

**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

ANDRES GARCIA, Charging Party,

Case No. 02-CA-138301

and

PAUL MURRAY, Charging Party,

Case No. 02-CA-138302

and

BERNARD PAEZ, Charging Party.

Case No. 02-CA-138303

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

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**Dated at New York, New York
This 15th Day of December, 2016**

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I. STATEMENT OF THE CASE

On September 23, 2016, Administrative Law Judge Mindy E. Landow, herein the ALJ, issued a decision, herein the Decision or the ALJD, in the instant case, finding that Cablevision Systems New York City Corp., herein Respondent, violated Section 8(a)(3) and (1) of the Act by involuntarily transferring employees Andres Garcia (Garcia), Paul Murray (Murray), Bernard Paez (Paez), Mike Vetrano (Vetrano), Ezequiel Lajara (Lajara) and Wayne Roberts (Roberts) from its Brush Avenue facility to other locations in retaliation for their actual and/or perceived union and/or other protected activities. ALJD at 25:21-24.

On November 21, 2016, Respondent filed Exceptions to the ALJ's findings of fact and conclusions of law, herein the Exceptions. Pursuant to Section 102.46(f)(2) of the Rules and Regulations of the National Labor Relations Board, herein the Board, Counsel for the General Counsel, herein General Counsel, requested an extension of time to file its Answering Brief and Cross Exceptions, from December 5, 2016 until December 19, 2016, which request was granted by the Office of the Executive Secretary. Pursuant to Section 102.46(d), General Counsel files this Answering Brief to the Exceptions.

It is General Counsel's position that the ALJ accurately set forth the facts of this case in the Statement of Case in her Decision and made sound rulings in regard to the credibility of the witnesses who testified during the proceeding. Therefore, the Board should reject Respondent's numerous challenges to the factual findings of the ALJ based on credited testimony and other evidence. Furthermore, contrary to Respondent, General Counsel contends that the analysis set forth in the Decision makes clear that the ALJ applied the correct legal standard in concluding that Respondent violated the Act in the manner alleged and properly concluded that the evidence was sufficient to establish that Respondent knew or believed that the alleged discriminatees

engaged in union and/or protected concerted activity and that Respondent demonstrated anti-union animus by engaging in a sustained and company-wide monitoring of union activity at the Brush Avenue facility. Moreover, General Counsel contends that the ALJ correctly concluded that the evidence clearly established that Respondent's stated reasons for the transfers were a pretext and that Respondent had thus failed to demonstrate that it would have selected the discriminatees for transfer absent their union and/or protected concerted activities. For reasons discussed at length below, General Counsel respectfully requests that the Board adopt the ALJ's findings and conclusions of law in her Decision and make certain additional findings and conclusions described in General Counsel Cross Exceptions and Brief in Support.

II. STATEMENT OF THE ISSUES

Respondent excepted to the ALJ's conclusions of law and factual findings that:

1. Knowledge of "low level" supervisors Donovan Reid, Andel Brady, Ewan Isaacs, and Director of Outside Plant Operations Alex Torres regarding the discriminatees' union and/or protected activity was attributable to Respondent. Exceptions at paras. 5, 10, 29, 31, 49, 50, 59.
2. There was some direct, independent evidence of union animus. Exceptions at paras. 44, 60.
3. Respondent's stated reason for the transfers was a pretext in that Respondent failed to show "why the transfer of the six specific individuals at issue here was necessary or warranted to cure the devolution of workplace culture in the Bronx" and "failed to advance a credible, non-discriminatory reason for its selection of the six employees...for involuntary transfer." Exceptions at paras. 61, 62, 66, 71, 74; ALJD at 22:27-29 and 24:10-11.

4. An adverse inference against Respondent was appropriate in light of Respondent's failure to identify or present testimony of the final decision-makers who selected the discriminatees for transfer. Exceptions at paras. 77; ALJD at 24:36-38.

Therefore, the essential issue raised by Respondent is whether the ALJ correctly found that the evidence presented established the essential elements to warrant an inference that the discriminatees' union and/or other protected activities were a motivating factor in their selection for transfer under *Wright Line* and that the inference was not rebutted. 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In contending that that the ALJ correctly applied the law to the facts presented here, General Counsel responds to Respondent's Exceptions, summarized above, as follows:

- A. That the ALJ applied the correct legal standard in assessing whether the alleged unlawful transfers violated the Act as alleged by:
 1. Imputing supervisors' knowledge to Respondent;
 2. Finding direct evidence of Respondent's sustained anti-union animus;
 3. Concluding that Respondent's stated reason for the transfers was a pretext.
- B. That the ALJ's adverse inference against Respondent was appropriate.

III. STATEMENT OF FACTS:

Contrary to Respondent's exceptions in that regard, the ALJ correctly and completely set forth the facts of this case based on the testimony and evidence presented during the hearing. General Counsel will not recapitulate those findings here, as they are clearly described in the Decision. ALJD at 1-14. Based on the ALJ's factual findings and for reasons discussed at length below, General Counsel contends that the ALJ properly concluded that union and/or

protected activity was a motivating factor in the transfer decisions and that Respondent would not have taken the same action absent the discriminatees' actual and/or perceived union activity and/or protected activity.

