

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

INTERACTIVE COMMUNICATIONS
INTERNATIONAL, INC., d/b/a INCOMM, INC.

and

Case 12-CA-155362

KARINA NILDA RODRIGUEZ, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION AND STATEMENT OF THE CASE¹

On March 22, 2016, Administrative Law Judge Keltner W. Locke (“ALJ Locke” or “the ALJ”) issued his Decision in this case. Respondent Interactive Communications International, Inc. d/b/a InComm (“Respondent”) and the Counsel for the General Counsel each filed exceptions with incorporated briefs on April 19, 2016. Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief to Respondent’s Exceptions.²

On June 24, 2015, several of Respondent’s managers had a meeting with the Charging Party, Customer Service Representative (“CSR”) Karina Rodriguez (“Rodriguez”) to discuss posters that she had hung in the break room to inform other employees that she had created a “JIRA ticket” in Respondent’s computer system. [ALJD 8:23-46, 9:2-10, 9:20-44; Tr. 23, 25-27, 32-33].³ Rodriguez created the JIRA ticket for the purpose of aggregating requests to management for copies of employees’ “scorecards,” which are the records of monthly evaluations performed by the CSRs’ supervisors. [ALJD 8:23-46, GCX 4; Tr. 23, 25-26]. Scorecards are stored on a secured portion of Respondent’s servers, and are normally inaccessible to rank and file employees unless they are meeting with their supervisor. [ALJD 7:4-8, Tr. 55, 104-105]. Once a year, Respondent holds an annual shift bid, determines a look-back period of four to six months, and plugs the data on the relevant scorecards into a formula to determine CSRs’ rankings for the shift bid. [ALJD 7:1-8; RX 9, 11; Tr. 18, 164]. Respondent’s Jacksonville call center, where Rodriguez and approximately 250 to 300 other CSRs work,

¹ A more complete statement of the facts is included in the Counsel for the General Counsel’s Exceptions to the Decision of the Administrative Law Judge and Incorporated Brief in Support.

² General Counsel does not oppose Respondent’s exception 1 or Respondent’s exception 13.

³ ALJ Locke’s Decision is referenced herein as ALJD (page:line). General Counsel’s Exhibits are referenced as GCX (number); Respondent’s Exhibits are referenced as RX (number). The hearing transcript is referenced as Tr. (page number).

operates 24 hours a day, seven days a week, and the annual shift bid helps to ensure coverage at all hours. [ALJD 6:34 to 7:2; Tr. 19, 114, 163, 193-194].

During the course of the meeting on June 24, 2015, Respondent informed Rodriguez that she had violated its no-solicitation policy by hanging the posters. [ALJD 9:43-44; Tr. 33, 110, 179]. Rodriguez and Employee Relations and Human Development Manager Patricia Kitler (“Kitler”) discussed whether hanging the posters was permitted, whether Rodriguez was speaking on behalf of all employees, Rodriguez’s scorecards, and Respondent’s problem solving policy. [ALJD 9:43 to 11:23; Tr. 33-38, 64, 181, 203].

The following day, June 25, 2015, Rodriguez was called into a second meeting to discuss her posters with Kitler and with Respondent’s Human Resources Manager, Klea Jackson (“Jackson”), who was visiting the Jacksonville location from Respondent’s corporate headquarters in Atlanta, Georgia. [ALJD 15:22-28; Tr. 41-42, 189-190]. Jackson and Rodriguez began to debate the applicability of the National Labor Relations Act in Respondent’s workplace. At various points Jackson stated that because Respondent was a non-union workplace, the concept of protected, concerted activity didn’t apply; that employees did not have a right to engage in protected, concerted activities anywhere on Respondent’s property, and that Rodriguez must follow Respondent’s policies or she would be terminated. [ALJD 18:3-18, incl. fn. 9; Tr. 42-44, 127-128, 191, 203].

