

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

\*\*\*\*\*

JAMES G. PAULSEN, Regional Director of  
Region 29 of the National Labor Relations Board,  
for and on behalf of the NATIONAL LABOR  
RELATIONS BOARD

Petitioner

15 CV 4000  
(ARR)(VVP)

v.

CIAMPA MANAGEMENT CORP.

Respondent

\*\*\*\*\*

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO APPLICATION FOR  
PRELIMINARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR  
RELATIONS ACT**

## Summary of Petitioner's Reply

Respondent's Memorandum of Law in Opposition to the Application for Preliminary Injunction ("Respondent's Memo"), does not rebut the Petitioner's showing that reasonable cause exists to believe that the Act has been violated or that 10(j) injunctive relief is just and proper. Just as it did during the investigation, Respondent has failed to present any substantive evidence to support its claims. Rather than providing documentary evidence to the Court, Respondent presented a memorandum filled with conjecture and rhetoric that misstates the law and mischaracterizes the evidence. In addition, Respondent's Memorandum attempts to divert the Court's attention away from the well-established reasonable cause analysis to an invented standard involving the Board's investigatory techniques. Respondent argues that reasonable cause does not exist because, in its view, the Board's investigation was flawed because it failed to ask for certain documentary evidence. Contrary to Respondent's argument, Petitioner submits that the reasonable cause analysis does not involve an inquiry into how the Board investigated the unfair labor practice charges. Moreover, it is simply untrue that the Board failed to request evidence from Respondent. In that regard, Petitioner has attached as Exhibits R1-R7 to this Reply, seven (7) evidence requests that the Board issued to Respondent.<sup>1</sup>

With regard to the just and proper standard, Respondent asserts that relief is not just and proper because 1) the Board waited seven months to seek the injunction, 2) the Board is seeking the same remedy that it is seeking in the underlying unfair labor practice proceedings, and 3) employees still support the Union as is demonstrated by the fact that a recent Union rally was

---

<sup>1</sup> Petitioner has also attached to this Reply, a new affidavit (both English and Spanish) from Andres Galarza that responds to new arguments made by Respondent (Exhibit S), and the original signed Spanish-language affidavits of both Galarza brothers. In its Memo, Respondent implies that the Galarza brothers' affidavits lack authenticity because they were unsigned. Petitioner submits that it initially provided the Court with the certified English translation of the brothers' Spanish-language affidavits for ease of review. However, in light of Respondent's concerns, the signed Spanish affidavits are attached hereto as Exhibits T1-T2.

“well-attended.” Petitioner submits that Respondent’s three points are misplaced and not supported by the evidence or the law. As will be shown below, there was no delay as the last charge in this case was filed on June 10, 2015. Second, Section 10(j) of the Act permits the Board to seek *interim* relief from a district court during the pendency of the administrative proceedings. Finally, contrary to Respondent’s assertion that a recent Union rally was well attended, the rally was actually attended by only two Ciampa workers; the remainder of the attendees were Union organizers and workers from other companies.

Thus, as will be discussed more fully below, Respondent’s Memo presents no new evidence to rebut the Petitioner’s showing that reasonable cause exists to believe that Respondent has violated the Act, and that 10(j) injunctive relief is just and proper. As such, most respectfully, the Court should reject Respondent’s claims and grant the temporary injunction.

#### 1. Respondent Misstates the Reasonable Cause Standard

In its Memo, Respondent erroneously argues that its own opinion of the sufficiency of the Board’s investigation is a factor that this Court should consider in its reasonable cause analysis. Respondent argues that reasonable cause does not exist because, in its view, the Board failed to ask for certain documentary evidence during the investigation and because the Board failed to interview certain witnesses. First, this is not the correct standard. The reasonable cause standard does not involve a review of the Board’s investigatory techniques. Rather, the reasonable cause standard focuses on whether the evidence actually adduced during the investigation, with due deference being given to the Regional Director’s views and conclusions regarding that evidence, is sufficient to spell out the likelihood of a violation. Respondent cites no case for the proposition that the Court’s inquiry should center on whether the Board obtained all the information that

Respondent felt it could have. Secondly, it is patently untrue that the Board failed to request documentary evidence from Respondent. The Board requested evidence from Respondent on seven (7) separate occasions. (Ex.R1-R7) Moreover, Respondent itself is in the best position to know what evidence will support its defense, and the fact that Respondent did not provide any exculpatory evidence either then or now, demonstrates that their defense is baseless and unsupported by any probative evidence.