IV. ARGUMENT

A. The ALJ Applied the Correct Legal Standard:

It is clear from the ALJD that Judge Landow applied the correct legal standard set forth in *Wright Line* in evaluating whether Respondent's decision to transfer Murray, Paez, Garcia, Vetrano, Lajara and Roberts was unlawfully motivated. Thus, citing *Wright Line*, the ALJ recognized that the General Counsel bears the initial burden of showing that Respondent knew of an employee's union activity, evinced anti-union animus, and took adverse action against such employee. 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The ALJ correctly concluded that the facts and evidence presented met the General Counsel's burden, relying on both direct and circumstantial evidence presented. See, e.g., *Control Building Services, Inc.*, 337 NLRB 844, 845 (2002). Furthermore, the ALJ recognized that the inference of unlawful motive may be rebutted where the evidence establishes that the employer would have taken the same adverse action even absent an employee's union activity, *id.*, and correctly concluded that the evidence presented here was insufficient to do so. Finally, the ALJ found that the same analytical framework applied in cases involving other protected concerted activity. ALJD at 16:15-21 (citing *Tortillas Don Chavas*, 361 NLRB No. 10 slip op. (2014) and *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 3 (2015)).¹

¹Although the ALJ made findings sufficient to establish that discriminatees Murray, Paez and Garcia were believed to have engaged in and did in fact engage in not only union activity but also other protected activity which was also a motivating factor in the transfer decisions, as alleged in the Complaint, the ALJ omitted in her conclusions of law to find an independent violation of Section 8(a)(1) on that basis. ALJD

Respondent's contention that the ALJ erroneously replaced Respondent's judgment with her own in discrediting Respondent's stated reason for the transfers is likewise unavailing. Although the ALJ's language may at times appear susceptible to misconstruction in that regard, she clearly recognized that "the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated" and that the only issue is "whether the Respondent would have transferred the [discriminatees] absent their protected activity." ALJD at 23:5-11 (citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. mem. 127 F.3d 34 (5th Cir. 1997)). Here, the ALJ expressly noted the absence of any evidence that Respondent maintained an involuntary transfer policy, ALJD at 23:1-2 & fn. 20, the Respondent's failure to explain how or on what basis the named discriminatees were selected for transfer, ALJD at 24:10-11, and Respondent's failure to identify let alone present as witnesses the "final decision makers" who selected the employees for transfer, ALJD at 24:17-38, in concluding that the Respondent failed to demonstrate that it would have taken the same adverse actions in the absence of the discriminatees perceived and/or actual union and other protected activity.

1. The ALJ Correctly Imputed Supervisors' Knowledge of the Discriminatees' Union and/or Protected Activity to Respondent

Respondent cannot but concede that, under Board law, a "low-level" supervisor's knowledge of an employee's union and/or protected activity is imputed to the employer absent "credited contradictory testimony." See Exceptions at 22-23 (citing *State Plaza Hotel*, 347 NLRB 755, 756-757 (2006)). Nevertheless, Respondent asserts that the ALJ's reliance on a spreadsheet of OSP Technicians perceived union sentiments created by Director of Outside Plant

at 4:6-9; 5:40-42; 6:27-30, 38-7:24; GC Exh. 1(g). This omission is addressed in General Counsel's Cross Exception to the Decision and Brief in Support.

Alex Torres just weeks before the transfers is undercut by the fact that Torres did not participate in the transfer decisions and by General Counsel's failure to produce evidence that he communicated the information from the spreadsheet to the final decision makers. Respondent has cited no basis in law to support this assertion, and General Counsel knows of none. Indeed, Respondent's argument is directly at odds with the well-established law regarding imputation of a supervisor's knowledge to the employer absent a credible denial.

Respondent's contention that Senior Vice President of Human Resources Paul Hilber's testimony that he did not know the union views of OSP Technicians and was unfamiliar with Director of Outside Plant Torres' spreadsheet constitutes a credible denial that defeats the imputation of knowledge here is patently untenable. Indeed, Hilber himself testified that he was one of seven managerial employees who participated in the transfer decisions and characterized his own participation as less than decisive. ALJD at 11:39-41. Thus, even assuming his testimony in this regard is credited, it is insufficient to contradict the presumption that Respondent knew of the discriminatees' union views in selecting them for transfer. Moreover, Respondent's contention that General Counsel's failure to call five of the seven managerial employees who participated in the decision to testify undercuts the ALJ's reliance on the spreadsheet as evidence of knowledge is likewise absurd. Evidence regarding the selection of employees for transfer is uniquely within the control of Respondent, who made those decisions. As the ALJ properly concluded, Respondent's failure to identify the final decisionmaker(s) or produce the individual(s) to testify weighs against Respondent and not the General Counsel. ALJD at 24:32-25:6.