ALJ Locke properly found that Respondent, by Jackson, violated the Act on June 25, 2015, as alleged in paragraph 5(a) and 5(b) of the Complaint. [ALJD 18:3-21; GCX 1(d)]. Respondent’s exceptions advance several meritless arguments seeking to have the Board overturn ALJ Locke’s credibility determinations, findings, and conclusions with respect to the events of June 25. For the reasons detailed below, Respondent’s exceptions 2 through 12 should

all be rejected by the Board, and ALJ Locke's findings with respect to June 25 should be affirmed and amended to the extent described in the General Counsel's exceptions.

II. ARGUMENT AND CITATION TO AUTHORITY

A. ALJ Locke Properly Determined that Rodriguez's Testimony Regarding the Events of June 25, 2015, was Credible, and Drew Appropriate Adverse Inferences Against Respondent. Respondent's Exceptions 10, 11, and 12, are Without Merit.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convincingly demonstrates that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In making credibility determinations, administrative law judges may rely on a number of factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014).

A trier of fact may draw the "strongest possible adverse inference" against a party that fails to present a material witness presumed to be favorable to it, sometimes called the "missing witness rule." *Flexsteel Industries, Inc.*, 316 NLRB 745, 758 (1995); *Douglas Aircraft Company*, 308 NLRB No. 179, 179 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). This is particularly true where the "missing" witness is "within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed the witness would have testified adversely to the party." *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), citing *Automated Business Machines*, 285 NLRB 1122, 1123 (1987).

Here, Respondent failed to present Jackson, a witness under its authority and control, to testify about the June 25, 2015, conversation, notwithstanding that Jackson was named in the complaint. [GCX 1(d), paragraphs 3, 5(a), and 5(b)]. Furthermore, Kitler offered a “perfunctory” one-word denial that she “heard” Jackson say anything unlawful. Thus, Kitler did not flatly deny that Jackson made the alleged unlawful statements. ALJ Locke properly relied on the above “missing” witness principle in reaching his presumption that if Jackson had testified, he would not have contradicted Rodriguez’s testimony.⁴ [ALJD 17:29-31]. Thus, the ALJ properly credited the testimony of Rodriguez notwithstanding Kitler’s one-word denial about what she “heard” Jackson say. [ALJD 17:29 to 18:21].

During the hearing, Respondent argued that “this case is all about the shift bid” and Rodriguez’s desire to improve her position in the shift bid, implying that Rodriguez may be fabricating testimony for personal gain. Respondent’s argument, repeated again for the Board in its exceptions, makes no sense. The shift bid closed on June 26. Rodriguez filed the charge in this case on July 6, 2015 – nearly two weeks after the conclusion of the shift bid, after her bid position had been improved, and after she had selected a shift. [GCX 1(a); RX 2]. Furthermore, no remedies are available for the allegations in the charge or the complaint that would impact the completed shift bid or allow Rodriguez to obtain a more desirable shift. Rodriguez had no financial or shift bid remedies available to her before the Board and therefore no motive to fabricate or embellish her testimony. Indeed, the Board’s longstanding, common-sense inference

⁴ Respondent argues in its exceptions that Jackson did not attend the hearing because he was in Atlanta, Georgia, where Respondent’s counsel is also located. However, neither this argument, nor any supporting evidence as to why Jackson did not make the relatively short trip from Atlanta, Georgia to Jacksonville, Florida, was made on the record at the hearing. Moreover, the record evidence demonstrates that as part of his job Jackson travels from Atlanta to other locations of Respondent as needed, just as he did on June 25 when he met with Rodriguez and others in Jacksonville. [Tr. 190]. No explanation of extenuating circumstances necessitating Jackson’s absence from the hearing has been offered, and the Board should not indulge Respondent’s belated attempt to excuse him. Jackson is and was at all material times within the control of Respondent, a company with literally global reach, and ALJ Locke drew an appropriate inference against Respondent for its failure to produce him on either day of the two-day hearing in January 2016.

in support of the credibility of current employees like Rodriguez actually bolsters her credibility in this context. *Flexsteel Industries*, supra at 745.

ALJ Locke's credibility resolutions favoring Rodriguez over Kitler with respect to the events of June 25 were appropriate, as were his findings and conclusions that Respondent violated the Act by Jackson's statements as alleged in the Complaint. Respondent's exceptions 10, 11, and 12 are therefore without merit and should all be rejected.

