

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

CORDUA RESTAURANTS, INC.	§	
	§	
and	§	
	§	
STEVEN RAMIREZ, an Individual,	§	Case 16-CA-160901
	§	
and	§	
	§	
ROGELIO MORALES, an Individual	§	Case 16-CA-161380
	§	
and	§	
	§	
SHEARONE LEWIS, an Individual	§	Case 16-CA-170940
	§	Case 16-CA-173451

**CORDUA RESTAURANTS, INC.’S ANSWERING BRIEF TO GENERAL COUNSEL’S
CROSS-EXCEPTIONS**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, Respondent Cordua Restaurants, Inc. files this Answering Brief to General Counsel’s Cross-Exceptions to the Decision of the Administrative Law Judge (“ALJ”).

CERTIFICATE OF SERVICE

I do hereby certify that on February 3, 2017, I caused a copy of the foregoing to be served

upon the following parties:

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I. The ALJ properly rejected General Counsel’s last-minute amendments allegedly based on testimony adduced at hearing. (GC’s Cross-Exceptions 1 and 2).

As the ALJ correctly pointed out, amendments to the complaint will be reviewed based on three factors: (1) whether there was surprise or lack of notice; (2) whether General Counsel provided a valid excuse for its delay in moving to amend; and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1071-1072 (2006). The ALJ correctly found that allowing the amendments¹ allegedly based on testimony adduced at trial would unfairly surprise Respondent and the allegations were not fully litigated.

GC claims the issues were “fully litigated.” This is inaccurate. In fact, when Respondent tried to pre-emptively defend against potential amendments, Respondents were expressly forbidden from doing so by the ALJ, who instructed Respondent to move on because “[GC] hasn’t moved to amend the complaint.”² Because GC amended the complaint after all witnesses had been called and the ALJ had forbidden Respondent from presenting evidence on potential amendments as irrelevant, the issues were certainly not “fully litigated.”

GC also disingenuously argues the proposed amendments were fully litigated by simply the introduction of relevant exhibits in other aspects of its defense. This theory has been soundly rejected by the Board: “The presentation of evidence associated with an alleged claim, however, is insufficient to put the parties on notice that another, unalleged claim (for which that evidence might also be probative) is being litigated.” *Dilling Mech. Contractors, Inc. & Indiana State Pipe Trades Ass’n, United Ass’n of Plumbers & Pipefitters, Afl-Cio, & Plumbers & Steamfitters Local Union No. 166, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the United States & Canada Dilling Mech. Contractors, Inc. & Tradesmen Int’l, Inc., Joint*

¹ The specific amendments were a charge that Steven Ramirez was unlawfully interrogated and a charge that Respondent unlawfully orally promulgated rules.

² Hr’g Tr. 1012:1-11.

Employers & Indiana State Pipe Trades Ass'n, United Ass'n of, 348 NLRB 98, 105 (N.L.R.B. 2006); see also *United States Postal Serv. & Bobby Cline & Am. Postal Workers Union, Playground Area Local 5643*, 352 NLRB 923 (N.L.R.B. 2008). The determinative factor in whether an issue is fully litigated is whether “[R]espondent would have altered the conduct of its case at the hearing, had a specific allegation been made.” *Pergament United Sales*, 296 NLRB 333, 335 (N.L.R.B. 1989). As the ALJ noted, had Respondent been notified of the proposed amendment earlier it “may have questioned the witness differently.”³

Additionally, there is no evidence of this alleged oral rule in the record.⁴ The GC **never** asked a single witness about such an oral rule. It cannot be said to have been fully litigated when **neither** side asked any witness any questions relating to the alleged oral rule.

Further, GC claims Respondent could have simply recalled every witness to address the new allegations, even though both sides had rested their cases-in-chief and witnesses had already left, sometimes days earlier. GC moved to amend on the fifth day of a five-day hearing. First, the ALJ did not rule on the amendments during the hearing. The ALJ did not permit any discussion regarding the amendments after GC read her motion into the record. Instead GC and Respondent were instructed to provide post-hearing briefing on the matter. Second, the ALJ had previously indicated that if the hearing was not concluded by the end of the fifth day, it would potentially be several months before the hearing would be able to resume, a delay that would prejudice all parties.⁵ Most witnesses were no longer available that day.