Furthermore, Respondent's attempt to characterize the spreadsheet created by Director of Outside Plant Torres as his "personal notes" in order to undercut the imputation of knowledge

here is patently inconsistent with the parties' stipulation regarding the spreadsheet and the credited evidence as a whole. Thus, Respondent counsel produced the document, GC Exh. 19 (a), accompanied by an additional spread sheet, GC Exh. 19 (b), which Respondent Counsel stipulated was "a similar list of field service employees whose...area operation managers...were asked about their perception of how employees would vote" and "the same recordation system was used. Yankees, Red Sox, Mets." Tr. at 564:8-16. Respondent did not identify who created this spread sheet, and the evidence does not support the conclusion that Torres did so.² Furthermore, Respondent counsel failed to offer any evidence, including testimony of Torres, to explain why he used a code to designate OSP Technicians' union views in personal notes not intended for dissemination, let alone how an identical "recordation system" came to be used for the Field Service spread sheet.

Rather, as found by the ALJ, the evidence supports the conclusion that the spread sheets were part of Respondent's monitoring of employees' union sentiments and union activities, focused particularly on the Bronx and involving Respondent's highest-level managerial personnel. ALJD at 17:9-29; see *Hedison Manufacturing Company*, 249 NLRB 791, 794, fn. 13 (1980), enfd. 643 F.2d 32 (1st Cir. 1981); see also *Rea Trucking Company, Inc.*, 176 NLRB 520, 525, fn. 5 (1969), enfd. 439 F.2d 1065 (9th Cir. 1971). In *Hedison*, the Board recognized that knowledge or belief that employees against whom an employer took adverse action are engaged in union activity may be inferred, where the evidence as a whole establishes that the adverse action was part of a "desperate and precipitous attempt to crush the Union." 249 NLRB at 794,

²Thus, the evidence shows that Torres is the Director of the Outside Plant Department, while the Field Service Department is overseen by Field Service Director Lester Mahon. Tr. at 180:2-9 (Grella). Moreover, the spreadsheets are differently laid out and, unlike Torres' spreadsheet, which uses handwritten "x's" to identify employees' union views in the coded columns, the Field Service spreadsheet is entirely type written.

fn. 13.³ Moreover, in *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126 (July 17, 2015), the Board inferred knowledge from the employer’s awareness of union activity at “multiple levels of its management” and from the evidence that the employer’s CEO “requested and received regular updates on the union campaign from supervisors.” *Id.* That was exactly the case here, as the ALJ found based on numerous internal communications and memoranda introduced into evidence, not least a March 12, 2014 email from Executive Vice President of Operations Bob Comstock email referencing a prounion message written on the tech room white board (“we need IBEW now”) and stating that “the threat is real, coming from a portion of the OSP Techs who are the most longed tenured...”. ALJD at 5:46-6:25; 17:17; GC Exh. 32(K).

Indeed, it is clear that low level supervisors at Brush Avenue were expected to and did report signs of union activity among employees up the chain of command in the weeks leading up to the unlawful transfers. Thus, OSP Supervisor Reid credibly testified that Director of Technical Operations Kennedy, during a work-related meeting with the OSP Supervisors on April 3, 2014, inquired whether they had “heard anything or seen anything” and was informed by Supervisor Carasquillo that OSP Technician Felix “is going around asking guys to join the Union.” Tr. at 534:10-20 (Reid). According to Reid’s credited testimony, the OSP Supervisors attended a meeting the following day at which they were instructed to report back on the reactions of their teams to a letter from Executive Vice President Comstock urging the employees not to sign authorization cards. Human Resources Manager Grella’s notes indicate that the OSP Supervisors did in fact report back in groups to a management team including

³In *Hedison*, the Board concluded that the employer’s permanent layoff of 19 employees who were union supporters, 14 of whom were from its press department and were offered transfer to other departments on terms substantially less favorable than those offered temporarily laid-off employees from other departments, was unlawfully motivated in light of evidence that the employer made the offers three weeks after it became apparent to the employer that the press department was a stronghold of union support and in order to “undermine and dissipate support for the Union.” *Id.* at 792, 794.

Comstock, Director of Outside Plant Torres, Senior Vice President of Network and Field Operations Mike Kaplan, and Vice President of Field Operations Barry Monopoli. ALJD at 8:28-31; Tr. at 249:3-250:10 (Grella); 806:14-807:21 & GC Exh. 31. About this same time, the evidence shows that Senior Vice President of Network Management and Operations Pragash Pillai received, via email, a forwarded message from Bronx fiber/construction manager Scott (last name unknown), reporting on talk among the technicians about the IBEW and unionization generally, coming from OSP and Field Service employees. GC Exh. 32 (P) & (Q)⁴. This evidence strongly supports the conclusion that Torres' spreadsheet documenting the OSP Technicians union views, produced on April 4, 2014 in the midst of this flurry of anti-union activity at all levels of Respondent's managerial hierarchy, were part of Respondent's on-going coordinated effort to monitor union activity in the Bronx and that the information gathered would almost certainly have been reported up the chain of command.