B. ALJ Locke Properly Found that Rodriguez was Engaged in Protected, Concerted Activity, and That Finding was, in any event, Irrelevant to Demonstrating Respondent's 8(a)(1) Violations. Respondent's Exceptions 2, 3, and 5 are Without Merit.

As ALJ Locke noted, proving that Rodriguez was engaged in protected, concerted activity was not an element of the General Counsel's case against Respondent.⁵ [ALJD 3:31-32 incl. fn. 2]. However, Respondent sought to litigate the issue regardless, introducing evidence and eliciting testimony from Rodriguez regarding her protected, concerted activities through questioning at trial that borders on unlawful coercive interrogation. [e.g., Tr. 61-65]. It is disingenuous for Respondent to now argue that it was inappropriate for the ALJ to make a finding regarding Rodriguez's protected, concerted activity simply because his ruling undermines Respondent's asserted "affirmative defense." [GCX 1(k), paragraphs 8 and 9].

A Board inquiry into whether an individual employee has engaged in concerted activity is a factual one based on the totality of the circumstances, and is distinct from the inquiry into

⁵ The Board has long held that when an employer permits discussions of other topics on the work floor, prohibiting employee discussions of wages, hours, and other working conditions has a chilling effect on crucial conversations that form the basis for later concerted actions, and thus violates Section 8(a)(1) of the Act. See, e.g., *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (2015); *Lutheran Heritage*, supra; *K Mart Corp.*, 297 NLRB 80 (1989). If a rule is unlawful on its face, it is not necessary to show whether or not it was promulgated in response to, or disparately applied to, employees' protected, concerted activities. *Lutheran Heritage*, supra at 647; see also *K Mart Corp.*, supra at 83 (regardless of whether an employee's comments about his work schedule to other employees were in themselves protected activity, the Board found "it is sufficient for finding [the supervisor's] remarks unlawful to note that discussion about such a subject can be protected activity and that an employer's unqualified rule barring such discussions has the tendency to inhibit such activity.").

whether the activity is protected. *National Specialties Installations*, 344 NLRB 191, 196 (2005). Protection is not denied simply because employees have not authorized one another to act as their spokesperson to management. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984); see also *Lou's Transport*, 361 NLRB No. 158, slip op. at 2 (2014) (finding concerted conversations among drivers regarding shared safety concerns); *Salisbury Hotel*, 283 NLRB 685, 686-687 (1987) (finding employees' complaints among themselves about a new lunch policy concerted where individual employees also protested to management). The Board has long found that activity is concerted where the evidence supports a finding that an employee engaged in activity “with the object of initiating or inducing or preparing for group action or that it *had some relation to group action in the interest of the employees.*” *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (emphasis added).

Activity can be concerted where the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group of employees. *Amelio's*, 301 NLRB 182 (1991). The Board has also found that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Finally, an employee’s subjective motivation in taking action is not relevant to the analysis of whether that action was concerted. *Kingman Hospital, Inc.*, 363 NLRB No. 145, slip op. at 10 (2016) (“employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish”), citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4 (2014).

The record evidence shows that Rodriguez attempted to give her coworkers the opportunity to speak in one voice to management to request that they receive their scorecards to review prior to the shift bid. The shift bid is the process by which employees select their shifts

for the entire coming year, and therefore could not be more obviously related to the terms and conditions of employment for all CSRs. Rodriguez created a JIRA ticket because it was the most straightforward way for employees to join together and get a response from management; as Rodriguez testified, the way JIRA tickets work is to *refer* them to a supervisor or manager for resolution. [Tr. 114-119]. The lack of employee comments on the ticket indicate nothing more than the effectiveness of Respondent's efforts to ensure that no other employees saw the JIRA ticket number,⁶ and therefore cannot diminish the fact that Rodriguez was attempting to induce the group of CSRs to action by creating the ticket.

