

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

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

Respondents,

and,

**ANDRES GARCIA, an Individual,**

Charging Party,

Case 02-CA-138301

and,

**PAUL MURRAY, an Individual,**

Charging Party,

Case 02-CA-138302

and,

**BERNARD PAEZ, an Individual,**

Charging Party.

Case 02-CA-138303

**RESPONDENTS' REPLY TO CHARGING PARTIES' ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION**

**(ORAL ARGUMENT REQUESTED)**

**KAUFF MCGUIRE & MARGOLIS LLP**

Kenneth A. Margolis

G. Peter Clark

Attorneys for Respondents

Cablevision Systems New York City

Corporation, and CSC Holdings, LLC

950 Third Avenue, 14<sup>th</sup> Floor

New York, NY 10022

(212) 909-0702

Respondents respectfully submit this reply in further support of its Exceptions to the September 23, 2016 Decision of Administrative Law Judge Mindy E. Landow (“ALJD”) and in response to the Charging Parties’ Answering Brief (“CP Brf.”)

## **I. CHARGING PARTIES MISSTATEMENTS OF FACT AND LAW**

Charging Parties mischaracterize both Respondent’s legitimate business reason for transferring the six individuals named in the Complaint (and other transfers and discharges not at issue) from the OSP department in the Brush Avenue depot, as well as the conclusions the Company drew from the investigation indisputably prompted by an April 23, 2014 attorney letter threatening litigation on behalf of two employees.<sup>1</sup> Charging Parties incorrectly state that Respondent “claim[s] the transfers were necessary because employees had failed to report inappropriate conduct” and the only problem revealed by the investigation was the inappropriate conduct of Nicasius Felix. (CP Brf. p. 1; see also pp. 2, 6, 7, 13, 15.) Neither is correct.

Rather, the investigation brought to light a more fundamental problem with the department’s dynamics: some employees did not believe there was anything wrong with Felix’s abusive conduct, which some viewed as just “horseplay,” and there was a reluctance to seek assistance from management, which led employees to instead address disagreements amongst themselves. (Tr. 621-622, 635-636, 642, 656-657.) Even the ALJ agreed that “the evidence is clear that Respondent was confronting serious allegations of workplace impropriety and had to take some actions to confront and cure the situation at the Brush Avenue depot.” (ALJD at p. 23, ll. 2-4.) Therefore, the transfer of the six employees, as well as the other transfers and discharges of both employees and supervisors, was not intended to punish employees for not reporting Felix’s

---

<sup>1</sup> The Charging Parties are Andres Garcia, Paul Murray and Bernard Paez. The three others, whom the GC did not call or subpoena to testify, are Mike Vetrano, Ezequial Lajara and Wayne Roberts. Cablevision also transferred Americo Rodriguez, one of the employees on whose behalf the attorney letter was sent; discharged Nicasius Felix, the employee accused of harassment in the attorney letter; discharged supervisor Donovan Reid, who failed to address Felix’s misconduct; disciplined and transferred three other supervisors; and re-trained another supervisor.

misconduct, but to change the dynamics of the department by altering the composition of the workforce, as well as to give the transferred employees a fresh start in departments where such behavior was not seen as acceptable and supervisors were more responsive. (Tr. 656-657, 663-664.)

Charging Parties also incorrectly state that Respondent transferred people to shorten their commutes, and questioned how commuting distance could have anything to do with improving the work environment. (CP Brf. p. 7, 16.) Instead, Respondent tried to conduct the transfers in a way that would minimize, as much as possible, disruption to employees' lives. Respondent did not transfer anyone to New Jersey or Long Island, which would involve crossing a bridge, looked at locations in the Hudson Valley and Connecticut that were busy enough to absorb additional technicians, and tried to move people closer to their homes where possible. (Tr. 665-666.)

Cablevision therefore took the following steps:

- Paez and Murray, who both lived in Connecticut, were moved to Litchfield and Norwalk, respectively. (Tr. 669, 672.)
- Vetrano, who lived in New Rochelle, NY, was moved to Mamaroneck, NY (rather than Yorktown Heights, as originally planned) in response to his to accommodate his childcare responsibilities as a single parent.<sup>2</sup> (Tr. 673; GCX 12.)
- Garcia was originally going to take the Mamaroneck position given to Vetrano, or go to Yorktown Heights (where Garcia expressed reluctance to go), but since he had earlier expressed interest in a Connecticut depot, he was moved to Stamford, with a commute of under an hour.<sup>3</sup> (Tr. 459-460, 624-626, 675-676; GCX. 23B, p. 20; RX 11.) Charging Parties admit that Garcia "was provided with several locations out of which he selected Stamford." (CP Brf. p. 8.)
- Roberts and Lajara were moved to Yonkers, NY, just north of and adjacent to the Bronx where each lived. (Tr. 679-680.)