In addition, the ALJ properly relied on testimony and record evidence apart from Director of Outside Plant Torres' spread sheet showing that upper management personnel including those on the "management team" that made the transfer decisions had specific knowledge of union and/or protected concerted activity by the discriminates or reasonably believed that the discriminatees were engaging in such activity. Thus, the uncontroverted evidence indicates that, Director of Area Technical Operations Kennedy, sent an email on March 31, 2014 to Vice President of Technical Operations Riley, reporting that he had met with a group of four employees, including discriminatee Garcia, who expressed their collective complaints about

⁴It bears mention that, on receiving the email, Pillai responded directly to Supervisor Scott [last name unknown] that in future such communications should be sent through "Amy" with a subject heading including the words "attorney client privilege." Thus, it appears that Respondent upper management took measures to avoid future production of documentation of these communications between lower and upper management even in circumstances where there is no indication that the communication was made pursuant to any pending litigation. *Id.*

various terms and conditions of employment and indicated their intention to “go across the river to Local 3 IBEW.” ALJD at 6:38-7:24.⁵ Indeed, in a March 2014 meeting co-led by Senior Vice President of Human Resources Hilber, Garcia also spoke up, expressing employees’ shared concerns about changes in their benefits. ALJD at 6:27-29. Moreover, just weeks before the transfers, Kennedy called a meeting to address an anonymous message (“IBEW” and “we need a union”) on the tech room white board and to solicit employees’ grievances, during which discriminatee Lajara admitted writing “IBEW” and stated his concern that technicians were being required to perform electrical work without proper certification. ALJD at 6:7-22. The credited testimony further indicates that discriminatee Vetrano spoke up on Lajara’s behalf during the meeting and that, immediately after the meeting, Kennedy approached discriminatee Murray and asked him what Respondent could “do better,” strongly indicating that he viewed Murray as one of the employees whose complaints about the employer were fueling the renewal of organizing activity in the Bronx. Tr. at 6:23-25.⁶ Thus, the evidence establishes that the

⁵Respondent’s attempt to discount this evidence by noting that Garcia, although present, was not the employee who spoke at the March 31, 2014 meeting is unavailing. Kennedy’s detailed recounting of the meeting makes clear that the employee who did most of the talking (Amerigo Rodriguez) was speaking on behalf of all present. Thus, it is evident that Kennedy (and Riley, the recipient of Kennedy’s email) reasonably believed that the complaints presented were shared by all of the employees present including Garcia. That only Rodriguez and Garcia were ultimately transferred does not undercut the conclusion that Garcia’s transfer was unlawfully motivated. Garcia’s participation in this meeting must be considered in light of the evidence of his vocal opposition to Respondent’s changes in terms and condition of employment during the meeting co-led by Hilber and OSP Supervisor Reid’s testimony that he was among the most vocal employees at meetings conducted by Respondent management personnel. Tr. at 524: 8-15 (Reid).

⁶Respondent’s contention that the ALJ’s crediting of this testimony in regard to Lajara and Vetrano’s union and/or protected activity during this meeting is undermined by the failure of either Lajara or Vetrano to testify at the hearing is misguided. It is undisputed that Lajara and Vetrano continue to work for Respondent at the locations to which they were unlawfully transferred. It is a matter of well-established law that the adverse inference rule does not apply when a party fails to call employee witnesses because they “may not reasonably be presumed to be favorably disposed to any party.” See *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); see also *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899 (6th Cir. 1997). Here, the fact of Lajara’s and Vetrano’s continued employment with Respondent provides a clear basis to conclude that their failure to appear was as likely due to their

“management team” that made the transfer decisions – including Riley, Kennedy and Hilber – collectively knew or believed that named discriminatees Garcia, Lajara, Vetrano, and Murray were spearheading the Bronx employees’ discontent and instigating their renewed interest in unionization.

Although the ALJ made no similar findings in regard to union and/or protected activity by discriminatee Roberts, General Counsel contends that his close association with Nick Felix, ALJD at 23:24-25, whom the ALJ found was viewed by Respondent as the principal union activist in the Bronx, ALJD at 7:47-52 and 8:26-28, supports the conclusion that Respondent believed that Roberts was a principal union promoter. See *BMD Sportswear Corp.*, 283 NLRB 142, 142-143 (1987) (citing *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), *enfd.* 657 F.2d 512 (3d Cir. 1981)), *enfd.* 847 F.2d 835 (2nd Cir. 1988). In regard to discriminatee Paez, Supervisor Isaacs’ November 2013 interrogation of Murray linking Paez to the instigation of renewed interest in unionization in the Bronx, strongly suggests that Respondent knew or reasonably believed that he was a principal union promoter. Moreover, as the Board in *Hedison* acknowledged, the fact that only some of the discriminatees were specifically known or believed to be at the forefront of perceived union activity at the employer does not undercut the conclusion that the adverse action against the entire group was motivated by that activity where the evidence as a whole establishes that the discriminatees were “caught in the web of their fellow employees’ union adherence ... [and] were swallowed up in [the employer’s] ... attempt to crush the Union.” 249 NLRB at 794, fn. 13. That is precisely what occurred here.

2. The ALJ Correctly Concluded that the Evidence Established Anti-Union Animus on the Part of Respondent

unwillingness to jeopardize their employment and their failure to file charges of their own supports rather than undercuts this conclusion.

