

**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,

and,

PAUL MURRAY, an Individual,

Charging Party,

and,

BERNARD PAEZ, an Individual,

Charging Party.

Case 02-CA-138301

Case 02-CA-138302

Case 02-CA-138303

**RESPONDENTS' REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION**

(ORAL ARGUMENT REQUESTED)

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Respondents submit this reply in further support of its Exceptions to the Decision of Administrative Law Judge Mindy E. Landow (“ALJD”) and in response to the General Counsel’s (“GC”) Answering Brief (“GC Brf.”) which is merely an attempt to fill the gaps in the GC’s case by mischaracterizing the record evidence and the ALJD.

I. GENERAL COUNSEL ADMITS THAT THE ALJ SUBSTITUTED HER PERSONAL PREFERENCE FOR RESPONDENT’S BUSINESS JUDGMENT

The fundamental error in the ALJD is that the ALJ substitutes her judgment for that of Respondents as to how best to address an abusive and unsafe work environment in the OSP department of the Brush Avenue depot, discovered after an investigation indisputably prompted by an attorney letter threatening litigation on behalf of two employees. The Company determined that changing the composition of the workforce by transferring the six individuals named in the Complaint (and other actions not at issue) was necessary to cure the defects disclosed by the investigation.¹ 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.) The ALJ then second-guessed Respondent’s business decision that supervisor and employee transfers were part of an appropriate response, opining 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.” (ALJD p. 22, ll. 27-29 (emphasis added).) The ALJ also criticized Respondent for not transferring more OSP technicians. (ALJD p. 23, ll. 17-24.)

¹ 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.

As the GC admits, “the ALJ’s language may at times appear susceptible to” the interpretation that the ALJ substituted her personal preference for Respondent’s business judgement. (GC Brf. p. 5.) By opining that transferring these six employees was either not an appropriate measure or was an insufficient way to address the problems revealed by the April 2014 attorney letter, the ALJ did exactly what Board law prohibits.² The GC offers no alternative interpretation of the ALJ’s language that transferring the six employee was not “necessary or warranted,” because that language is not “susceptible” to any other interpretation.

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

The GC mischaracterizes the ALJD and makes assertions not supported by the record in a vain attempt to meet its burden of proving that Cablevision was motivated by its awareness of protected activity actually engaged in *by the transferees*. Mere background evidence of a prior, unsuccessful organizing campaign by the Communication Workers of America (“CWA”) or rumors of more recent organizing attempts by the International Brotherhood of Electrical Workers (“IBEW” or “the Union”) is insufficient. Critically, there is no evidence that Respondent knew, or even suspected, that the six transferees were involved in the prior organizing effort, were IBEW supporters or engaged in any other protected activity, let alone that such activity motivated the decision to transfer them.³ Lacking such evidence, the GC resorts to falsely asserting that the ALJ concluded Respondent had “long viewed” the six transferred employees “as spearheading the discontent among its Bronx employees and fueling the renewed interest in unionization.” (GC Brf.

² 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”).

³ 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.”).

p. 16). In fact, the ALJ's actual finding was to the contrary: "none of the six employees at issue here were proven to be 'ringleaders' of any organizing activity." (ALJD p. 20, ll. 47-48.)

Paez: The GC's assertion that Respondent knew or believed Paez was "a principal union promoter" is belied by the ALJ's conclusion that *none* of the six transferees were union ringleaders. 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 Paez's transfer) told Murray that Monopoli told Isaacs to find out what was going on with Paez and the union is insufficient to prove that anyone in management in 2014 believed either was still a union supporter, even if they had been a year before. (Tr. 358-59, 433.)

Garcia: Garcia actually testified that he did not speak to any managers or supervisors about bringing in a union. (Tr. 481.) The GC asserts that Kennedy's March 31, 2014 email about what Rodriguez said at a meeting implicates Garcia but, according to the email, only Rodriguez spoke at the meeting, and there is no suggestion that Rodriguez was speaking on behalf of Garcia. While Garcia claimed to have spoken up at a meeting with EVP of Human Resources Sandy Kapell regarding Respondent's change to its cash balance plan, Garcia specifically testified that the meeting took place in late 2013, shortly after the change was announced in November 2013, not in March 2014 (as claimed by the GC).⁴ (Tr. 449-450.) That meeting is far too remote in time to infer any connection to his transfer. *See, e.g., Thom Brown Shoes, Inc.*, 257 NLRB 264, 268 (1981) (conduct 6 months before discharge insufficient to show antiunion motivation).