It is well established that the reasonable cause standard requires that, “appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB’s legal or factual theories are fatally flawed.” *Silverman v. Major League Baseball Player Relations Committee*, 67 F.3d 1054, 1059 (2d Cir.1995). The reasonable cause requirement is satisfied where the Regional Director has come forward with evidence “sufficient to spell out a likelihood of violation.” *Danielson v. Joint Bd. of Coat, Suit and Allied Garment Workers’ Union*, 494 F.2d 1230, 1243 (2d Cir. 1974). Case law plainly establishes that Petitioner’s burden is minimal and requires only a very low threshold of proof. *Aguayo ex rel. NLRB v. Tomco Carburetor Co.*, 853 F.2d 744, 748 (9th Cir. 1988). In meeting this low threshold, Petitioner is not required to conclusively show that an unfair labor practice occurred or that precedents governing the case are in perfect harmony. Instead, Petitioner must only meet a lower burden of proof – that there is “reasonable cause” to believe that an unfair labor practice has occurred. *Silverman v J.R.L. Food Corp*, 196 F.3d 334 (2d Cir.1999); *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d.Cir.1980); *Silverman v. Red & Tan Charters, Inc.*, 1993 WL 404146 (S.D.N.Y. Oct. 6, 1993).

Respondent attempts to skew this reasonable cause analysis by claiming that, in its view, the Board should have asked for additional evidence such as paycheck information and should

have interviewed additional unidentified employee witnesses prior to coming to its conclusions that the law had been violated. This argument is nothing more than a diversion. The reasonable cause standard only requires that the Court analyze whether the evidence actually adduced reasonably supports the likelihood of a violation. There is no provision in the analysis for a respondent's views regarding the sufficiency of the investigation. For all the reasons set forth in our initial Memorandum of Law in Support of the Petition, the Petitioner submits that the evidence adduced strongly supports the findings of various violations. In the instant case, the findings of violations are based on sworn affidavit testimony- the bedrock of the Board's investigative process. In any event, it is patently untrue that the Board failed to ask for probative testimonial and documentary evidence.

In support of its claim that the Board's investigation was flawed, Respondent points to certain documents that the Board purportedly failed to request. (Respondent's Memo pg. 15) Respondent goes so far as to say that "the Board failed to consider, or even request. .the tenant complaint received by Ciampa on May 28. " (Respondent Memo pg. 17) This assertion is completely untrue. Respondent was repeatedly asked for evidence concerning all allegations, including tenant complaints. (See attached Exhibit R1-R7 (tenant complaints)). Moreover, the Board repeatedly asked for "any and all other evidence you deem to be relevant to the case." Id. More specifically, the Board asked for evidence such as copies of Respondent's policies (Ex.R-2,3), copies of written warnings issued to the Galarzas and other employees (Ex.R-3,7), copies of all tenant complaints (Ex.R-7) , and documentation related to the criteria utilized by Respondent to grant bonuses. (Ex.R-5) In total, the Board issued seven requests for evidence to Respondent. (Ex.R1-7) For Respondent to now claim that the Board failed to ask for evidence is disingenuous at best.

Significantly, although Respondent claims that the Board failed to ask for exculpatory documentation such as “paycheck records,” Respondent has NOT provided these records to the District Court, likely because such evidence would not support its claim. Respondent was in the best position to provide evidence that would have exonerated it of the underlying unfair labor practices. Tellingly, they failed to provide this evidence then, and they fail to provide it now. Thus, Respondent’s claim that the Board’s investigation was flawed is baseless because 1) Respondent’s opinion of the investigation has nothing to do with the reasonable cause standard, 2) the investigation was not flawed as is evidenced by the repeated requests that the Board made for evidence, which were all but ignored, and 3) the investigations conclusions were based on sworn affidavits and documentary evidence.

## 2. Respondent Attempts to Argue the Merits of the Case to the Court Which Is Not Permissible In Section 10(j) Proceedings

As noted above, in determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. *See Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Kaynard v. Mego Corp.*, 633 F.2d at 1033 (quoting *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F.2d 237, 242 n. 17 (2d Cir. 1962)). The District Court should not resolve contested factual issues; the Regional Director's version of the facts "should be given the benefit of the doubt" (*Seeler v. The Trading Port, Inc.*, 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (*Kaynard v. Mego Corp.*, 633 F.2d at 1031).

