

**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, An Individual,                      Case No. 02-CA-138301**

**and**

**PAUL MURRAY, Charging Party, An Individual                      Case No. 02-CA-138302**

**and**

**BERNARD PAEZ, Charging Party, An Individual.                      Case No. 02-CA-138303**

-----

**REPLY BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL  
TO RESPONDENT'S ANSWER TO GENERAL COUNSEL'S CROSS EXCEPTIONS**

On September 23, 2016, Administrative Law Judge Mindy E. Landow, herein the ALJ, issued a decision, herein the ALJD, in the instant case, finding that CSC Holdings, LLC and Cablevision Systems New York City Corp., as a single employer 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), herein collectively the Discriminatees, from its Brush Avenue facility to other locations in retaliation for their actual and/or perceived union activity. ALJD at 25:21-24.<sup>1</sup> Pursuant to Section 102.46(h) of the Rules and Regulations of the National

---

<sup>1</sup>In addition, as argued in Counsel for the General Counsel's Cross Exceptions to the ALJD, herein Cross-Exceptions, and contrary to Respondent's contention in its Answer to Cross Exceptions, herein Respondent's Answer, the ALJ's findings of fact support the further conclusion that the transfers of Garcia, Murray and Paez independently violated Section 8(a)(1),

Labor Relations Board, herein the Board, General Counsel files this Reply to Respondent's Answer to Cross-Exceptions.

**I. STATEMENT OF THE CASE**

It remains General Counsel's position that the ALJ correctly relied on factual findings and documentary evidence not alleged to constitute independent violations of Section 8(a)(1) as direct evidence of Respondent's anti-union animus, ALJD at 18:43-19:19 & fn. 18 & 21:47-22:26, which, in combination with the strong timing and pretext evidence found by the ALJ, *id.* at 19:12-17, 22:48-23:2 & fn. 20, established that the transfers of the Discriminatees were unlawfully motivated and would not have occurred absent their actual and/or perceived union and/or other protected concerted activity. Moreover, General Counsel contends, contrary to Respondent, that factual findings of the ALJ on which she did not expressly rely—specifically, that Supervisor Ewan Isaacs interrogated Murray about his and Paez's union activity in June 2013, ALJD at 5:16-20, and that Regional Director of Operations Robert Kennedy promised to remedy employee grievances during a March 2014 meeting to address a pronoun statement written on the tech room white board, ALJD at 6:15-25—supply additional direct evidence of animus that, in combination with the substantial evidence of pretext, unassailably demonstrates that the transfers violated Section 8(a)(1) and (3) of the Act, as alleged.

**II. ARGUMENT**

**A. Evidence of Animus is Not Limited to Violations of Section 8(a)(1):**

Respondent apparently contends that the absence of independent 8(a)(1) violations here vitiates the ALJ's finding of anti-union animus and her conclusion that General Counsel

---

as alleged, because they were also in retaliation for those employees' protected concerted activities. General Counsel will not repeat its arguments, made in Cross-Exceptions, *infra*.

met its initial burden under *Wright Line*. 251 NLRB 1083, 1089 (1980).<sup>2</sup> Respondent's contention is at odds with well-established Board law and must be rejected. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LLC*, 327 NLRB 222 (1998); *Gen-Corp*, 294 NLRB 717 fn. 1 (1989)(citing *General Battery Corp.*, 241 NLRB 1166, 1169 (1979)) (employer 8(c) statements may be "background evidence" of animus); see also *Air Products and Chemicals Inc.*, 227 NLRB 1281, 1281 & fn. 3 (1977)); *Smithfield Foods, Inc.*, 347 NLRB 1266, 1266-1267 & fn. 9 (2006)(employer statements outside 10(b) period background evidence of animus in support of violations occurring within 10(b) period); *In re Wilmington Fabricators, Inc.*, 332 NLRB 57, 58 & fn. 6 (2000)(citing cases). To the extent Respondent contends that a finding of unlawful motive is nevertheless precluded because such a finding may not rely exclusively on "background evidence" of animus that contention is irrelevant here, in light of the strong pretext evidence found by the ALJ. Cf. *E&I Specialists, Inc.*, 349 NLRB 446, 450 (2007); *J.O. Mory, Inc.*, 326 NLRB 604, 605 (1998) (background evidence of animus alone insufficient, where no substantial evidence of pretext).