The ALJ found anti-union animus based on the following credited evidence: (1) Comstock's April 3, 2014 letter urging employees not to sign authorization cards for IBEW and Reid's credited testimony regarding the flurry of anti-union meetings held by Respondent management just prior to the transfers; (2) Respondent's spreadsheet of the Bronx technicians' union sentiments, using a code that characterized suspected union supporters as "Red Sox," i.e. not members of the "home team;" and (3) Vice President of Technical Operations Riley's statement, in an email to upper management opposing discriminatee Paez's request to be moved to a location closer to the Bronx that might be less disruptive to his family's commuting arrangement, that the discriminatees were transferred "for a reason." In addition, the ALJ's findings of fact provide the following evidence of animus that the ALJ relied on implicitly, if not explicitly, in concluding that the General Counsel met her burden of showing unlawful motivation: (1) OSP Supervisor Isaacs' questioning of discriminatee Murray about his and discriminatee Paez's union activity in June 2013; and (2) Director of Area Technical Operations Kennedy's March 2014 "elephant in the room" meeting, during which he solicited employees' concerns and stated that he would "look into" those concerns.

Respondent's assertion that lawful statements by an employer, such as those contained in Comstock's anti-union letter, may not be relied upon as evidence of animus is in clear contradiction to well-established Board law cited by the ALJ. ALJD at 18:43-19:10; see also *Sunshine Piping Inc.*, 351 NLRB 1371, 1387 (2007); *Tejas Electrical Services*, 338 NLRB 416, 416 fn. 5 (2002); *Mediplex of Stamford*, 334 NLRB 903, 903 (2001). As found by the ALJ, *E & I Specialists, Inc.*, 349 NLRB 446, 450 (2007), and *J.O. Mory, Inc.*, 326 NLRB 604, 605 (1998) are not to the contrary. Thus, in those cases, the Board concluded that lawful anti-union

statements by an employer were insufficient to support a finding of unlawful motive *in the absence of any other evidence*, direct or circumstantial, from which animus might be inferred. Here, on the contrary, the ALJ found abundant circumstantial evidence, discussed in detail below, to buttress the background evidence of animus.

In this regard, the ALJ relied on Respondent's survey of the Bronx OSP Technicians' suspected union sentiments, indicating that even if all of the "on the fence" employees voted against unionization the suspected union supporters would prevail (27 to 25), GC Exh. 19(a)⁷, and the contemporaneous uptick in Respondent's anti-union meetings just weeks before the transfers, ALJD at 19:12-17, as strong timing evidence warranting the inference that the transfers of six identified union supporters was in part motivated by Respondent's increasing concern over the interest in unionization in the Bronx. See, e.g., *Hedison Manufacturing Company*, 249 NLRB at 792-793 (timing of the discriminatory transfer offers made to laid off press department employees, three weeks after employer vice president signaled his belief that the press department was the "stronghold of union support" and a "center of protected activity" at the employer, supported conclusion that offers were unlawfully motivated). Moreover, the ALJ properly relied on Respondent's use of coded and implicitly negative language in documenting Bronx employees' support for unionization as further evidence of unlawful motivation. ALJD at 19:17-19 & fn. 18.

Even assuming, Respondent counsel contends, that the ALJ's characterization of Vice President of Technical Operations Riley's email as "direct" evidence of anti-union animus was in error, that error does not undercut the ALJ's reliance on this email to support the inference of unlawful motive here. Thus, Riley's assertion that the discriminatees were transferred "for a

⁷That Respondent was fully aware of this calculus is evident from the totals scribbled at the bottom of each column of the spreadsheet. See. GC Exh. 19(a).

reason” must necessarily be read against the backdrop of Respondent’s failure to articulate a reason at the time of the transfers. See, e.g., *Pro/Tech Security Network*, 308 NLRB 655 fn. 2 (1992)(evidence that employer’s stated reason for adverse action was not provided at time of adverse action supports conclusion that adverse action was unlawfully motivated). The evidence makes clear that the discriminatees were assured at the time of the transfers that their selection was not disciplinary but was intended to give them “a fresh start.” The discriminatees were never told on what basis Respondent had determined that they in particular needed a “fresh start” and there is no evidence that Respondent had previously involuntarily transferred employees for any such unspecified reason. ALJD at 11:9-10 & fn. 9. Against this background and given the timing of the transfers, Riley’s statement supports the inference that the actual reason alluded to was an unlawful one. See, e.g., *Tupco, Division of Dart Industries, Inc.*, 216 NLRB 1046 fn. 1 & 1051 (1975)(background evidence of animus supported by the absence of a bona fide business reason for an employer’s action warrants inference of unlawful motive).