Through its baseless attack on the Board's investigation, Respondent is attempting to argue the merits of the underlying unfair labor practice charges in order to have the District Court decide the ultimate merits of the case. However, as the above case law clearly demonstrates, the Court may not decide the merits of the case. Rather, the Court's limited role is to decide whether, based on the evidence before the Board, reasonable cause exists to believe that the Act has been violated. Thus, the Court should not entertain Respondent's attacks on the Board's investigation as they are nothing more than an effort to avoid the reasonable cause analysis and improperly convince the Court to decide the merits of the underlying cases.

3. The Sparse Documentary Evidence that Respondent Submitted to the Court Does Not Rebut the Petitioner's Showing that Reasonable Exists to Believe that the Act Has Been Violated.

*a. Affidavits From Jose Merchan and Victor Hidalgo*

For the first time, Respondent, in new affidavits from supervisor Jose Merchan and superintendant Victor Hidalgo, argues that the Galarza brothers were given multiple warnings prior to their discharge. However, Respondent's own evidence does not support this assertion.

The affidavit prepared by Respondent of Supervisor Jose Merchan conflicts with the affidavit that Merchan gave to the Board on this key point of whether Respondent had ever issued written warnings to the Galarza brothers prior to the submission of the Union petition in December 2014. In the affidavit to the Board, Merchan testified, "I do not recall the exact date that I gave Andres his written warning. Kevin does not have any written warnings. (Ex.N, pg. 2 ¶2). In Merchan's affidavit taken by Respondent, Merchan - for the first time - asserts that he issued both Andres and Kevin Galarza "written warnings," plural. (Merchan Aff. Pg. 4¶28) Respondent's Superintendant Victor Hidalgo repeats this assertion in his affidavit prepared by Respondent (Hidalgo Aff. Pg. 3¶11) and Respondent reiterates this assertion in its Memorandum.

(Respondent's Memorandum, pg. 9) Respondent's own evidence is inconsistent and disingenuous. Merchan admitted to the Board it only issued one single write up to Andres after Respondent started to more strictly enforce work rules, and that it did not issue any written discipline to Kevin at all. Merchan appears to have changed his testimony in Respondent's submission to the Court in an effort to support Respondent's claim that the Galarzas' own misconduct caused their termination. However, the fact remains that Respondent has not presented any of these alleged warnings issued to the Galarzas. The only warning in existence is the single January 2015 warning issued to Andres Galarza, after he had submitted the Union petition to Respondent. Thus, Merchan and Hidalgo's affidavits in no way alter the conclusion that reasonable cause exists to believe that the Act was violated when Respondent terminated the employment of Andres and Kevin Galarza.

With the exception of the inconsistency detailed above, Merchan's new affidavit does nothing more than mirror the affidavit he gave to the Board. Merchan still has not testified with any detail as to when he supposedly verbally warned the Galarza brothers or any other employee regarding work rule violations. Merchan still has not testified with any specificity regarding the employees that he purportedly verbally terminated for cell phone use. In his new affidavit, Merchan asserts for the first time that he allegedly verbally informed all employees of the work rules upon hire. Merchan does not give any details regarding which employees he spoke to or when he spoke to them, nor did Merchan provide any written confirmation of these conversations. Andres Galarza refutes this claim. Andres Galarza asserts that when he was hired in or around March of 2014, Merchan told him that the job was "supereasy" and that after he did his work he could "read, or use his cell phone, or do his homework if he was in school." (Ex.S, pg. 1, ¶2) Galarza testified that Merchan never spoke to him about the use of cell phones, or

tablets, or eating at the desk. In fact, Galarza pointed out that in June 2014, Merchan watched World Cup soccer games with Galarza on his “ipad” while Galarza was working. (Ex.S, pg.2¶4)

The vague tone and utter lack of detail in Merchan’s affidavit renders the affidavit devoid of competent proof and, as such, does not affect the Petitioner’s conclusion that reasonable cause exists to believe that the Act has been violated.

Hidalgo’s affidavit offers nothing to the reasonable cause analysis either. Hidalgo claims that he “assisted in creating the rules and policies” of Respondent. (Hidalgo Aff. Pg.2 ¶5) Furthermore, he claims that he explained these rules to Merchan and told Merchan to explain these rules to each doorman. Id ¶ 7) Hidalgo did not provide any written work rules that he may have created. Furthermore, Hidalgo did not provide any evidence that he confirmed with Merchan that Merchan had in fact informed each and every employee of the supposed work rules. Given this lack of detail, Hidalgo’s affidavit does not provide any probative evidence that could impact the reasonable cause analysis.

