matter referenced by the Company (indeed the only example cited by the GC) is the collective bargaining agreement the parties entered into in February 2015, which Respondent has moved to have added to the record.

³ Hildenbrand was asked on cross-examination if Dolan had the “ultimate authority” to approve the pay initiative and he responded “the structure was put together by the human resources department and compensation people.

Moreover, all evidence indicates that Dolan's motives were unobjectionable. Hildenbrand testified without contradiction that the only concern Dolan expressed in their discussions about the wage increases was the future competitiveness of the Company, not the threat of unionization. (Tr. Vol. 12, p. 1861.) The GC incorrectly claims that Hildenbrand was merely speculating about Dolan's motivations, because Hildenbrand did not testify to any direct conversations with Dolan. (GC's Answering Br. 4-5.) In fact, however, Hildenbrand testified that, in the course of investigating the network problems in the last months of 2011, one of the findings that he reported to Dolan was that pay levels had not been assessed in years to determine whether they were competitive, and that he also discussed with Dolan the negative effect that below market compensation had on employee morale and, by extension, on customer service. (Tr. Vol. 12, pp. 1828-34, 1836-39, 1851.) Hildenbrand also testified that in late 2011, upon learning about these issues, Dolan determined to correct the problem "as fast as possible." (Tr. Vol. 12, p. 1839.)

Hildenbrand further testified—without contradiction—that none of his own actions or his discussions with Dolan had anything to do with defeating the Union. (Tr. Vol. 12, p. 1861.) Similarly, Questell testified that at the more than twenty meetings she attended regarding the market analysis, union organizing was never discussed as a reason behind the analysis or the proposed wage increases. (Tr. Vol. 16, pp. 2523, 2553.) The ALJ—who did not dismiss this testimony as untruthful—erred in ignoring it and in relying instead on the absence of Dolan's testimony to support his conclusion that Respondent had not met its burden to rebut an inference

And at the end of the day, it's the head of the company's choice to approve or disapprove it, yes." (Tr. Vol. 12, p. 1856.) Questell similarly testified that she "made the final determination on the individual employee pay adjustments that were recommended" to Dolan, who gave final approval to her recommendations. (Tr. Vol. 16, p. 2532.) None of that testimony supports a conclusion that Dolan "created" the plan.

of unlawful motivation. Because the ALJ's conclusion was based on a misreading of the evidence—and not, as the GC contends, a credibility determination—it should be rejected.⁴

B. The Wage Improvement Plan Was Conceived and Announced Before Cablevision Was Aware of Any Union Organizing by its Bronx Employees and Was Lawfully Made in Anticipation of Future Activity

Contrary to the GC's assertions, the ALJ's conclusion that Cablevision violated the Act by implementing Company-wide wage and benefits improvements is factually and legally flawed. As a factual matter, the ALJ's conclusion resulted from his erroneous finding that the Company conceived the wage increase plan after it allegedly became aware of union organizing activity in the Bronx. As a legal matter, the ALJ erred in concluding that a decision to increase wages across the Company footprint in response to the possibility of *future* organizing activity violates the Act, even in the absence of employer knowledge of an active union campaign.

As Cablevision has previously explained, the framework set forth in *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), rests on an erroneous interpretation of the statutory limits on employer conduct. (*See* Cablevision Exceptions Br. 19.) Under a proper reading of the Act, it is not coercion for an employer to *improve* the terms and conditions of employment, even in response to union organizing activity. But even accepting the “counterintuitive” premise of *Exchange Parts*—a premise that has been questioned by the D.C. Circuit and various legal scholars⁵—the holding of *Exchange Parts* is expressly limited to circumstances where benefits

⁴ In general, the GC errs in suggesting that the “vast majority” of Cablevision's exceptions “ask the Board to disregard the ALJ's well-reasoned credibility resolutions,” which the GC claims are entitled to deference. (GC's Answering Br. 2.) Cablevision's exceptions are based instead on the ALJ's disregard or misinterpretation of the relevant evidence in question. Moreover, the Act “commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence.” *RC Aluminum Indus., Inc.*, 343 NLRB 939, 939 n.1 (2004). The Board “attach[es] great weight to a judge's credibility findings” only “insofar as they are based on demeanor.” *Id.* The ALJ made no credibility determinations based on demeanor here and thus no deference is warranted.

⁵ *See Skyline Distrib. v. NLRB*, 99 F.3d 403, 409 (D.C. Cir. 1996) (*Exchange Parts* relies on the “counterintuitive” premise that “the granting of benefits necessarily conveys a threat that the employer will

are conferred “*while a representation election is pending.*” 375 U.S. at 409 (emphasis added). Here, the plan to evaluate employee compensation and ameliorate any disparity with the market was first discussed in late 2011 and then announced to the whole Company on February 1, 2012—three and a half months before a petition was filed and five months before the election in the Bronx was held. (JX 242.) Because there plainly was no representation election pending in the Bronx at the time the wage and benefits increases were announced, it is the GC—and not Cablevision—who manipulates the holding of *Exchange Parts* and its Board law progeny by applying them here.

