

**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

**RESPONDENT'S ANSWER TO GENERAL COUNSEL'S  
CROSS-EXCEPTIONS TO THE ALJ'S DECISION**

**(ORAL ARGUMENT REQUESTED)**

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Respondents submit this Answering Brief to General Counsel's ("GC") Cross-Exceptions to the Decision of Administrative Law Judge Mindy E. Landow ("ALJD"). The GC's two cross-exceptions, which the GC concedes would not affect any remedy in this case, are not supported by the record or Board law and should therefore be denied.

**I. NO INTERROGATION OR SOLICITATION OF GRIEVANCES  
(Cross-Exception 1)**

Contrary to the GC's assertion, the ALJ did not "fail" to rely on any "findings" that Supervisor Isaac unlawfully interrogated Charging Party Murray or that Director of Area Technical Operations Kennedy unlawfully solicited grievances as "background evidence" of anti-union animus for the simple reason that the ALJ never made any such "findings" regarding these two incidents, which the GC concedes are time-barred. The ALJ specifically held that there are "no independent allegations of Section 8(a)(1) here." (ALJD 18:43.) Even assuming, without admitting, that the limited testimony regarding these alleged incidents is correct, no unlawful interrogation or solicitation of grievances occurred, so the incidents are not "background evidence" of anti-union animus.

**A. Supervisor Ewan Isaacs Did Not Interrogate Charging Party Murray**

According to Charging Party Murray's minimal testimony on the issue, sometime in June 2013, almost a year prior to the May 2014 transfers at issue in this case, Ewan Isaacs, a supervisor not involved in the transfer decision (and to whom Murray did not report), allegedly approached Murray while Murray was working in the field and said "what's up with you and the union."<sup>1</sup> (Tr. 358.) Murray further testified that he responded by saying that he did not know what Isaacs was

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<sup>1</sup> It is undisputed that the individuals involved in the decision to transfer the employees were Grella, Monopoli, Kennedy, Riley, Kaplan, Pillai, Hilber and Reyes. (Tr. 176-177, 212.) Murray reported to Andel Brady, not to Isaacs. (Tr. 343.)

talking about, and Isaacs did not ask any other questions about Murray, any union activity, or any other employee.<sup>2</sup> (Tr. 358.)

There is no allegation in the Complaint that this encounter was an unlawful interrogation. The GC did not call Isaacs to testify and, until the GC filed the instant Cross-Exceptions, the GC has never sought to amend the Complaint and has never asserted (during the hearing or in the GC's post-hearing brief to the ALJ) that this alleged June 2013 interaction was an unlawful interrogation in violation of Section 8(a)(1). The ALJ never found that Murray's alleged encounter with Isaacs was an unlawful interrogation. Further, the ALJ was entirely correct in not citing this alleged incident as evidence of "anti-union animus" because the event, as described by the GC's witness Murray, contained no coercion, threat or promise of benefit.

The GC's Cross-Exception regarding this incident should be rejected because Isaacs' alleged statement to Murray is not an unlawful interrogation as a matter of Board law. The Board has long held that "[b]ecause Section 8(a)(1) prohibits employers only from activity which in some manner tends to restrain, coerce, or interfere with employees, either the words themselves or the context in which they are used must suggest an element of coercion or interference to fall within the parameters of Section 8(a)(1)." *Sikorsky Support Serv.*, 356 NLRB 1155, 1158 (2011) (citing *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)).<sup>3</sup> There is nothing about either the words allegedly used by Isaacs, nor the circumstances of this encounter, to suggest any coercion or interference with Section 7 rights. *See, e.g., Phillips 66 (Sweeny Refinery) & Int'l Union, Local Union No. 564*, 360 NLRB No. 26, 2014 NLRB

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<sup>2</sup> The only other testimony about this alleged encounter is Murray's double hearsay that Isaacs allegedly told Murray that Regional Vice President for Field Operations Barry Monopoli told Isaacs that Monopoli thought Murray and Bernard Paez were "behind all this." (Tr. 358.) Murray did not claim that Isaacs asked any questions about Paez.