Finally, although the ALJ recognized that neither OSP Supervisor Isaac’s questioning of discriminatee Murray in June 2013 nor Director of Area Technical Operations Kennedy’s March 2014 “elephant in the room meeting” were alleged as Section 8(a)(1) violations in the Complaint, she nevertheless found facts sufficient to warrant the reliance on these events as further background evidence of anti-union animus. Contrary to Respondent’s unsupported assertion, the fact that these events occurred outside the 10(b) period does not disqualify them from consideration to the extent they relate to the alleged unlawful conduct within the 10(b) period. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. N.L.R.B.*, 362 U.S. 411, 416 (1960)(citing well established principal of Board law that 10(b) is a statute of limitation not a rule of evidence). Indeed, the uncontroverted evidence relied upon by the ALJ, establishes

that Isaacs' questioning of discriminatee Murray in June 2013 was an unlawful interrogation and no less so for having occurred more than six months before the timely filed charges. See, e.g., *Air Products and Chemicals Inc.*, 227 NLRB 1281, 1281 & fn.3 (1977)(adopting administrative law judge's conclusion that employer discriminated in hire and tenure of employees which relied in part on interrogation outside 10(b) period as background evidence bearing on the alleged discrimination).⁸ Similarly, the uncontroverted evidence relied upon by the ALJ establishes that during the "elephant in the room meeting" in March 2014, less than two months before the alleged unlawful transfers albeit more than six months prior to the timely filed charges, Kennedy solicited employees' grievances and impliedly promised to remedy them in order to discourage employees' interest in unionization. See *Smithfield Foods, Inc.*, 347 NLRB 1266, 1266-1267 & fn. 9 (2006)(employer promise of unspecified benefits to employee, in context of union campaign, although outside 10(b) period is background evidence of animus).⁹ It is beyond dispute that these events provide additional background evidence of Respondent's anti-union animus although they were not alleged in the Complaint as independent violations of law. See

⁸Although the passage of time between the interrogation by Isaacs and the adverse action may tend to reduce the probative value of the evidence in establishing unlawful motive it does not render the incident irrelevant let alone bar the ALJ from considering it as background evidence. Moreover, where, as here, the evidence as a whole demonstrates a sustained companywide practice of monitoring union activity, see ALJD at 17:6-12; 20:40-47, the effect of this passage of time is minimized.

⁹Cf. *Borg-Warner*, 229 NLRB 1149, 1152-1153 (1977)(meeting held to discuss employee grievances held in direct response to union activity during which plant manager stated that the employer would review its policies and "try to do better" violated Sec. 8(a)(1)); *Forest City Grocery Co.*, 306 NLRB 723, 723 & 729 (1992)(supervisor's solicitation of employee concerns and response that he would "look into" them established unlawful solicitation of grievances and implied promise to remedy them in the absence of any statement by the supervisor that no promises could be made).

Kaumagraph Corporation, 316 NLRB at 793-794 & fn. 2 (1995); *In re Wilmington Fabricators, Inc.*, 332 NLRB at 58 & fn. 6 (2000).¹⁰

3. *The ALJ Correctly Concluded that the Evidence Established that Respondent's Stated Reasons for the Transfers was a Pretext*

Having concluded that the direct and circumstantial evidence presented was sufficient to warrant the inference that anti-union animus was a motivating factor in Respondent's selection of the discriminatees for transfer, the ALJ correctly considered whether Respondent met its rebuttal burden of showing that it would have taken the same adverse action even absent the discriminatees' union and/or protected concerted activities. Respondent contends in the Exceptions that the ALJ erroneously failed to find that it had done so and instead replaced Respondent's valid business judgment with her own in concluding that the reasons advanced by Respondent during the hearing were a pretext.

On the contrary, the ALJ's findings of fact and credibility determinations led her to conclude that Respondent seized on the investigation into OSP Technician Felix's misconduct as a pretext for removing from the Bronx six employees whom it had long viewed as spearheading the discontent among its Bronx employees and fueling the renewed interest in unionization. In so finding the ALJ correctly relied upon the absence of any policy or past practice in regard to involuntary transfer of employees (apart from site closures and operational failures). See, e.g., *Gelita USA Inc.*, 353 NLRB 406, 406 & 415 (2008), *affd.* 356 NLRB No. 70 (2011)(adopting

¹⁰General Counsel made clear during the course of the hearing that we were relying on events outside the 10(b) period and thus not alleged in the complaint as background evidence of animus. Respondent counsel was on notice of General Counsel's intention to rely on this evidence and objected on the grounds that Respondent counsel would then have to put on rebuttal evidence in regard to those matters. Tr. at 352:13-16; 354:11-355:9. The administrative law judge allowed the evidence in as background, Tr. at 355:14-21, and, to the extent Respondent counsel did not rebut the evidence, they did so with full knowledge of General Counsel's intention in this regard. See, e.g., *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126 at 2-3, 27-28 (2015). Thus, Respondent cannot rely on its failure to call Isaacs and Kennedy to testify during the hearing as a basis to claim that the issues were not fully and fairly litigated.