*b. Affidavit from Employee Raul Valle*

Raul Valle’s affidavit actually supports the finding of a violation. Valle admitted that he “sometimes” used his cell phone while at work – and yet, Respondent never disciplined him for engaging in this conduct. (Valle Aff. Pg.3 ¶ 13) Rather, Valle noted that Merchan would just “talk” with him about it and “verbally warn” him. In stark contrast to this, Respondent terminated Andres and Kevin Galarza, purportedly for engaging in this same conduct.

*c. Tenant Complaints*

It is important to note that during the underlying unfair labor practice investigation, the Board requested that Respondent provide all tenant complaints that it relied upon to issue discipline or new work rules. (R-7) Respondent failed to produce any such documentary evidence. For the first time, Respondent now submits two tenant complaints to the Court. One complaint made in October 2014, allegedly involves the work performance of Andres and Kevin Galarza. The second complaint made in May 2015, involves the conduct of Jonathan Par. First, it must be noted that Respondent redacted the names of the tenants, thus making it impossible to verify the origin or authenticity of the complaints. Second, the complaints contain almost identical phraseology. For example, both complaints contain the following phrases: “Hello!,” “I wanted to bring a few things to your attention,” “People just stroll into the building,” “sometimes people at the door don’t even look up when people walk in,” “please work on this.” The subject lines are also written in the same format. Such similarities are unusual for two supposedly separate complaints from two different buildings which makes these complaints suspicious.

Putting the authenticity of the purported tenant complaints aside, neither complaint changes the reasonable cause analysis. Respondent claims that the October 2014, complaint supports its defense that the Galarzas’ own misconduct caused their termination. However, this argument fails, as the complaint does not name either brother. Rather, the complaint addresses problems with the “doormen” in general. In fact, Victor Hidalgo confirmed in his affidavit that the email was addressed to all the doormen at Packard Square 3. (Hidalgo Aff. Pg. 3 ¶ 14). Therefore, this complaint does not support Respondent’s argument that tenants specifically complained about the conduct of the Galarza brothers. Furthermore, Respondent does not explain why it waited until January 2015 to terminate the Galarzas if it had supposedly received a tenant complaint in October 2014. It is telling that Respondent failed to issue any discipline whatsoever

to the Galarzas or to the other doormen at Packard Square 3 as a result of this alleged complaint. What becomes evident is that Respondent was unconcerned with the tenant complaint until the employees signed a petition on behalf of the Union.

With regard to the purported May 2015 tenant complaint, Respondent argues that this complaint prompted its June 1 rule that stated that employees could not discuss “personal issues” with tenants. Respondent claims that the Board ignored this evidence and blindly relied on the testimony of Luis Martin to allege that the rule was implemented as a result of employees’ Union activities. First, although the Petitioner requested a copy of this alleged complaint, Respondent never provided it. Even if the complaint is authentic, contrary to Respondent’s argument, the Petitioner primarily asserts that the work rule is overly broad on its face and argues that a reasonable employee would interpret the rule as restricting their ability to talk to tenants about their working conditions. As set forth more fully in Petitioner’s Memorandum of Law in Support of the Petition, under Board law, employees are protected when they discuss their working conditions with third parties. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). Thus, Respondent was not privileged to promulgate a rule that restricted employees’ ability to speak to tenants about their working conditions.

*d. Surveillance of footage of Andres and Kevin Using Their Cell Phones in January 2015*

Respondent presented three blurry photos that supposedly show that the Galarza brothers were using their cell phones while at work in January 2015, purportedly to support its defense that it fired the Galarzas for engaging in misconduct. This is just another diversion. Again, Respondent is attempting to get the Court to analyze the merits of the case. As stated earlier, the District Court is not permitted to decide the ultimate merits of the case. Rather, the Court must

only decide whether the evidence before the Regional Director supports a conclusion that reasonable cause exists to believe that the Act has been violated. Secondly, whether or not the Galarzas used their cell phones is not even the issue in the case. The evidence adduced during the investigation established that Respondent never had any rules, and certainly never disciplined anyone for using cell phones until the Union organizing began. These photos were taken in January 2015, well after the Union petition had been submitted to Respondent in December 2014. Thus, the photos are probative of nothing.

Based on all of the above, Respondent has not rebutted Petitioner's showing that reasonable cause exists to believe that the Act has been violated.