<sup>3</sup> *See also Rossmore House*, 269 NLRB 1176, 1177 (1984), *affid. sub. nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (traditional test is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.").

LEXIS 34 (Jan. 15, 2014) (affirming dismissal of unlawful interrogation charge regarding supervisor asking employee “What’s going on with the union?” where, considering all of the circumstances, statement “was a general, nonspecific, question, rather than one that attempted to induce [the employee] to incriminate himself”); *Flex-N-Gate Tex., LLC*, 16-CA-27742, 16-CA-27790, 2011 NLRB LEXIS 753 (ALJD Dec. 28, 2011) (dismissing unlawful interrogation charge where there was “no evidence whatsoever of any coercion or other evidence of unlawful interrogation” based on “scant testimony” by employee that supervisor “asked me one time what I think about the union” but no testimony about what the supervisor said prior to or after or whether the supervisor was seeking information to take action against the employee), *aff’d in part, modified in part*, 2012 NLRB LEXIS 388 (June 27, 2012); *Milum Textile Servs. Co.*, 357 NLRB 2047, 2070 (2011) (affirming dismissal of unlawful interrogation claim where supervisor asked employee whether her open distribution of a union button in the workplace occurred on worktime where question “could not reasonably have tended to restrain, coerce, or interfere with [the employee’s] statutory rights.”); *Hancock*, 337 NLRB 1223, 1224 (2002) (low-level supervisor’s asking employee during break how many employees attended a union meeting was not an unlawful interrogation under all the circumstances where “[t]he question arose casually as part of an ordinary conversation, nothing in the record suggests that [the supervisor’s] tone was hostile, and no threat of reprisal, explicit or implicit, accompanied the question.”), *enforced*, 73 Fed. Appx. 617 (4<sup>th</sup> Cir. 2003).

In addition, the GC’s statement that “[t]here is no evidence to suggest that either Murray or Paez was an active union promoter” (GC Brf. p. 4), in support of its argument that Isaacs question was coercive, is directly contradicted by the GC’s assertion that, “since late 2013,” “[t]he evidence makes clear that the discriminatees were not only perceived by Respondent as principal

union promoters from the outset but were among the most outspoken employees . . .” (GC Brf. p. 9.) If, as the GC asserts (but Respondent denies), Respondent viewed Murray as a union supporter, asking him what was “up” with him and the union was not coercive. *See, e.g., Rossmore House*, 269 NLRB 1176 (1984) (fact that employee is an open and active union supporter is one factor indicating that question is not a coercive, unlawful interrogation).

Furthermore, this alleged June 2013 conversation (almost a year before the May 2014 transfers) with Isaacs (a supervisor not involved in the transfer decision) is far too remote in time to infer any connection to the transfers. *See, e.g., Thom Brown Shoes, Inc.*, 257 NLRB 264, 268 (1981) (conduct 6 months before discharge insufficient to show antiunion motivation); *Rockland Bamberg Print Works, Inc.*, 231 NLRB 305, 306 (1977), *enfd. mem.* 566 F.2d 1173 (4th Cir. 1977) (employee’s discharge was too remote in time from his support of union in election 5 months earlier to establish discriminatory motive).

**B. Director Kennedy Did Not Solicit Grievances or Promise Remedies**

There is also absolutely no evidence to support the GC’s assertion that Kennedy unlawfully solicited grievances in the March 12, 2014 meeting during which Kennedy allegedly said “we need to talk about the elephant in the room,” after observing that someone had anonymously written “we need a union” and “IBEW” on a whiteboard. Even assuming, without admitting, that Kennedy made this statement, Kennedy did not ask employees to report any grievances and, most importantly, he did not promise to remedy any issues raised by employees at this meeting. It is well-settled that “[t]he essence of a solicitation of grievances/implicit promise of benefit violation is the *promise of remedying the grievances*, not the mere solicitation.” *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006) (emphasis added). *See also Amptech, Inc.*, 342 NLRB 1131, 1137 (2004) (“solicitation of grievances by an employer . . . violates the Act when the employer

*promises to remedy* those grievances.”) (emphasis added) (citing *Uarco Inc.*, 216 NLRB 1, 2 (1974)); *Curwood, Inc.*, 339 NLRB 1137, 1140-41 (2003) (no violation of act absent promise to resolve grievance).