Although the Board has extended the *Exchange Parts* rationale to benefits granted even before an election petition has been filed, the Board nonetheless requires a showing that the employer had specific knowledge of “actual” union organizing by its employees in order to infer any improper motive behind a promise of economic benefits. *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 18 (2006) (“to find an employer’s promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees”). Here, the plan to evaluate employee compensation for market competitiveness was first conceived in late 2011. The Company was not aware of any “actual” union organizing by its Bronx employees at that time, and the fact that some supervisors may have speculated about the possibility of *future* organizing is insufficient to establish such awareness. Indeed, the ALJ recognized the absence of any actual organizing when he stated that “even *before the Union began organizing* in the Bronx, there was talk amongst managers in the Bronx about the *possibility* of the organizing spreading to the Bronx.” (ALJ Op. 183 (emphasis

exact retribution if the employees vote for the union”); *see also* Daniel V. Johns, *Promises, Promises: Rethinking the NLRB’s Distinction Between Employer and Union Promises During Representation Campaigns*, 10 U. Pa. J. Bus. & Emp. L. 433, 456 (2008) (“There is little or no evidence supporting a blanket and unequivocal assumption that all employer promises are inherently coercive and should be prohibited.”).

added).) Moreover, there is no evidence that any of the Bronx managers who speculated that union organizing might spread to the Bronx ever expressed their views to the relevant decision makers—much less had any involvement in the decision to increase wages and benefits.

The slim evidence of union activity in the Bronx prior to the announcement of the wage increases on February 1, 2012 is insufficient to find liability here. The ALJ identified a single e-mail indicating that CWA representatives—not Cablevision employees—had started “circulating handouts” in late January 2012. (*Id.*) But the ALJ supplied no authority—because there is none—for the proposition that mere leafletting by a union at a single facility requires an employer to suspend improvements planned for its entire workforce. The GC points to a January 27, 2012 e-mail speculating that some Bronx technicians “*may have signed* union cards,” and that CWA personnel were “trying to speak to the technicians.” (GCX 86 (emphasis added).) But again, the GC identifies no support for a rule that knowledge of *possible* signatures and *attempted* union outreach is enough to infer knowledge of “actual” union organizing, such that an inference of unlawful motivation is warranted.⁶

The GC purports to advocate “free choice” in union elections (*see* GC’s Answering Br. 1, 10, 12, 14, 18, 20, 22), but at the same time seeks to dramatically constrain an employer’s ability to offer across-the-board wage and benefits increases to its workforce.⁷ That result finds no support in the logic of *Exchange Parts* or in subsequent Board law. Because it is a perfectly “lawful stratagem” to “stay ‘one step ahead’ of the union by diminishing the appeal of

⁶ The GC’s citation to a February 1, 2012 e-mail from Cablevision Vice President Paul Hilber is even further afield, since that e-mail was sent *after* Dolan announced the plan to evaluate employee compensation on February 1. (GC’s Answering Br. 6 (citing GCX 87).)

⁷ The notion that Cablevision should have simply “defer[red] the wage increase” until after the election (GC’s Answering Br. 23-24) simply proves the point; at the time of the February 1 announcement, there was no election scheduled, and might never have been. Requiring an employer to defer wage increases until after an election that *might never occur* would mean immediately freezing wages at any facility where there is the slightest hint of union activity. Ironically, what the GC requests is a rule that *discriminates* against any facility where a union attempts to organize, while at the same time permitting wage increases everywhere else.

unionization,” *Hampton Inn*, 348 NLRB at 18, the Board should reject the ALJ’s finding that Cablevision had an unlawful motivation for its wage and benefits increases.

C. The Totality of the Circumstances Establishes That the Wage Increases Were Conferred for Legitimate Business Reasons

The Board considers a variety of factors in determining whether benefits were conferred for legitimate reasons, rather than to coerce employees in connection with a union election. Among other things, the Board will consider whether the decision applies to employees outside the bargaining unit; whether the decision is consistent with past practice; and whether the increase was given before a petition was filed. *Holly Farms Poultry Indus., Inc.*, 194 NLRB 952, 955 (1972). The GC ignores the overwhelming evidence that Cablevision implemented Company-wide wage increases for legitimate business reasons.

As explained above, the wage increase was announced in February 1, 2012, three and a half months before a petition was filed in the Bronx. The wage increase plan applied to over 17,000 employees at Cablevision’s facilities in New York, New Jersey, and Connecticut, as well as to employees of Cablevision affiliates Lightpath, News 12, and Newsday. (Tr. Vol. 16, pp. 2522-23, 2541.) The vast majority of employees who received wage increases were *outside* the Bronx technicians’ potential bargaining unit, which totaled approximately 250 employees—less than 1.2% of the total population.

The ALJ specifically found that the very same increases granted to employees outside of the Bronx did not violate the Act. (ALJ Op. 268.) Even more telling, because of the individualized and impartial nature of the analysis conducted by Questell and the Compensation team, 3,000 out of a total of 17,000 employees who were considered for increases, *including technicians in the Bronx*, did not receive any increase. (Tr. Vol. 16, pp. 2546-47, 2556.) Surely,

if discouraging unionization in the Bronx was the real motivation, *all* of the potential voters in the Bronx would have received wage increases.