Murray: There is absolutely no support in the record for the GC's conjecture that the mere fact that Kennedy approached Murray after a meeting and asked Murray what the Company could "do better," indicated that Kennedy, or anyone else at the Company, viewed Murray as a union

⁴ The GC ignores testimony that many other employees allegedly spoke up about the change in the cash balance plan but were not treated adversely. (Tr. 450-451, 524.)

supporter, or even as someone who engaged in other protected activity. Notably, there is no testimony that Murray actually said anything at the meeting. Murray, in fact, testified that he did not recall any meetings with management in which union activity was discussed and he did not speak to management about such activity. (Tr. 378.)

Roberts: The GC falsely cites the ALJD to claim that there was evidence that Respondent thought Roberts was a “principal union supporter” because of his “close association” with Nick Felix, but the cited portion of the ALJD merely says Roberts and Felix worked the same shift. (GC Brf. p. 11 (citing ALJD p. 23-24-25).) This assertion is even more preposterous given the GC’s admission that “the ALJ made no . . . findings in regard to union and/or protected activity by discriminatee Roberts.” (GC Brf. p. 11.)

Lajara: The only allegation about Lajara 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.) Whatever significance might be accorded to that limited evidence is wholly eliminated by Murray’s additional testimony that Kennedy said he did not care who wrote the statement on the white board. (Id.)

Vetrano: The sole mention of Vetrano is his “apparent support” of Lajara at the above meeting, but there is no testimony about anything Vetrano may have said. (ALJD p. 18, ll. 2-5.) With no testimony from Vetrano, Lajara or Kennedy, there is not even a suggestion that Kennedy reacted negatively to this alleged safety complaint.

Recognizing that there is no evidence to show that Respondent was motivated by knowledge of union or protected activity engaged in by the transferees, the GC argues that the ALJ properly imputed knowledge of the transferees’ alleged union support to Respondent because of a list created by Alex Torres, Director of OSP. (GC Brf. p. 6.) The GC incorrectly asserts that the

parties' stipulation about this list, GC Ex. 19(a), is "inconsistent with" Respondent's assertion that it was created by Torres. (GC Brf. p. 6-7.) Reid's testimony and the representations Respondent's counsel made on the record (which the GC accepted) clearly explain that the first part of the list, GC Ex. 19 (a), was created by Torres at a meeting he held with OSP supervisors in which Torres asked for the supervisors' perceptions of how OSP employees might vote in a union election.⁵ (Tr. 547-48, 563-564.) There is no dispute that neither the supervisors who provided the input for the list, nor Torres, played any role in determining who would be transferred out of the Bronx.

The GC nonetheless argues that knowledge of the list should be imputed to Respondent generally, despite Hilber's uncontradicted testimony that he had never seen it, *and* that Cablevision did not consider union activity in making the decision to transfer these six employees. (Tr. 312-313, 690-692.) Such imputation of knowledge is improper 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)). The GC asserts that Hilber's testimony is "patently untenable," but fails to explain why it should not be credited.

The GC further asserts that Hilber's testimony is insufficient to contradict the presumption that Cablevision knew of the six transferees' union views because Cablevision never identified the "final decisionmaker(s)" regarding the transfers (GC Brf. p. 6), but Hilber and Grella did identify the "final decisionmaker(s)" as a team of individuals which included both Grella and Hilber. (Tr. 145, 176-177, 212, 296-301.) Hilber never testified, as the GC claims, that his participation was "less than decisive" (GC Brf. p. 6), nor did the ALJ reach that conclusion. (ALJD p. 11, ll. 39-

⁵ It is also clear from the record that the second part, GC Ex. 19(b), is a survey about another department, Field Service, overseen by Field Service Director Lester Mahon, not Torres, which is irrelevant to this case. (Tr. 150, 180, 564-69; 595-96.) Respondent has never contended that Torres created the second part, GC Ex. 19(b).