³ Decision, JD-117-16, page 7.

⁴ Any testimony alluding to confidential information within personnel files does not support the existence of an oral rule that employee personnel files are confidential. It is accurate to state that there is confidential information within personnel files, such as medical information. Hr’g Tr. 1031:11-13; Respondent’s Exhibit 27.

⁵ Hr’g Tr. 1077:7-11.

GC's justification for the late amendment is also highly misleading. GC claims that she moved to amend "at her earliest opportunity." She also claims the introduction of the transcripts was the "first time Counsel for the General Counsel became aware of Espinoza's exact words during each of the conversations." This is incorrect. At hearing, GC acknowledged she had previously heard the recordings prior to their introduction at the hearing.⁶ She admitted it was audible and expressed no trouble hearing or understanding it.⁷ However, she chose to wait until the final day of the hearing, after both sides had rested their cases-in-chief, to move to amend in a deliberate attempt to surprise and prejudice Respondent. She now claims she had never heard the recordings before, contrary to her statements on the record at hearing.

Further, GC was aware of the allegedly unlawful interrogation at least nine months prior to the hearing. The charge had been included in an earlier version of the complaint issued September 24, 2015, but was withdrawn six months prior to the hearing. GC had an obligation to amend as soon as the information "came to light" but, for unfair strategic reasons, she opted to wait until all witnesses had been presented. *See Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1172 (N.L.R.B. 2006), review denied, enforcement granted sub nom. *Stagehands Referral Serv., LLC v. N.L.R.B.*, 315 Fed. Appx. 318 (2d Cir. 2009). It would be unjust to allow GC to amend a previously withdrawn charge with no notice. *See Station Casinos, LLC, Aliante Gaming, LLC, d/b/a Aliante Station Casino & Hotel, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, Np Palace, LLC, d/b/a Palace Station Hotel & Casino, Charleston Station, LLC, d/b/a Red Rock Casino Resort Spa, Santa Fe Station, Inc., d/b/a Santa Fe Station Hotel & Casino, Sunset*, 358 NLRB 1556, 1585 n. 65 (N.L.R.B. 2012) ("The Acting General Counsel voluntarily withdrew the allegation in paragraph 6(i)(3) of the complaint. I hereby deny the Acting General Counsel's

⁶ Hr'g Tr. 1040:21-1041:2.

⁷ Hr'g Tr. 1041:3-7.

posttrial request to amend the complaint to include a charge that Lopez threatened employees on February 19 not to sign Union membership cards. It would not be just to permit the proposed amendment at this posttrial stage because among other things, the proposed allegation was not fully litigated.”) (internal citations removed).

It is the GC’s obligation to amend as soon as the matter came to light. She chose not to do so for unfair strategic purposes, and now attempts to get prejudicial last-minute amendments granted. She attempts to deflect from her failure to timely amend by claiming Respondent could simply present its case all over again, issuing new subpoenas and recalling all of their witnesses in the remaining few hours of the final day of a five-day hearing, after resting their case, or potentially schedule a second hearing several months later to do so. This is simply not the requirement, and it is remarkable for the GC to argue this should be an acceptable alternative to simply amending the complaint at her earliest convenience. As noted above, GC was aware of the allegations at least nine months prior to the hearing and by her own admission had access to the audio recordings prior to the hearing. It would be unjust and highly prejudicial to reward the GC’s unfair strategic decision not to meet her obligation to timely amend.

II. The interviews of Steven Ramirez were lawful. (Response to Cross-Exception 1)

GC asserts that the interviews of Ramirez were unlawful because they were based on “unlawful surveillance.” First, unlawful surveillance did not occur. Second, the ALJ did not find that unlawful surveillance occurred. Third, GC did not except on this basis. Therefore, alleged unlawful surveillance is not a valid basis to assert that the interviews were unlawful.