Moreover, the record evidence also supports an inference that Rodriguez engaged in protected, concerted conversations with her coworkers regarding the overall fairness of the shift bid in advance of her taking action "on behalf of all" CSRs. [Tr. 64]. Rodriguez testified that she and her coworkers discuss many topics, "anything," on the floor in between customer calls. [Tr. 45]. Rodriguez's testimony regarding the June 24 and June 25, 2015 meetings also shows that she was raising an issue of group concern to management. Thus, she told Kitler that she was speaking on behalf of all employees, and making sure that everyone could get their scorecards before the shift bid. [Tr. 36-37, 61]. During cross examination, Rodriguez was asked approximately how many people she was speaking on behalf of. Her response was "It wasn't just *for those few people*. It was for the entire call center. It wasn't just for them." [Tr. 61, emphasis added]. Clearly, Rodriguez had discussed this issue with certain coworkers, and extrapolated that all CSRs should be concerned with the accuracy of their scorecards relative to

⁶ In all, the JIRA ticket remained in "Open" status and intact with Rodriguez's original description overnight, for a little over 15 hours. [GCX 4]. As the credible evidence shows, the JIRA ticket number remained advertised for CSRs to see for about two hours on the night of June 23 (on the counter in the break room), and between a few minutes (on the break room walls) and an hour (in the low-trafficked stairwell) on the morning of June 24. [RX 14; Tr. 31-32; 57-58; 178; 182-183]. Following Kitler's changes, if any employee stumbled upon the ticket in the database, all they would see would be Rodriguez's comment requesting her own score cards unless they clicked the Activity tab to view the "Resolved" ticket's entire history. [GCX 4; Tr. 25-26, 31].

the shift bid rankings computation. The inference of earlier conversations on the subject is further supported by the prefatory emails she sent to Kitler on June 22 and June 23, seeking a remedy from management for CSRs' lack of possession of their score cards to review for fairness in advance of the shift bid. [GCX 2/RX 16⁷].

Although it was not necessary for ALJ Locke to make a finding regarding Rodriguez's protected, concerted activities as part of the General Counsel's case in chief, Respondent repeatedly asserted the relevance of the issue to its primary defense. Accordingly, it was appropriate for ALJ Locke to make a ruling on the issue, and his finding that Rodriguez was, in fact, engaged in protected, concerted activity, is supported by the weight of the record evidence. Respondent's exceptions 2, 3, and 5 are therefore without merit, and the Board should affirm ALJ's Locke's finding.

C. ALJ Locke Properly Rejected Respondent's Argument that Rodriguez was "Deceitful" at the Hearing. Respondent's Exception 4 is Without Merit.

ALJ Locke committed no error in rejecting Respondent's argument that Rodriguez's testimony on the witness stand was "deceitful," because Respondent relies solely on misdirection and misconstruction of both the testimony and the contents of the meeting on June 24, 2015, in order to support its contention. [ALJD 5:25-31]. Respondent wrongly conflates seemingly conflicting answers to two distinct questions – one occurring at the hearing, and the other at the meeting on June 24 – and ALJ Locke correctly refused to read the testimony as "outright lying," as Respondent would have him do.

During the June 24 meeting, Kitler asked Rodriguez whether she was speaking on behalf of other employees. Rodriguez replied that she was speaking on behalf of all employees, because she believed that the fairness of the shift bid was a group concern affecting all CSRs. Kitler then

⁷ RX 16 is identical to pages 3 and 4 of GCX 2.

asked her whom she was speaking on behalf of. Rodriguez refused to name specific employees she had spoken with about their shift bid concerns in the meeting with Kitler because she was afraid to share their names, and not everyone would be comfortable voicing their opinions to management. [ALJD 13:9-12; Tr. 35-37, 203]. Rodriguez truthfully answered all questions about her conversation with Kitler at the hearing.

Respondent's counsel then asked Rodriguez at the hearing whether she was expressly *authorized* to speak on behalf of any other employees on June 24. Rodriguez truthfully testified that she was not. Counsel then asked Rodriguez again whom she was speaking on behalf of in the meeting on June 24, and she again refused to name any current employees.⁸ Kitler, however, never asked Rodriguez about being *authorized* to speak on anyone's behalf, and therefore Rodriguez's answers were not inconsistent. Being authorized to speak was not a prerequisite to speaking up "on behalf of" others about their group concern as an issue that affects all of them, as described above and in the previous section. Rodriguez's answers to Respondent's distinct and discrete questions at the hearing therefore do not support a finding of inconsistency in her responses, let alone the intent to deceive urged by Respondent and rightly rejected by the ALJ. Respondent's exception 4 should be summarily rejected and ALJ Locke's credibility findings regarding Rodriguez's testimony should either be affirmed or amended to remove the implication that it was in any way inconsistent.