---

<sup>2</sup> GCX 12 shows Vetrano's address in New Rochelle, NY on page 2. Hilber's statement that Vetrano lived in Norwalk is either a transcription error or because Hilber was looking at the wrong page or the wrong document. (Tr. 675.)

<sup>3</sup> Garcia had previously spoken with Grella about seeking jobs outside of the Bronx, including one in Stratford, CT. (Tr. 624-626.) In a covert recording he made of his interview with Grella during the investigation, Garcia said he could "get to Stratford." (GCX 23B, p. 20.) Stamford, CT is closer to the Bronx than Stratford.

Charging Parties also incorrectly state that Cablevision was required to establish a “lawful basis” for the transfers and that General Counsel did not have to prove that Respondent had an unlawful motive because “it is the tendency of an employer’s conduct to interfere with the rights of his employees protected by Section 8(a)(1), rather than his motives, that is controlling.” (CP Brf. pp. 1, 17 (citing *Welch Scientific Co. v. NLRB*, 340 F.2d 199, 203 (2d Cir. 1965)). To the contrary, “[t]o prove a violation under *Wright Line*, the General Counsel must make a showing ‘sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.’” *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180 (Aug. 26, 2015).

## **II. CABLEVISION WAS NEITHER AWARE OF NOR MOTIVATED BY ANY UNION OR OTHER PROTECTED ACTIVITY BY THE TRANSFERREES**

Logically, Respondent could not have been motivated by any union or other protected activity by the transferees of which it was unaware. In their attempt to establish Respondent’s knowledge, Charging Parties falsely characterize the transferees as “some of the most vocal employees who complained about recent changes in the workplace and engaged in union activity,” and “union supporters” who engaged in “ongoing union activity” (CP Brf. p. 2, 3, 10, 12.) This is directly contradicted by the ALJ’s finding that “none of the six employees at issue here were proven to be ‘ringleaders’ of any organizing activity.” (ALJD p. 20, ll. 47-48.) Charging Parties’ citation to a prior, unsuccessful organizing campaign by the Communication Workers of America (“CWA”) several years prior to the May 2014 transfers (CP Brf. p. 1, fn. 1) and e-mails which do not even mention the transferees, are insufficient to show the requisite knowledge. (See CP Brf. p. 3-4 (citing GCX. 32K, N, O, P); CP Brf. p. 10 (citing GCX 32A, F)). While Cablevision was aware of rumors of organizing efforts by the International Brotherhood of Electrical Workers (“IBEW”), there is no evidence that Respondent knew, or even suspected, that the six transferees were IBEW supporters, or that they were involved in the prior CWA organizing effort or engaged in any other

protected activity, let alone that such activity motivated the decision to transfer them.<sup>4</sup> The following efforts to establish that Respondent was aware of and motivated by union or protected activity by four of the six transferees (Charging Parties' brief makes no mention of activity by Vetrano and Roberts) also fail:

**Murray and Paez**: Charging Parties rely on the double hearsay testimony of Paez and Murray that, in June 2013 (almost a year before the May 2014 transfers), Ewan Isaacs (a supervisor not involved with the transfers) asked Murray what was going on with the union and told Murray that Monopoli told Isaacs to find out what was going on with Paez and the union. (CP Brf. p. 3.) This conversation that allegedly occurred in June 2013 is wholly insufficient to prove that anyone in management in 2014 believed Murray or Paez was still a union supporter, even if either had been a year before. (Tr. 358-59, 433.)

The allegation that Kennedy approached Murray after a meeting and asked what the Company could "do better" is neither protected activity by Murray nor proof that Kennedy viewed Murray as a union supporter. (CP Brf. pp. 3, 12.) Notably, there is no testimony that Murray said anything at the meeting and Murray testified that he did not recall any meetings with management in which union activity was discussed and did not speak to management about such activity. (Tr. 378.)

**Lajara**: The only allegation about Lajara (who did not file a charge or testify) is Murray's claim that Murray attended a meeting where Lajara brought what he believed was a safety issue to Kennedy's attention and admitted to writing "IBEW" on a whiteboard. (Tr. 402-403.) Murray

---

<sup>4</sup> See, e.g., *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 255-256 (2006) (no violation where employer "had reason to believe that many of its employees were engaged in union activity" but "there is no evidence showing why it would know or suspect the involvement of any particular employee"); *Amber Foods*, 338 NLRB 712, 714 (2002) ("[T]here is not a scintilla of record evidence that the Respondent believed or, at the very least, even *suspected* that [the alleged discriminatee] was engaged in union activity at the time she was warned and discharged, although the Respondent knew generally . . . that its employees had contacted the Union.").

testified that Kennedy said he did not care who wrote the statement on the white board and there is no evidence that Kennedy reacted negatively to the safety concern. (Id.)