41.) Rather, Hilber unequivocally answered “I did” when asked “[d]id you participate in decisions about whether to transfer employees” and only said he was involved “to some extent” in the decision as to *where* the transferees would be placed. (Tr. p. 665; see also p. 660.)

Based upon the above mischaracterizations, the GC argues that Respondent’s alleged failure to identify or call as witnesses the final decisionmaker(s) “weighs against Respondent” (*i.e.*, should result in an adverse inference). Respondent did identify the decisionmakers and no adverse inference should be drawn from Respondent’s decision not to call all of them because a party “is under no obligation to call every witness” at its disposal to prove its case. *Int’l Bus. Sys.*, 258 NLRB 181, 192 (1981). The Board has held that there is “no basis for inferring that” a witness’s testimony would have been adverse where a party has “elected not to call [a witness] because the other record evidence supporting [other testimony] made the [uncalled witness’s] testimony unnecessary.” *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1022 (2006). As the GC did not present any evidence to contradict Hilber and Grella, their undisputed testimony required no further corroboration from duplicative witnesses.

III. NO EVIDENCE OF ANTI-UNION ANIMUS

The GC only reinforces Respondent’s argument that there is no evidence of anti-union animus by listing the paltry basis on which the ALJ concluded that such animus existed: (1) the lawful Section 8(c)-protected statements in Comstock’s April 3, 2014 letter to employees about the legal consequences of signing authorization cards; (2) the list created by Torres (addressed above); and (3) Riley’s post-transfer statement that the employees were transferred “for a reason.”

The ALJ’s reliance on Comstock’s lawful letter to show animus is inconsistent with Board law and such reliance has been rejected by the Courts of Appeal. *See, e.g., Brown & Root, Inc. v.*

NLRB, 333 F.3d 628, 639 (5th Cir. 2003) (rejecting “any reliance on [a manager’s lawful statements] as evidence of illegal union animus.”).⁶

Contrary to the GC’s assertion, the ALJ did not find that there was an “uptick” in anti-union meetings just before the transfers. (GC Brf. p. 13, citing ALJD p. 19, ll. 12-17.) The ALJ said nothing about “anti-union meetings” and merely referred to “various internal memoranda” (ALJD p. 19, ll. 14-15), most of which long predated the transfers, and the ALJ actually conceded that “there is little direct evidence which would demonstrate anti-union sentiment in the record.” (ALJD p. 19, ll. 31-32.)

There is also no support for an inference of anti-union animus from Riley’s email response to Paez’s request to transfer from one location in Connecticut to another because he preferred a “city environment.” Riley stated that the employees “were moved for a reason” and the ALJ and GC engage in utter speculation to assert that this implies the reason was discriminatory. (ALJD p. 19, ll. 21-29; GC Ex. 24.) Riley’s post-transfer statement, made “after the decision was taken do[es] not, considering the record as a whole, constitute substantial evidence that it was unlawfully motivated.” *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1323 (5th Cir. 1994).

The GC is simply wrong in asserting that this email “must be read against the backdrop of Respondent’s failure to articulate a reason at the time of the transfers” and the “timing of the transfers” to support an inference of animus. (GC Brf. p. 14.) As stated in “talking points” created for meetings with employees at the time of the transfers, Respondent explained that the transfers were part of “personnel changes [which] are actively underway to immediately address the

⁶ See also *Custom Food Prods., LLC*, Case 09-CA-144165, 2015 NLRB LEXIS 587 (ALJD Aug. 4, 2015), adopted and dismissed by 2015 NLRB LEXIS 710 (Sept. 16, 2015) (“words expressing a belief that a “union-free environment” is most beneficial do not suggest any intent at all to break the law” and “to infer animus from this language would implicate the First Amendment because it would burden a lawful expression of opinion, which contains no hint of threat or intimation of action, with a serious legal consequence.”); additional cases cited in Respondent’s initial brief at p. 34-35.