GC also asserts that the interviews of Ramirez were unlawful because Espinoza was “asking directly about Ramirez’s protected activity related to the lawsuit.”⁸ This is objectively

⁸ GC’s Brief in Support of Exceptions, at 6.

false. The interview transcripts illustrate that Espinoza did not question Ramirez about his lawsuit.⁹ Espinoza briefly mentioned Ramirez's lawsuit during the first interview, only to explain that while Cordua respected Ramirez's right to file a lawsuit, Cordua had the obligation to investigate Ramirez's potential breach of its confidential information.¹⁰ At the hearing, Ramirez falsely testified that Espinoza asked him who else was involved in the lawsuit,¹¹ but Ramirez's perjury is proven by the interview transcripts.¹² Ramirez's perjury aside, it is clear that the interviews focused on Ramirez's misconduct, and did not relate to his protected activity. Because the interviews did not relate to protected activity, they are not unlawful under the NLRA.

In addition to the fact that Espinoza did not ask about Ramirez's protected activity (which is clearly proven by the interview transcripts), the interviews did not restrain, coerce, or interfere with Ramirez's protected activity. A recent case, *Bridgestone Firestone S. Carolina & United Steelworkers of Am., Afl-Cio, Clc*, is instructive. 350 NLRB 526, 528–29 (N.L.R.B. 2007). In that case, the employer interrogated an employee who used profane language while declaring his support for the union. The interrogation was lawful because the employer had a legitimate basis for investigating the misconduct; its investigation was consistent with its policy prohibiting employees from using profane language; it was appropriate, as part of a full investigation, to ask the employee whether he made the profane statements; the employer did not ask questions about the employee's union views; the focus of the questioning was clearly communicated; and an additional questioning session was caused by the employee's refusal to answer questions. *Bridgestone Firestone S. Carolina & United Steelworkers of Am., Afl-Cio, Clc*, 350 NLRB 526, 528-29 (N.L.R.B. 2007). Likewise, Espinoza's interviews of Ramirez were lawful because there

⁹ Respondent's Exhibits 27, 28.

¹⁰ Respondent's Exhibit 27.

¹¹ Hr'g Tr. 44:11-21. Ramirez made this statement before he knew transcripts of the interviews would be introduced.

¹² Respondent's Exhibits 27, 28.

was a legitimate basis for investigating the misconduct (text messages that asserted Ramirez was attempting to steal company records containing Social Security numbers); the investigation was consistent with Cordua’s policy against theft;¹³ it was appropriate, as part of a full investigation, to ask Ramirez whether he tried to obtain confidential information; Espinoza did not ask questions about the lawsuit; the focus of the questioning was clearly communicated;¹⁴ and an additional questioning session was caused by Ramirez’s refusal to tell the truth in the first interview.¹⁵ Like Ramirez, the employee in *Bridgestone* was also given an opportunity to provide a written statement explaining what occurred. *Id.* Accordingly, the interviews of Ramirez were lawful.

III. There was no unlawful oral policy that employee personnel files were confidential. (Response to Cross-Exception 2)

GC mischaracterizes Espinoza’s oral statement to Ramirez, claiming that he announced “the rule that employee personnel files are confidential” which “rule is not otherwise contained in Respondent’s employee handbook.”¹⁶ In reality, Espinoza specifically stated that he was explaining the employee handbook rule: “Okay, our employee handbook states that only for permission employee personnel files records is consider [sic] confidential and any violation to that policy is a serious offense which can result in termination.”¹⁷ The employee handbook states employees are permitted to review their own personnel files, the information in the files is considered confidential, and violations may result in termination.¹⁸ GC admits that this policy is lawful.¹⁹ Espinoza specifically mentioned *permission*, which is required in the employee handbook. The employee handbook does not permit employees to review personnel files of *other*

¹³ Respondent’s Exhibit 15.

¹⁴ Respondent’s Exhibits 27, 28. Additionally, Ramirez testified that he knew the purpose of the interview: Espinoza “wanted to see if [he was] stealing information from the company.” Hr’g Tr. 39:21-22.

¹⁵ Hr’g Tr. 1185:15-17; 1186:16-23.

¹⁶ GC’s Brief in Support of Cross-Exceptions, at 8.

¹⁷ Respondent’s Exhibit 28.