⁸ Although not alleged as unlawful, had it been alleged, as noted above, Respondent's questioning of Rodriguez on the stand may itself have constituted unlawful interrogation of Rodriguez regarding her protected, concerted activities.

D. ALJ Locke Properly Found Insufficient Evidence in the Record to Support Respondent's Assertion that Rodriguez Knew Barnett, and Properly Found that Barnett's Unrelated Charge Filed with the Board had No Bearing on Whether Respondent Made the Alleged Statements that Violated Section 8(a)(1). Respondent's Exception 6 is Without Merit.

Respondent additionally devoted much time at the hearing and in its exceptions arguing that Rodriguez's testimony cannot be considered trustworthy because she testified that she did not recall a former employee who left the company after the 2014 shift bid named John Barnett. Respondent contends that Rodriguez must have known him and collaborated with him in deciding not to select a shift in 2014, and is now lying about it, ostensibly because she is trying to cover up that he "trained" her in how to successfully prosecute Board charges against an Employer. Beyond being a ridiculous argument, Respondent failed to demonstrate that Rodriguez knew Barnett, as ALJ Locke properly found, and failed to demonstrate Barnett's actual relevance to the proceeding at hand. [ALJD 6 at fn. 4].

Although Respondent's counsel argued during an objection that Rodriguez worked in close proximity to Barnett for "three months for forty hours a week," there is no testimony from Kitler (and certainly none from Rodriguez) that even suggests that Rodriguez actually knew Barnett. Respondent's Jacksonville call center operates 24 hours a day, seven days a week, and has a turnover rate of at least 70%. [ALJD 6:34-37; Tr. 114, 205-206]. With such constant churn and the uncertainty about the overlap of their schedules, it is not surprising that even if Rodriguez knew a "John" in passing at the time, he would have been lost in the sea of faces coming and going through the call center in the intervening year and a half between his separation following the June 2014 shift bid and the date of the hearing.

Rodriguez's failure to recall knowing an employee named John Barnett in early 2014 has no bearing on her credible recollection of the events of June 25, 2015. Accordingly, the Board

should reject Respondent's exception 6 and affirm the ALJ's refusal to find that Rodriguez knew Barnett. Furthermore, because Rodriguez truthfully testified that she did not know Barnett, Respondent's protestations regarding ALJ Locke's revocation of its subpoena duces tecum issued to Rodriguez are moot: there are no communications between Rodriguez and Barnett to produce. Consequently, the Board should also reject Respondent's request to remand the case to ALJ Locke for subpoena enforcement.

E. ALJ Locke's Summations of the June 22-23, 2015 Email Chain Between Rodriguez and Kitler Accurately Reflect the Contents of those Emails. Respondent's Exceptions 7, 8, and 9 are Without Merit.

Respondent makes no argument and cites to no authority supporting its position that ALJ Locke's summaries of the emails between Rodriguez and Kitler on June 22 and 23, 2015, should be overruled by the Board. No prejudicial error was committed; no prejudice was even alleged. ALJ Locke's descriptions accurately reflect the contents of the emails, and Respondent's exceptions 7, 8, and 9 should be rejected accordingly.

III. CONCLUSION

In summary, Respondent's exceptions to ALJ Locke's credibility resolutions and certain other findings are without merit. Counsel for the General Counsel respectfully urges that the Board deny Respondent's exceptions 2 through 12 in their entirety for the reasons described herein, and to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by ALJ Locke, with the amendments proposed in the General Counsel's exceptions.

Dated at Tampa, Florida on May 3, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 3, 2016, she electronically filed the foregoing Counsel for the General Counsel's **Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision** and served said document by electronic mail on the below-named parties, as follows:

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