Although the GC repeatedly characterizes the wage increases as “unprecedented” (GC’s Answering Br. 4, 15, 25), that is incorrect. The Company engaged in a similar comprehensive market analysis of wages in 1999 and granted increases based on that analysis.⁸ (Tr. Vol. 16, pp. 2624-25, 2649-50.) Moreover, the relevant comparator is not the “annual merit increases” that the Company previously awarded as part of its regular performance review cycle. (GC’s Answering Br. 7; CWA’s Answering Br. 5.) Annual merit-based increases are different in kind from wage increases intended to rectify significantly below-market compensation. In the latter case, it is entirely reasonable to use immediate wage increases to address an immediate problem.

Because the timing, scope, and nature of the wage increases belie the ALJ’s finding of anti-union motivation, the Board should dismiss all charges relating to the wage increases.

D. The Benefits Improvements Were Made in Response to Employee Feedback

The same is true with respect to Cablevision’s decision to implement Company-wide benefits improvements. The GC offers nothing to refute the evidence that, in accordance with prior practice, the benefits improvements were motivated by employee feedback across the Company, and were announced and implemented well before the Bronx petition was filed. Moreover, the benefits improvements affected all 12,000 to 13,000 employee participants in Cablevision’s medical plan—including employees at its various subsidiaries. (JX 252, p. 4.) Once again, the 200 employees in the prospective Bronx bargaining unit comprise a very small

⁸ The CWA claims that Cablevision was aware that wages were below market level in 2008, and questions why the Company did not raise wages at that time. (CWA’s Answering Br. 14-15.) The simple answer is that Dolan was not involved in the day-to-day management of the Company until late 2011. (Tr. Vol. 12, pp. 1825, 1836, 1838-39, 1842-43.) As both Hildenbrand and Questell explained, Tom Rutledge, the Company’s Chief Operating Officer at the time, was more focused on increasing return on investment, cash flow, and shareholder value and was unwilling to adjust compensation levels as long as the midpoint of a salary range was competitive and attrition was low. (Tr. Vol. 12, pp. 1825-28; Tr. Vol. 16, pp. 2515-19.)

percentage (about 1.7%) of the total. Plainly, the decision to address Company-wide concerns about high employee health plan costs was unrelated to union organizing.

II. Cablevision Did Not Improperly Solicit Grievances or Make Promises or Threats

In arguing that Cablevision unlawfully solicited employee grievances, the GC (like the ALJ) ignores substantial evidence in the record that the Company had a longstanding “Open Door Policy,” which has provided employees with direct access to the CEO for many years, and that Cablevision has, at various times, responded to and resolved issues raised through that policy. (*See, e.g.*, RXs 23, 24, 25; Tr. Vol. 12, pp. 1866-72.) In view of this history, Dolan’s speeches—in which he invited employees to e-mail him and indicated that the Company would work to address their problems—were not unprecedented. The GC’s attempt to distinguish *Wal-Mart Stores, Inc.*, 339 NLRB 1187 (2003), is therefore unavailing.

In *Wal-Mart Stores*, where managers visited a facility for the first time during union organizing, the Board held that “the occurrence of soliciting and remedying grievances during the critical period was substantially consistent with past practice,” even if those specific managers had not previously engaged in the practice (or had not engaged in it to such an extent). 339 NLRB at 1188. Similarly here, the mere fact that Dolan made a televised speech or conducted in-person meetings in the Bronx cannot be unlawful, even assuming that he had not personally engaged in those activities before—because his actions and the message he conveyed were consistent with the past practice of the Company’s Open Door policy.⁹

The GC deliberately mischaracterizes the statements Dolan made as threats—but Cablevision has already explained why these comments were entirely lawful restatements of an

⁹ The GC’s own statement of the solicitation rule cuts in favor of Cablevision: “An employer’s solicitation of grievances during a union campaign is unlawful only if it is accompanied by an express or implied promise to remedy the grievance *if the union is rejected in the election.*” (GC’s Answering Br. 25 (emphasis added).) No such promise—conditional or otherwise—can be derived from the record here.

employer's bargaining obligations and descriptions of the possible consequences of unionization. *See, e.g., United Rentals, Inc.*, 349 NLRB 190, 190-91 (2007) (“[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c).”). Moreover, to the extent Dolan's statements were susceptible to more than one understanding, they must be treated as protected speech under Section 8(c) of the Act and the First Amendment. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386-87 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (Board's interpretation was not entitled to deference because it “raise[d] difficult constitutional issues about employers' First Amendment rights”).

The GC also completely fails to address the Company's argument that Dolan effectively and immediately repudiated any supposed threat by responding to a follow-up question with the clarification that he was *not* making a threat and that no employee would face retaliation for voting in favor of the Union. (Tr. Vol. 4, p. 597; Tr. Vol. 6, p. 988; Tr. Vol. 12, pp. 1847-48; Tr. Vol. 13, pp. 1917-18.) Under these circumstances, the charges should be dismissed.

CONCLUSION

For all of these reasons, and the reasons contained in its prior briefs, Respondent respectfully requests that the Board sustain Respondent's 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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