situation and to ensure that [an] appropriate work environment exists for all of our employees,” and that “[t]he changes will create a new start for the OSP team, as well as for those being transferred to new locations.” (GCX 7 (last page); RX 12; Tr. 682-683.) The timing of the transfers in May 2014 was solely a function of Respondent having concluded its investigation of the April 23 attorney letter on or about April 30, just days before the transfers occurred.⁷

IV. THE EMPLOYEE TRANSFERS WERE A LEGITIMATE RESPONSE TO THE ABUSIVE WORK ENVIRONMENT

Lacking any direct evidence of anti-union animus, the ALJ relied on so called “circumstantial evidence” to mischaracterize Respondent’s lawful reason for the transfers as a pretext to disguise anti-union discrimination. For example, the fact that other employees interviewed in the investigation who had not reported misconduct were not transferred is not “disparate treatment,” or evidence of animus or pretext. The transfers were not disciplinary actions and the six employees were not transferred for failing to report misconduct. As Grella testified, her notes do not indicate that other employees engaged in aggressive action similar to Felix, who was discharged. (Tr. 642-647.) If they had, they likely would have been terminated, not transferred. And, if Cablevision’s motivation for the transfers was to dilute support for the Union, the Company would have transferred many more than 6 of the 350 employees in the Brush Avenue depot.

Grella’s comment in the surreptitiously recorded meeting with Garcia that his transfer had “nothing to do with the investigation” is taken completely out of context. As is obvious from the rest of the recording and Grella’s testimony, Grella was only trying to assure Garcia that he was

⁷ The GC’s assertion that the ALJ relied upon two time-barred allegations as “background evidence” of animus is belied by the GC’s cross-exception stating that the ALJ “failed to rely on” these incidents. (GC Brf. p. 12.) The two incidents, addressed in Respondent’s Answer to the cross-exceptions, are (i) Supervisor Isaacs (who was not involved in the transfer decision) allegedly asking Murray about the Union in June 2013, which was not an unlawful interrogation, and (ii) Kennedy’s alleged March 12, 2014 “elephant in the room” comment, which was not unlawful solicitation of grievances. The ALJ never found that these two incidents were unlawful.

not being transferred in response to any wrongdoing on his part that came to light during the investigation.⁸ 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).

As already explained, the timing of the transfers is simply a result of the conclusion of the investigation and the ALJ did not find an increase in "anti-union" meetings. In any event, "[t]he circumstances of timing alone is [sic] not sufficient to support the allegation of discriminatory motive." *Brooklyn-Queens Cable*, Case Nos. 29-CA-14864, et al., 1995 NLRB LEXIS 244 (ALJD Mar. 24, 1995) (quoting *Lasell Junior College*, 230 NLRB 1076, 1081 (1977)).

Finally, the GC fails to address the fact that if, as the GC claims, Cablevision viewed the six employees as "spearheading" interest in the Union (which the Company denies) and wanted to keep them from encouraging future organizing, surely they would have been discharged rather than transferred to multiple locations where they could influence other employees to support unionization.⁹ There is no evidence that the 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 disagrees with Cablevision's decision is insufficient to show pretext.

⁸ For example, Grella says "it has nothing to do with anything that you've done." (GC Ex. 17.)

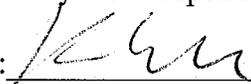
⁹ *See, e.g., TNT Logistics of N. Am., Inc. v. NLRB*, 413 F.3d 402, 409 (4th Cir. 2005) ("it is hard to explain why TNT would grant Morgan's request to transfer to its Florida location (a location with non-unionized employees), when it was well aware of Morgan's long history as an avid union supporter.").

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.

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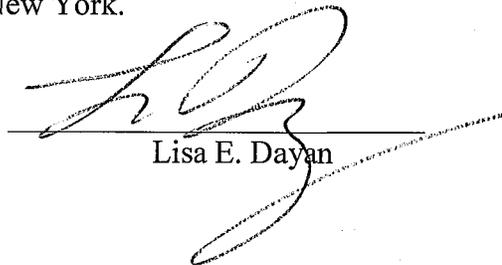
**CERTIFICATION OF SERVICE BY
E-FILING, ELECTRONIC MAIL AND MAIL**

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 General Counsel's 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:

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