administrative law judge’s conclusion that accelerated termination of employee was unlawful in part based on pretext evidence that employer had no such “accelerated departure” policy). Moreover, the ALJ’s analysis makes clear that she found the absence of past practice to be compounded by the substantial evidence that numerous similarly situated employees, i.e., Bronx OSP technicians interviewed in the course of Human Resources Manager Grella’s investigation of aggressive workplace behavior by Felix who had witnessed and failed to report his misconduct, were not selected for transfer.¹¹ ALJD at 23:20-24 & fn. 21. Senior Vice President of Human Resources Hilber’s own general explanation for the decision to transfer employees at the hearing, i.e., that “complete acceptance of events, coercion, physical intimidation was...out of control and we needed to take serious actions,” does nothing to elucidate the mystery surrounding the selection of the transferees. On the contrary, the ALJ correctly found that several OSP technicians who admitted during their investigatory interviews to themselves engaging in aggressive workplace behavior were not transferred. ALJD at 23:20-24 & fn. 22.¹² (All of those individuals were designated as “Yankees” or “Mets,” hence not confirmed union supporters, in Director of Outside Plant Torres’ spreadsheet, in contrast with the discriminatees who were all branded as “Red Sox.”) Although the ALJ did not use the term “disparate

¹¹During her testimony, Human Resources Manager Grella recalled that Antonio Rosado, Americo Rodriguez, Derrick Gill, Andres Garcia, Tanesha Mouzon, and Carmela Acevedo all reported being subjected to and/or witnessing aggressive conduct by Felix. Tr. at 222:13-15 (Grella). Grella’s interview notes indicate that Mike Vetrano, Jose Irizarry (“Izzy”), Craig Banks, Shelley Richardson, Sudesh Ramgoolan, Errol [Malcolm], Ruben [Dejesus], Brandon [Ganishalal?], and J.J. Cespedes also reported witnessing and/or being subjected to Felix’s aggression. GC Exh 7 at pp. 14 (back), 23 (front), 27 (front) to 29 (back), 33 (front) to 34 (front), 38 (front), 44 (front), 45 (back), 50 (back), 53 (back), 55 (back), respectively.

¹²Human Resources Manager Grella’s notes reflect that Carmelo Acevedo admitted having heated arguments with several coworkers, Jorge [Borrero] admitted punching people, and Jason Edwards self-identified as “an aggressor” in the workplace. GC Exh. 7 at pp. 39 (back), 40 (back), and 45 (front), respectively. Cespedes admitted having a machete and a bat in his truck, GC Exh. 7 at p. 46 (front), while Basil [Anderson] admitted carrying a pocket knife, GC Exh. 7 at 52 (back).

treatment,” she clearly found as much in concluding that Respondent failed to persuasively explain the selection of the discriminatees over both similarly situated coworkers and those who self-identified as workplace aggressors. See, e.g., *La Gloria Oil and Gas Company*, 337 NLRB 1120, 1122 (2002)(finding of pretext based in part on disparate treatment of terminated drivers where stated reason for terminations was safety violations noted by safety supervisor whose notes monitoring drivers’ performance revealed numerous similar safety violations by other drivers who were not discharged); see also *Hedison Manufacturing Company*, 249 NLRB 792 (fact that employer’s adverse action affected almost entirely perceived union promoters was evidence of unlawful motive).

In addition, The ALJ found direct evidence of pretext in the evidence that Human Resource Manager Grella told discriminatee Garcia that the investigation had “nothing to do with” his selection for transfer. Although Respondent asserts in the Exceptions that Grella’s statement was intended to reassure Garcia that he was not being punished, that is not what Grella said. Moreover, Respondent counsel entirely failed to elicit any such explanation on cross examination. Respondent’s implication that the failure of General Counsel to ask what Grella meant by the comment undercuts its probative value is patently absurd. Had Respondent counsel believed that such a question would have elicited the explanation supplied by counsel in Exceptions, Respondent could have asked the question on direct examination. See, e.g., *Flex-N-Gate Texas LLC*, 358 NLRB 622, 622 & 630 (2012) (adopting findings of administrative law judge who declined to draw adverse inference from General Counsel’s failure to question hostile witness on “critical issue” on grounds that General Counsel had no duty to do so and Respondent had opportunity but likewise failed to do so).

In light of the substantial evidence that the results of Respondent's investigation into workplace misconduct were not the basis for the selection of transferees, the ALJ properly relied on the timing of the transfers in relation to Respondent's monitoring of employee Union activity in the Bronx as further evidence that its stated reason for the transfers, that the discriminatees were being given a "fresh start," was a pretext. Specifically, as described above, the ALJ noted Respondent's survey of the OSP Technician's union views and the contemporaneous increase in Respondent's anti-union meetings just weeks before the transfers, ALJD at 19:12-17, as strong timing evidence supporting the view that the Respondent seized on the Felix investigation as an opportunity to remove six identified union supporters and reduce a threat of unionization that Respondent perceived as imminent. The ALJ correctly viewed this conclusion as further supported by the abrupt manner in which the transfers were implemented, ALJD at 23:32-24:1, such that the discriminatees were immediately escorted off the premises and instructed to travel to their new locations although their new Supervisors at those locations had only just learned that morning of the transfers, ALJD at 13:10-12, 23-24. See *id.* (abrupt manner in which employees were terminated further supports inference that employer's stated reason was a pretext); see also *Service Technology Corporation*, 196 NLRB 1036, 1043 (1972). Finally, the ALJ found unpersuasive Respondent's attempt to establish through testimony of Human Resources Manager Grella and Director of Human Resources Hilber, which the ALJ found noncredible, that the selection of transferees was based on Respondent's efforts to avoid imposing more onerous commutes on the transferees.¹³ ALJD at 24:10-22. Rather, the ALJ noted Respondent's refusal