Although Kennedy did not ask any questions, the GC would infer that Kennedy’s alleged comment that “we need to talk about the elephant in the room” offered employees an opportunity to raise issues or ask questions. Even assuming, without admitting, that Kennedy was offering such an opportunity, and even accepting, *arguendo*, Murray’s testimony that Lajara used that opportunity to bring up what he viewed as a safety issue regarding electrical work and that Kennedy said he would look into it (Tr. 380-81), no unlawful solicitation occurred because an employer does not violate the Act by responding to an employee’s expression of a safety concern, even during a union organizing effort. *See Professional Eye Care*, 289 NLRB 1376, 1388 (1988) (noting that “even during an election campaign” when concerns about solicitation of grievances may be greater, “an employer is not foreclosed from addressing business problems as they arise”); *see also DMI Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409, 417-18 (2001) (discounting an alleged “promise” to fix equipment problems, and contrasting it with an unlawful promise to improve wages and benefits); *Pya/Monarch, Inc.*, 275 NLRB 1194, 1195 (1985) (“Respondent did not violate Section 8(a)(1) when it promised to solve the Company’s production-related problems and distributed new equipment to employees . . .”)

Murray also testified that, after the meeting, Kennedy allegedly asked him “what can I do better,” to which Murray responded that the changes were “coming from a corporate level” so that there “really isn’t much that” Kennedy could do. (Tr. 381.) Murray’s response, referring to the benefit changes that had already been made at “a corporate level” (and therefore could not be changed by Kennedy) shows that Kennedy’s alleged ambiguous comment, when taken in context,

did not imply that any employee grievances would be remedied. Absent such a promise, there is no unfair labor practice and no basis to find that this alleged exchange is “background evidence” of any anti-union animus.

**C. The Above Incidents Were Not “Fully Litigated”**

The GC argues that the above two alleged incidents were “fully litigated” merely because a witness mentioned them at the hearing. The GC’s exception, however, is only that the ALJ did not cite these incidents as “background evidence,” thereby conceding that the incidents cannot be the basis of additional individual violations. As the incidents were never included in any Complaint, the GC never sought to include them in any amended Complaint and the GC never even mentioned at the hearing that she considered the testimony to be evidence of an unfair labor practice, the incidents were not “fully litigated” as a matter of Board law, and should not be relied on as “background evidence.” *Cf. Desert Aggregates*, 340 NLRB 289, 293 (2003) (“an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing.”); *Arkema, Inc.*, 357 NLRB 1248, 1266 (2011), *enforcement denied*, 710 F.3d 308 (5th Cir., 2013) (finding issue was not “fully and fairly litigated” where General Counsel “gave no indication to opposing counsel that he considered [a witness’s] answers to the question to be evidence of an unfair labor practice. Thus, Respondent did not offer competing evidence nor did the Respondent have an opportunity to argue that the questioning of [the witness], even if it occurred as he testified, did not amount to unlawful interrogation.”); *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992) (“the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be ‘fully and fairly litigated’”) (quoting *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987)).

The General Counsel's Cross-Exception No. 1 should be rejected as the above time-barred incidents were not "fully litigated," the ALJ never found that the incidents constituted violations of the Act and the ALJ therefore did not "fail" to rely on them as background evidence of anti-union animus.

**II. NO INDEPENDENT SECTION 8(a)(1) VIOLATION  
(Cross-Exception 2)**

Contrary to the GC's assertion, the ALJ did not "inadvertently" fail to find an independent violation of Section 8(a)(1) regarding the transfers of Charging Parties Garcia, Murray and Paez. Rather, the ALJ did not find an independent Section 8(a)(1) violation because there is no evidence in the record that the transfers of these three employees were motivated by other protected activity.