#### **B. Respondent's Interrogation of Murray Is Direct Evidence of Anti-Union Animus**

Respondent does not deny that Supervisor Ewan Isaacs interrogated Murray about his and Paez's involvement in perceived unionizing at Brush Avenue. Indeed, the uncontroverted testimony establishes that, in June 2013, Supervisor Isaacs called Murray while he was working in the field to find out his location and thereafter came to the work site to ask him "what was up with him and the union?," ALJD at 5:16-17, informing him that Respondent's Executive Vice President of Field Operations Barry Monopoli believed that Murray and Paez were "behind all of this," *id.* at 5:19-20. Respondent contends that, because Isaacs' statements were unaccompanied

---

<sup>2</sup>Enforcement was granted, 662 F.2d 899 (1<sup>st</sup> Cir. 1981), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)

by threats, the incident is not evidence of Respondent's anti-union animus. As discussed below, Respondent's contention is inconsistent with the facts found by the ALJ, the record evidence and with well-established Board law. See, e.g., *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985)(whether employer's interrogation of a known union supporter in absence of threats is coercive depends on an examination of the totality of circumstances); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (the Board considers, *inter alia*, whether an employee is an open and active union supporter, the identity of the questioner, the nature of the information sought, and the place and method of interrogation, in assessing lawfulness of questioning).

As an initial matter, Murray's uncontroverted testimony establishes that, at the time of the conversation initiated by Isaacs, Murray was not aware of, let alone openly engaged in, any union organizing at his work location. Tr. at 359:23-25.<sup>3</sup> Furthermore, Murray responded to the question by stating that he did not know what Issacs was talking about and thereafter informed Paez that Issacs had been "*accusing* me and you of unionizing (emphasis added)." Tr. at 359:17-19; 362:20-23. Contrary to Respondent's assertion, the fact that Murray was an outspoken critic of Respondent's subsequent changes to the OSP Technicians' benefits in November 2013, ALJD at 5:40-43; 17:40-43, and thereafter attempted unsuccessfully to contact the IBEW in or about March 2014, Tr. at 374:23-375:19 (Murray), is quite simply irrelevant to the inquiry whether Issacs' questioning of Murray, at a time when Murray was entirely unaware of let alone engaged

---

<sup>3</sup>The only evidence in regard to Murray's union activity prior to June 2013 is his testimony on cross examination that he intended to vote for CWA when that union was attempting to organize at Brush Avenue in January 2012. Tr. at 395:3-396:3 (Murray). There is no evidence to indicate that Murray was an open supporter of CWA at that time. Indeed, even after Murray himself attempted to contact the IBEW in March 2014, the evidence indicates that the only person from management whom Murray informed of his action was a friendly supervisor, Donovan Reid. Tr. at 375:9-376:13 (Murray); 528:2-10 (Reid).

in union activity, had a reasonable tendency to coerce or interfere with the exercise of Section 7 rights. Similarly, whether Respondent believed at the time of the interrogation that Murray was involved in promoting unionization at Brush Avenue is also entirely beside the point. Coercive interrogation is not a motive violation; thus, Respondent's state of mind has no bearing on whether alleged unlawful questioning reasonably tends to coerce employees. See *El Rancho Market*, 235 NLRB 468, 471 (1978) ("It is too well settled to brook dispute that the test of interference, restraint, and coercion. .does not depend on an employer's motive not on the successful effect of the coercion.")

The cases cited by Respondent's Answer entirely fail to support Respondent's assertion that the June 2013 questioning was not coercive. Thus, in *Milum Textile Services Co.*, 357 NLRB 2047 (2011), the Board adopted the administrative law judge's conclusion that a supervisor had not unlawfully interrogated several employees who came to deliver a union authorization petition, based on his finding that the employees "could scarcely have more openly or actively demonstrated their union support." *Id.* at 2069. Similarly, the Board in that case adopted the administrative law judge's conclusion that the employer did not unlawfully interrogate an employee by asking if her distribution of union buttons in the workplace had occurred on work time based in part on the express finding that the employee's union activity in this regard was "open" and, in that context, the question did not reasonably tend to coerce. *Id.* at 2047 & 2070.