**Garcia:** Charging Parties completely mischaracterize Kennedy's March 31, 2014 email describing what Rodriguez said at a meeting about the change to the cash balance plan. (CP Brf. p. 4; GCX 32L & M.) This email does not say that Garcia said anything at this meeting. Rather, it says that Rodriguez (whose transfer is not challenged) said that taking away benefits would make people interested in the IBEW. Charging Parties also incorrectly assert that Garcia spoke up at another meeting about changes to Cablevision's cash balance plan that they claim occurred in March 2014, but Garcia testified that this meeting took place in late 2013, shortly after the change was announced in November 2013, not in March 2014.<sup>5</sup> (CP Brf. p. 4; Tr. 449-450.) That 2013 meeting is too remote in time to show that Respondent transferred Garcia because of these statements.<sup>6</sup> *See, e.g., Thom Brown Shoes, Inc., 257 NLRB 264, 268 (1981)* (insufficient showing of antiunion motivation where protected conduct occurred almost 6 months prior to discharge).

Recognizing that there is no evidence to show that Respondent was motivated by knowledge of union or protected activity engaged in by the transferees, Charging Parties argue that the ALJ properly imputed to Respondent knowledge of a list created by Alex Torres, Director of OSP. (CP Brf. pp. 6, 12.) As explained by Reid and Respondent's counsel's stipulation, the first part of the list, GCX 19 (a), was created by Torres at a meeting with OSP supervisors in which Torres asked for the supervisors' perceptions of how OSP employees might vote in a union election.<sup>7</sup> (Tr. 547-48, 563-564.) There is no dispute that neither the supervisors who provided

---

<sup>5</sup> The CWA communication referred to is a November 2013 group email announcement about the cash balance plan, not a 2014 communication, as Charging Parties imply. (CP Brf. p. 13; GCX 32J)

<sup>6</sup> Many other employees allegedly spoke up about the 2013 change in the cash balance plan but were not transferred or otherwise treated adversely. For example, Juan Cespedes and Melvin Encarnacion were outspoken about the change, but neither was transferred. (Tr. 450-451, 524.)

<sup>7</sup> It is also clear from the record that the second part of the exhibit, GCX 19(b), is a survey of about another department, Field Service, overseen by Field Service Director Lester Mahon, not Torres. (Tr.150, 180, 564-69; 595-96.) The 104

the input for the list, nor Torres, played any role in determining who would be transferred. Reyes (who Grella reported to) reported to Hilber, not Torres, as Charging Parties claim. (Tr. p. 135, 616-617.)

Hilber testified, without contradiction, not only that he had never seen the list, but also that Respondent did not consider union activity in making the decision to transfer these six employees.<sup>8</sup> (Tr. 312-313, 690-692.) Knowledge of the contents of this list (which only represents supervisors' perceptions, not actual union activity) should not be imputed to Respondent because "the Board does not impute knowledge of protected activity in the face of credited contradictory testimony." *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 22, 2014 NLRB LEXIS 154 (Feb. 28, 2014) (citing *State Plaza Hotel*, 347 NLRB 755, 757 (2006)). Charging Parties assert that "there is no evidence that this information was not shared by Torres with any other managers" (CP Brf. p. 11.), but there is also no evidence that it was shared. There is only Hilber's testimony that Respondent did not consider union activity in the transfer decision, and General Counsel did not present any evidence to discredit or contradict Hilber.

Charging Parties' argument that the six were transferred to "eliminate" the chance of losing a union election is belied by the numbers. (CP Brf. p. 13.) There were approximately 350 employees in the Brush Avenue depot, including about 104 Field Service technicians outside of OSP, many of whom were identified by their managers as being "Red Sox", *i.e.*, possible union supporters, but none of these employees is alleged to have been transferred out of the Bronx as a result. (Tr. 282, GCX 19B.) If the Company's goal was to dilute support for the Union in the Bronx, it would have transferred many more than six OSP employees out of the 350 in the Bronx.

---

employees cited by Charging Parties' refer to Field Services, which is irrelevant to this case. (CP Brf. p. 6; GCX 19(b).) The OSP list has only 52 technicians. (CP Brf. p. 12; GCX 19(a)).