The GC states that the "findings as to Paez" engaging in other protected activity are "less clear," but in actuality the ALJ made no findings whatsoever that Paez engaged in other protected activity. The section of the ALJD that the GC cites, ALJD 17:40-18:1, makes no mention of Paez at all. The ALJD merely noted that Paez was one of several employees who discussed changes in benefits "among themselves," but there is no testimony from any witness that Paez discussed any changes in benefits with a supervisor or manager. The mere fact that there was testimony that some unnamed supervisors "generally" kept their office doors open, and so "may have" overheard employees' discussions, is wholly insufficient to support an independent 8(a)(1) violation regarding Paez. The approximately 350 employee workforce in the Brush Avenue depot is too large by far for an application of a "small plant" doctrine under which an employer's knowledge of employees' protected, concerted activity may be inferred based on the small size of the

workforce.<sup>4</sup> Therefore, the GC must specifically prove the Company's actual knowledge of employees protected activity as an essential element, which the GC has failed to do.

The ALJ in fact held that, "there is no specific evidence that this [*i.e.*, supervisors' overhearing employees' discussions] would have or did occur regarding the allegations set forth in the complaint." (ALJD 4:6-9.) There is no evidence that Respondent was aware that Paez had any discussions with anyone about changes in benefits and therefore there is also no evidence that any such discussions motivated Respondent to transfer Paez.

With regard to Murray, the ALJ merely noted that Murray testified that he stated his concerns about the elimination of the Cash Balance Plan to his supervisor Brady in about March 2014. (ALJD 17:41-43.) It is undisputed that Brady played no role whatsoever in the decision to transfer Murray. There is also no evidence that Murray's alleged statement to Brady motivated Respondent's decision to transfer Murray as many other employees expressed concerns about the change to Respondent's Cash Balance Plan, but none of those other employees were transferred. (Tr. 450-451, 524.)

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, and not in March 2014 (as claimed by the GC and erroneously found by the ALJ). (Tr. 449-450.) That 2013 meeting is far too remote in time to infer any connection to his May 2014 transfer. *See, e.g., Thom Brown Shoes, Inc.*, 257 NLRB 264, 268 (1981) (conduct 6 months before discharge insufficient to show antiunion motivation); *Rockland Bamberg Print Works, Inc.*, 231 NLRB 305,

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<sup>4</sup> See, e.g., *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir.1986) ("The essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor.")

306 (1977), *enfd. mem.* 566 F.2d 1173 (4th Cir. 1977) (employee's discharge was too remote in time from his support of union in election 5 months earlier to establish discriminatory motive). In addition, as noted above, many other employees expressed concerns about the November 2013 change in the Cash Balance plan but were not transferred.

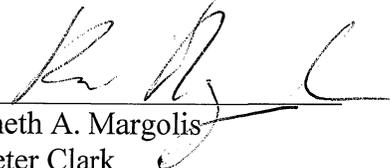
In light of the fact that there is no evidence that Respondent was motivated to transfer Paez, Murray or Garcia because they engaged in any alleged other protected activity, the ALJ properly did not find that their transfers constituted an independent Section 8(a)(1) violation and the GCs Cross-Exception No. 2 should be rejected.

### CONCLUSION

For all of the above reasons, and because the GC unavoidably concedes that the two Cross-Exceptions "have no bearing on the Remedy in this matter," Respondent respectfully requests that the Board reject General Counsel's cross-exceptions to the ALJ's decision and dismiss the Complaint in its entirety.

Dated: January 17, 2017, at New York, New York.

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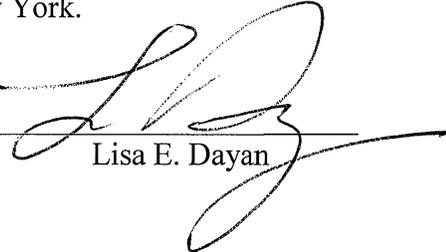
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The undersigned, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, that, on January 17, 2017, she caused a true and correct copy of the attached Respondent's Answering Brief to General Counsel's Cross-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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