The Board's decision in *Flex-N-Gate, LLC*, 358 NLRB at 622, 627 (2012), also cited by Respondent, is similarly inapposite. In that case, the Board adopted the administrative law judge's dismissal of an alleged unlawful interrogation based solely on the employee's unelaborated testimony that a supervisor asked him what he thought of the union. *Id.* In

dismissing the allegation, the judge found that the evidence was insufficient to establish a tendency to coerce in light of the absence of testimony regarding the context in which the conversation occurred, in particular what was said before and after the question, the employee's response, and the location. *Id.* at 627. Here, in contrast, the uncontroverted evidence establishes that Isaacs intentionally located Murray while he was working alone in the field to question him and followed his inquiry with the comment that upper management believed Murray and Paez to be principal union promoters. Tr. at 358:8-25. Finally, in contrast with the insufficient evidence in *Flex-N-Gate*, Murray expressly testified that he responded to Isaacs' inquiry by stating that he did not know what Isaacs was talking about and thereafter told Paez that Issacs had "accused" them of promoting unionization. Tr. at 358:22-25; 359:17-19; 360:14-19. See, e.g., *Aluminum Technical Extrusions, Inc.*, 274 NLRB 1414, 1414 & 1418 (1985)(employer who questioned employee who was not an open union supporter about his union activity while the employee was alone at his work station in an abrupt manner rather than in casual conversation engaged in unlawful interrogation); see also *Advo System, Inc.*, 297 NLRB 926, 931 (1990)(supervisor who asked an employee who was not an open union supporter whether she was "behind this Union thing" while employees was working alone at her machine engaged in unlawful interrogation).

Finally, relying on *John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002), and *Phillips 66 (Sweeney Refinery)*, 360 NLRB No. 26 (2014), Respondent contends that the general nature of Issacs' question and the fact that Isaacs did not directly supervise Murray undermine the conclusion that the question reasonably tended to coerce. In both cases, the Board adopted the administrative law judge's dismissal of unlawful interrogation allegation based on the fact that the questions asked did not demand information about the employee's or his coworkers' personal views in regard to the union and on the casual circumstances of the conversation, in the one case

between long-time friends and in the other during break time. *Phillips 66 (Sweeney Refinery)*, 360 NLRB No. 26 slip op. at \*4 (supervisor, who did not supervise any of the employees seeking to organize, asked one such employee with whom he had a close friendship “what was going on with the union?”); *John W. Hancock, Jr., Inc.*, 337 NLRB at 1223 (supervisor, while riding in an employee’s vehicle during break time, asked *how many* employees had attended a union meeting but dropped the subject when employee replied that he did not know). Here, in contrast, Issacs asked Murray “what is up *with you* and the union (emphasis added),” ALJD at 5:16-18, and, after Murray indicated that he had no idea what Isaacs was talking about, pursued the matter further by indicating that a high level manager was convinced that Murray and Paez were union promoters. Although Isaacs did not directly supervise Murray at the time, the record evidence reflects that he had the authority to assign work to Murray and the other OSP technicians seeking to organize. Tr. at 519:1-2 & 520:1-9 (Reid); cf. *Phillips 66 (Sweeney Refinery)*, 360 NLRB at \*4. Moreover, Issacs’ invocation of high level management and the fact that Issacs came out to Murray’s work location to question while he was working adds to the coercive nature of the questioning. Cf. *John W. Hancock, Jr., Inc.*, 337 NLRB at 1223.

**C. Respondent’s Solicitation of Grievances and Promise to Remedy Them is Further Direct Evidence of Anti-Union Animus**

The uncontroverted record evidence likewise establishes that, on March 12, 2014, Director of Area Technical Operations Kennedy held a meeting in response to an anonymous message written on the tech room white board stating “we need a union” and “IBEW.” ALJD at 6:15-23; Tr. at 379:5-11 (Murray); 428:9-25 (Paez); 531:18-532:6 (Reid). Although there is evidence that lower level supervisors held regular meetings with employees on their teams, there is no indication that Kennedy held meetings with the OSP Technicians generally or that Respondent’s upper management had an open door policy. Cf. *Flex-N-Gate Texas, LLC*, 358

NLRB at 628 (supervisor's statement that if employee had a problem he should speak with supervisor and the employer would fix it not unlawful in light of open door policy and employee's admission that he regularly brought work issues to supervisor). On the contrary, the uncontroverted testimony of Murray, Paez and Reid, all of whom were present, indicates that Kennedy called the meeting impromptu after entering the tech room where the messages were written and, during the meeting, gestured to the white board stating "we need to talk about the elephant in the room." ALJD at 6:15-23; Tr. at 379:5-381:4 (Murray); 428:9-430:9 (Paez); 531:18-533:22 (Reid). It is undisputed that, after Lajara admitted writing part of the message and explained that it was motivated by his concern that technicians were being required to perform electrical work in lampposts (a concern seconded by Vetrano), Kennedy promised to come up with an operating procedure for dealing with lampposts. ALJD at 6:22-23. It is clear that Kennedy's conduct constituted a promise to remedy employees' concerns in a direct response to employees' union activity. See, e.g., *Borg-Warner*, 229 NLRB 1149, 1152-1153 (1977)(employer unlawfully solicited and promised to remedy grievances at meeting held in direct response to union activity during which plant manager stated that the employer would review its policies and "try to do better"); *Forest City Grocery Co.*, 306 NLRB 723, 723 & 729 (1992)(supervisor's solicitation of employee concerns and response that he would "look into" them, in context of union organizing campaign, unlawful in absence of any statement by supervisor that no promises could be made).