<sup>8</sup> Charging Parties' assertion that a reference to the "usual union supporters" in a 2013 email from Lester Mahon, the Director of the Field Services Department, a different department than OSP where the six transferees worked, "could only have been the six discriminatees" because the six were "some of the more vocal employees" (CP Brf. p. 12; GCX 27) is unsupported speculation contradicted by the ALJ's conclusion that none of the six were union ringleaders.

### III. NO EVIDENCE OF DISCRIMINATORY MOTIVE OR THAT THE TRANSFERS WERE A PRETEXT FOR DISCRIMINATION

Charging Party incorrectly states that Respondent claims that it “had no choice” but to transfer the six employees. (CP Brf. p. 13.) Rather, Respondent made a business decision that terminating and transferring *both* employees *and* supervisors was an effective way to change the dysfunctional environment revealed by the investigation of the April 2014 attorney letter, but that additional employees might have to be transferred if that proved not to be enough. (Tr. 787-788.) The ALJ’s determination that “Respondent has 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 her criticism of Respondent for not transferring more employees (ALJD p. 22, ll. 27-29, p. 23, ll. 17-24 (emphasis added)) is an impermissible second-guessing of Respondent’s business judgment, which is insufficient to prove animus or pretext. *See, e.g., Mini-Industries, Inc.*, 255 NLRB 995 (1981) (“it is not within the Board’s competence to second-guess respondent’s business judgment regarding the manner in which it dealt with its employees”).

Charging Parties’ claim that “Cablevision could not even establish, without contradiction, who made the decision to transfer” is completely false. (CP Brf. p. 15.) Grella testified, without contradiction, that the decision was made by a team of managers that included herself and Hilber. (Tr. 145, 176-177, 212.) Hilber also unequivocally testified that he participated in the decision about whether to transfer employees. (Tr. 660, 665.) Contrary to Charging Parties’ claim, Kennedy (who General Counsel chose not to call as a witness) did not tell Garcia that “neither he nor Grella had any involvement in the transfer decisions.” (CP Brf. p. 15.) What Kennedy actually said in the surreptitiously recorded meeting was that the transfer decision was “made by our senior management team” and that Kennedy could not answer why Yorktown was initially picked as Garcia’s new location. (GCX 17.) Grella also did not, as Charging Parties claim “unequivocally testif[y]” that the transfers had nothing to do with the investigation prompted by the attorney letter.

(CP Brf. p. 15.) Rather, in the recoding made by Garcia (which is not testimony), Grella says that his transfer had “nothing to do with the investigation,” but, as is obvious from the rest of the recording and Grella’s testimony, Grella was only trying to assure Garcia that he was not being transferred in response to any wrongdoing on his part that came to light during the investigation. For example, Grella said “it has nothing to do with anything that you’ve done.” (GCX 17.) In addition, in the same recorded conversation, Grella and Kennedy refused to accept Garcia’s resignation. If Cablevision intended to get rid of Garcia because he was a union supporter or had engaged in other protected activity, they would have accepted Garcia’s resignation. *See, e.g., Easter Seals Conn., Inc.*, 345 NLRB 836, 839 (2005) (fact that supervisor urged employee to reconsider resignation evidence that she was not constructively discharged).

Likewise, Charging Parties both misstate the rationale for the transfers and ignore evidence in the record in asserting that Cablevision did not “establish a single instance of inappropriate conduct that was not reported” and that this alleged failure “further supports a finding that the transfers were based on pretext.” (CP Brf. p. 15.) To the contrary, both Grella’s testimony and her notes of the investigation describe many examples of misconduct that were never reported to Human Resources at the time the incidents occurred. (Tr. 221-222, 617, 620-624, 627-630; GCX 7.) As explained above, that failure to report was only one of the issues affecting the dysfunctional dynamics in the OSP department.

Charging Parties’ assertion that Cablevision “did not provide any basis for determining that the six [transferees] needed a fresh start and not any of the other OSP technicians” (CP Brf. p. 16.) again misstates the rationale for the transfers. As explained above, Respondent determined that the whole department needed a fresh start to address the dysfunctional work environment and tried to achieve that by changing the workforce. Respondent was ready to transfer additional people in the future if more transfers were needed to improve the work environment. (Tr. 787-788.)