¹³Thus, Human Resources Manager Grella admitted that "[t]here was not really a specific conversation that was focused on who lives where per se" but that "[w]e looked at everyone's addresses from the perspective of-I'm fairly certain from the Bronx to their home." Grella admitted that "[w]e didn't look at everyone, it was impossible, from their home to every location that we would have transferred people." Tr. at 238:12-22 (Grella). Hilber testified in regard to discriminatee Roberts that he was transferred to Yonkers because commuting from his home in the Bronx to Yonkers would be a "reverse

to permit discriminatee Paez to return to the Bronx to meet with Human Resources or to move to the transfer location where Murray had been placed and the refusal to permit discriminatee Garcia to leave his company vehicle in the Brush Avenue parking lot when on “on call” status as further evidence of Respondent’s attempt to isolate the discriminatees from their former coworkers. ALJD at 14:18-38; 24:3-8.

For the reasons described above, it is clear that the ALJ correctly concluded that Respondent failed to demonstrate that it would have selected the six discriminatees for transfer even absent their actual and/or perceived union and/or other protected activity. Having failed to do so, the ALJ properly relied on the background evidence of Respondent’s anti-union animus and the pretextual nature of its stated reasons for the transfer in concluding that Respondent violated Section 8(a)(3) and (1) of the Act.

B. The ALJ Correctly Drawing an Adverse Inference Against Respondent:

Finally, Respondent contends that the ALJ erred in drawing an adverse inference against the Respondent based on its failure to identify and produce the final decision maker in regard to the selection of the discriminatees to testify or, alternatively, to produce the five other high-level managers whom Respondent admits participated in the decision making process. Respondent contends, on the contrary, that such inference is unwarranted because testimony of those additional managers would have been duplicative of testimony provided by Human Resources Manager Grella and Director of Human Resources Hilber, which testimony was not controverted. Such an assertion is untenable in light of the ALJ’s credibility findings and her conclusion that neither the self-contradictory testimony of Grella nor the vague assertions of

commute...going away from [] New York City traffic” but admitted that he did not know what shift Roberts worked. Tr. at 679:13-25 (Hilber). (In fact, Roberts worked the night shift and would thus have been traveling into New York City from his new work location in Yonkers at 8:30 am to return to his home in the Bronx.)

Hilber was sufficient to elucidate the process by which the transferees were selected. ALJD at 24:10-24.

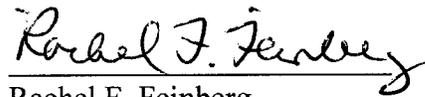
Respondent's argument is essentially circular. The testimony of the high-level managers who participated in the transfer decisions can only be deemed duplicative to the extent that the managerial witnesses who were produced to testify gave a sufficient and credible account of the basis for the decision. Cf. *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006)(employer's failure to call one of two supervisors present during the alleged unlawful conduct did not warrant adverse inference because the evidence as a whole supported the other supervisor's testimony in this regard and rendered additional testimony unnecessary); see also *International Business Systems, Inc.*, 258 NLRB 181, 192 (1981)(affirming administrative law judge's finding that testimony by four out of 12 strikers established the protected character of the strike although the other strikers did not testify). Here, the ALJ correctly concluded that the confused and vague testimony of Human Resources Manager Grella and Director of Human Resources Hilber failed to provide a credible account of how the transferees were selected let alone who made the final decisions. Respondent cannot use obfuscation of the process by which or person(s) by whom the transferees were selected to avoid the adverse inference that properly arises from Respondent's failure to present evidence within its control to elucidate this central issue at the hearing.

V. CONCLUSION:

For the reasons stated above, General Counsel respectfully contends that the ALJ's Decision and Recommendations should be affirmed by the Board and the Remedy ordered in accordance with the Decision.

Dated: December 15, 2016
New York, New York

Respectfully submitted,

A handwritten signature in cursive script that reads "Rachel F. Feinberg". The signature is written in black ink and is positioned above a horizontal line.

Rachel F. Feinberg
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

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

and

ANDRES GARCIA, An Individual

Case 02-CA-138301

and

PAUL MURRAY, An Individual

Case 02-CA-138302

and

BERNARD PAEZ, An Individual

Case 02-CA-138303

AFFIDAVIT OF SERVICE OF: DECEMBER 15, 2016 Answering Brief on Behalf of Counsel for the General Counsel to Respondent's Exceptions to the Administrative Law Judge's Decision

I, the undersigned employee of the National Labor Relations Board, being duly sworn and deposed, say that on the date indicated below, I served the above-entitled document **by electronic mail** upon the following persons, addressed to them at the following addresses:

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15th day of December, 2016

Designated Agent:
/s/ Rachel F. Feinberg
National Labor Relations Board