Respondent contends, citing cases, that because Lajara's grievance concerned a safety issue, Respondent did not act unlawfully by promising to address it, even though the promise was made in the context of union activity. The cases cited by Respondent, *Professional Eye Care*, 289 NLRB 1376 (1988) and *PYA/Monarch*, 275 NLRB 1194 (1985), however, are entirely

distinguishable from the circumstances presented here. Thus, in both cases, the Board adopted the administrative law judge's conclusion that an employer's promise to remedy an immediate business problem during a meeting called to discuss the problem was not unlawful although it occurred during an organizing campaign. *Professional Eye Care*, 289 NLRB at 1388 ("Respondent's decision to hold the meeting and the solicitation of grievances that occurred in it were narrowly related to an important and *suddenly developing business problem and was [sic] not related to employees' union activities* (my emphasis)"); *PYA/Monarch*, 275 NLRB at 1195 (judge's finding no unlawful promise to remedy grievances based on credited testimony that "Respondent decided to give the employees new equipment months before the organizational campaign" and that "its delivery was merely the continuation of a prior normal business decision"). Here, in contrast, the uncontroverted evidence shows that the safety concern raised by Lajara was one of long standing, Tr. at 410:15-411:14 (Murray), and there is no evidence that Respondent had previously initiated any effort to address it. Cf. *PYA/Monarch*, 275 NLRB at 1195. Moreover, the uncontroverted testimony indicates that the March 12, 2014 meeting was called not for the purposes of addressing it but rather in direct response to the pro-union messages on the tech room white board. Cf. *Professional Eye Care*, 289 NLRB at 1388.

**D. Interrogation of Murray and Solicitation of and Promise to Remedy Grievances Were Fully Litigated**

Any argument that the above described incidents were not fully litigated due to General Counsel's failure to plead or amend the Complaint to include them is untenable. On the contrary, General Counsel made clear during the hearing that it was relying on events outside the 10(b) period as background evidence of animus and at no point sought an independent 8(a)(1) remedy or otherwise sought to alter or enlarge the theory of its case. Cf. *Desert Aggregates*, 340 NLRB 289 fn. 2 (2003)(declining to find unalleged 8(a)(1) violations in absence of motion to

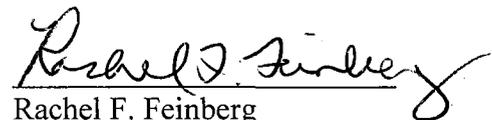
amend where doing so would alter the theory of the case). Respondent counsel was on notice of General Counsel's intention to rely on such evidence and in fact objected on the grounds that Respondent counsel would then have to rebut it. Tr. at 352:13-16; 354:11-355:9. The administrative law judge allowed the evidence in as background, Tr. at 355:14-21, and, indeed, Respondent counsel cross examined General Counsel's principal witness in regard to the incidents, Tr. at 395:3-396:10; 401:2-404-2 (Murray). Cf. *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992)(declining to find 8(a)(1) violation where no indication that respondent knew it had reason to cross-examine witnesses in regard to unalleged incident). Respondent counsel's decision not to call Kennedy or Isaacs to rebut the testimony of General Counsel's witnesses was made with full knowledge of General Counsel's intention to rely on this background evidence of animus. See, e.g., *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126 at 2-3, 27-28 (2015).

### III. CONCLUSION

In conclusion, General Counsel contends that Respondent's June 2013 interrogation of Murray and March 2014 promise to remedy grievances, although occurring outside the 10(b) period, constitute strong background evidence of Respondent's anti-union animus that, in combination with the strong timing and pretext evidence found by the ALJ, establish the violations of Section 8(a)(1) and (3) alleged.

Dated: January 31, 2017  
New York, New York

Respectfully submitted,



Rachel F. Feinberg  
Counsel for the General Counsel  
National Labor Relations Board, Region 2  
26 Federal Plaza, Room 3614  
New York, New York 10278