The fact that another employee, Melvin Encarnacion, was not granted a transfer to Connecticut, where he lived, fails to show pretext. (CP Brf. p. 16.) Encarnacion, (who Reid identified as being outspoken about changes in the terms and conditions of employment), was not transferred because he had been working in the Regional Operations Center with the Dispatch Team, located in a different part of the Bronx depot, and was not part of the dysfunctional workforce that Cablevision was trying to change. (Tr. 524, 687-688.) Even assuming he was called a good guy, the remark had nothing to do with union activity.<sup>9</sup> Similarly, Riley's reluctance to transfer Paez to Norwalk, was not to keep him away from Murray, who was in Norwalk, but because Riley did not view Paez's preference for a "city environment" to be reason enough to transfer him again.<sup>10</sup> (GCX 24.) Hilber suggested that Paez could go to Stamford, and Riley did not rule out Stamford on the grounds that Garcia was located there. (GCX 24; Tr. 711.) If Charging Parties are trying to argue that Respondent wanted to isolate the transferees from each other, that is clearly not the case as both Lajara and Roberts were sent to work together in the Yonkers depot. (Tr. 677-679).

The Board also must reject Charging Parties' circular argument that transferring the six employees "without any basis . . . establishes that not only was [Respondent] aware of the discriminatees['] union and other protected activity, but it unlawfully transferred them because of this activity." (CP Ans. Brf. p. 17.) The mere fact that the employees were transferred is not proof

---

<sup>9</sup> Hilber contradicted Encarnacion's testimony that Pragash Pillai allegedly said, during Encarnacion's meeting with Hilber and Pillai, that Encarnacion was not being transferred because Encarnacion was one of the "good guys." (Tr. 508, 689.) Even if Pillai said anything like that, it is in accordance with Hilber's testimony that Pillai acknowledged that Encarnacion was a good employee who did not play any role in the creating the unprofessional work environment in the Bronx OSP because Encarnacion was not working there. (Id.)

<sup>10</sup> It is utter speculation to assert that Riley's post-transfer statement that the six were "moved for a reason" implies that the reason was discriminatory. (GCX 24.) See, e.g., *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1323 (5th Cir. 1994) (statements made "after the decision was taken do not, considering the record as a whole, constitute substantial evidence that it was unlawfully motivated.").

that Respondent was motivated by alleged protected activity, and Respondent did provide a basis for the transfers.

Finally, if, as Charging Parties claim (but Respondent denies), the transferees were “some of the most vocal employees” who “engaged in union activities” and Respondent wanted to keep them from encouraging future organizing activity, surely they would have been discharged rather than transferred to other locations where they could influence other employees at multiple locations to support unionization.<sup>11</sup> There is no evidence that Respondent’s decision to transfer the six employees was motivated by anti-union animus or because they engaged in union or other protected activity, and the mere fact that the ALJ second-guessed Respondent’s decision and did not think the transfers were “necessary or warranted” (ALJD p. 22, ll. 27-29) is insufficient to show pretext. The Complaint therefore must be dismissed.

### CONCLUSION

For all of the above reasons, Respondent respectfully requests that the Board sustain Respondent’s exceptions to the ALJ’s decision and dismiss the Complaint in its entirety.

Dated: January 3, 2017, at New York, New York.

### KAUFF MCGUIRE & MARGOLIS LLP

Attorneys for Respondents

By:   
Kenneth A. Margolis  
G. Peter Clark  
950 Third Avenue, 14<sup>th</sup> Floor  
New York, NY 10022  
(212) 644-1010

---

<sup>11</sup> See, e.g., *TNT Logistics of N. Am., Inc. v. NLRB*, 413 F.3d 402, 409 (4th Cir. 2005) (“it is hard to explain why TNT would grant Morgan’s request to transfer to its Florida location (a location with non-unionized employees), when it was well aware of Morgan’s long history as an avid union supporter.”).

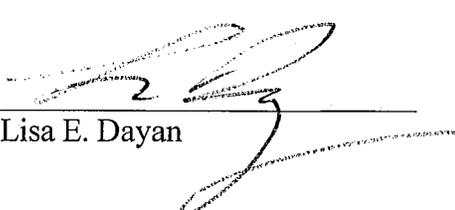
**CERTIFICATION OF SERVICE BY  
E-FILING, ELECTRONIC MAIL AND MAIL**

The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on January 3, 2017, she caused a true and correct copy of the attached Respondent's Reply to Charging Parties' Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision to be served upon counsel for the General Counsel and counsel for the Charging Parties by electronic mail, pursuant to the Board's e-filing rules, at the following addresses designated by each for this purpose, respectively:

Rachel F. Feinberg, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza - Room 3614  
New York, NY 10278-0104  
Rachel.Feinberg@NLRB.gov

Sumanth Bollepalli, Esq.  
Legal Department, CWA District 1  
80 Pine Street – 37th Floor  
New York, New York 10005  
sbollepalli@cwa-union.org  
Counsel for the Charging Parties

Dated: January 3, 2017, at New York, New York.

  
\_\_\_\_\_  
Lisa E. Dayan