#### 4. Just and Proper

Respondent claims that relief is not just and proper in this case for three reasons: 1) the Board waited seven months to seek the injunction, 2) the Board is seeking the same remedy that it is seeking in the underlying unfair labor practice proceedings, and 3) employees still support the Union as is demonstrated by the fact that a recent Union rally was "well-attended." Each of Respondent's arguments must fail as they are not supported by the facts or the law.

With regard to Respondent's claim that the Board waited seven months to seek an injunction, this statement is patently untrue. The charge regarding the discharge of the Galarza brothers was filed on February 2, 2015. Respondent then continued to engage in unfair labor practices prompting the Union to file 3 additional charges, the last charge being filed on June 10, 2015. It is black-letter Board law that the General Counsel is duty bound to investigate all matters that are encompassed by a charge and to proceed appropriately thereafter. The Board has stated that "multiple litigation of issues which should have been presented in the initial

proceeding constitutes a waste of resources and an abuse of our processes. ” *Jefferson Chemical Co.*, 200 NLRB 992 fn3. (1972). Thus, the Board actually filed its Petition for a Preliminary Injunction within a matter of weeks after the final charge had been investigated. Moreover, Respondent’s claim that the investigation was inadequate is inconsistent with its claim of undue delay since a thorough investigation by its very nature requires time to be completed, as here, in a quality manner.

With regard to Respondent’s vague argument that relief is not just and proper because the Petitioner is seeking the same remedy during the 10(j) proceedings that it is seeking through the administrative proceedings, Respondent misunderstands Section 10(j) of the Act. Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board’s resolution of unfair labor practice proceedings. 29 U.S.C. Section 160(j). That is the sole purpose of Section 10(j). The relief sought under Section 10(j) is temporary, and is thus not the same as the permanent relief that the Board will ultimately provide. An injunction under Section 10(j) of the Act expires with the issuance of a final Board Order. Thus, Respondent’s argument must be rejected. Moreover, the relief sought in the 10(j) proceeding is different since the Board is not seeking any monetary remedy in the 10(j) proceeding as it will be in the administrative proceeding.

Respondent also argues that relief is not just and proper because the Union held a rally on June 17, 2015, which had “considerable support.” In this regard, Respondent submitted pictures of the rally which they claim shows that there were numerous attendees. Again, this is patently untrue. Andres Galarza, who attended the rally asserts that only two (2) of Respondent’s workers actually attended that rally. (Ex.S, pg. 2¶5) The remainder of the attendees were employees of

other companies and Union organizers. Thus, it is false that the rally shows that Union support has grown.

Finally, Respondent makes one last argument that it would be greatly harmed by both the reinstatement of the Galarza brothers and the rescission of the warnings issued to Jonathan Par and Luis Martin. Respondent claims that building security will be compromised by this reinstatement and rescission of disciplinary actions. Petitioner submits that this is just an extension of Respondent's baseless claim that these employees engaged in discipline-worthy misconduct. The investigation revealed that Respondent was unconcerned with employees' purported misconduct until the Union petition was submitted to Respondent. This is demonstrated by the lack of any disciplinary warnings issued to any employee prior to the submission of the Union petition in December 2014. Respondent's claim that it is now concerned about building security is completely pretextual. The balance of harms strongly weighs in favor of the discriminatees who have been without work since January 2015, and who have recently had to take menial, low-wage jobs just to make ends meet. The balance of harms also weighs in favor of Respondent's remaining employees, including Jonathan Par and Luis Martin, who remain vulnerable to Respondent's continuing unfair labor practices, including possible termination, and who continue to work in fear of supporting the Union.

Therefore, relief is just and proper to prevent the further erosion of support for the Union and to restore all employees back to the status quo that existed prior to Respondent's pervasive unfair labor practices.

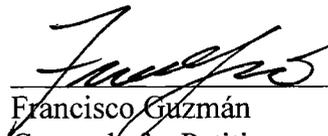
Conclusion:

Respondent's Memo has presented no substantive evidence to undermine the conclusion that reasonable exists to believe that the Act has violated and that relief is just and proper. Respondent's Memo presents nothing more than misstatements of the law and mischaracterizations of facts. For all the foregoing reasons, it is respectfully requested that the Court reject Respondent's defenses and argument and grant the 10(j) preliminary injunction pending the adjudication of this matter before the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily A. Cabrera", written over a horizontal line.

Emily A. Cabrera

A handwritten signature in black ink, appearing to read "Francisco Guzmán", written over a horizontal line.

Francisco Guzmán  
Counsels for Petitioner  
National Labor Relations Board, Region 29  
Two MetroTech Center, Suite 5100  
Brooklyn, New York 11201