¹⁸ GC Exhibit 5.

¹⁹ GC’s Brief in Support of Cross-Exceptions, at 8.

employees without permission, and Ramirez was terminated for trying to steal information of *other* employees.²⁰

Undisputed testimony established that employees could voluntarily share personnel files, including wage information, with each other. Cordua's Human Resources Director testified that an employee could access his own records, and could access another employee's records with that person's signature.²¹ Keith McMillon, a host, discussed the amount of his wages in relation to another employee's wages.²² Ramirez testified that he discussed wages with servers and bussers.²³ Accordingly, GC failed to carry her burden of establishing an oral rule that employee personnel files are confidential.

In addition to the fact that no such a rule existed, it was not applied in the termination of Ramirez. The evidence shows that Ramirez was terminated for lying and for attempting to steal other employees' payroll or time records, which is not information included within a personnel file.²⁴ Thus, even the GC's alleged oral rule existed, which it did not, it would not be applicable to Ramirez's termination.

IV. Rogelio Morales was lawfully terminated. (Response to Cross-Exception 3)

Respondent fully incorporates its briefing excepting to the ALJ's decision to credit Morales's version of events and discredit the neutral disinterested customer's testimony. Despite this erroneous finding, the ALJ correctly determined the GC failed to prove animus, and correctly determined Morales was lawfully terminated because Respondent would have terminated Morales for his conduct, regardless of his protected activities.

²⁰ Reichman objected to providing the documents Ramirez demanded because the documents had other employees' Social Security numbers, not because she thought she couldn't share wage information. Respondent's Exhibits 8, 9; Hr'g Tr. 389:6-23.

²¹ Hr'g Tr. 406:23-407:2.

²² Hr'g Tr. 937:4-19.

²³ Hr'g Tr. 20:23-21:6.

²⁴ Respondent's Exhibit 9, 28 (mentioning payroll and time records).

Respondent conducted an investigation into Morales's incident, including speaking with Henderson, an employee witness.²⁵ GC disputes whether Respondent spoke to Henderson; however, GC questioned Henderson at the hearing and failed to ask him whether he was questioned as part of the investigation. Regardless, Henderson made it clear that he would not have been able to provide much information, testifying that he "didn't really hear what was said."²⁶

Most importantly, Respondent terminated Morales based on the complaint of an offended customer who was extremely upset about his explicit sexual and illegal conversation regarding how to "roofie" women. Respondent presented evidence that it terminated employees who customers complained about; in one instance, an employee was terminated for refusing to provide a guest with a children's menu.²⁷ The employee who Morales had the inappropriate conversation with was not part of the lawsuit, and was also terminated.²⁸ Accordingly, GC's discussion of sexual harassment complaints is inapposite; the record is clear that Respondent did not tolerate customer complaints. Morales was lawfully terminated.

V. Respondent did not unlawfully promulgate and enforce its arbitration agreement (GC's Cross-Exception 4).

GC claims Respondent unlawfully promulgated, maintained, and enforced its arbitration agreement by filing a motion to compel arbitration in a lawsuit and when it circulated an arbitration policy. However, as Respondent has noted in its Exceptions Brief and its Post-Hearing Brief, nothing in the National Labor Relations Act provides the required clear "congressional command" to pre-empt the Federal Arbitration Act ("FAA"). The enforceability of the arbitration clause is governed by the FAA rather than the NLRA or any Board decision. The Supreme Court has stated

²⁵ Hr'g Tr. 1135:22-1136:3.

²⁶ Hr'g Tr. 1113:1-3.

²⁷ Respondent's Exhibit 18.

²⁸ Respondent's Exhibit 12; GC Exhibit 5.

that application of the FAA may only be precluded by another statute if there is a clear “congressional command” to do so. *Am. Express. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 655, 669 (2012)). Additionally, the Fifth Circuit has expressly rejected the NLRB’s attempt to extent its authority over arbitration agreements. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 362 (5th Cir. 2013) (holding that the NLRA does not take precedence over the FAA regarding arbitration agreements that waive collective and class action involvement). The Fifth Circuit has held there is no clear congressional command in the text of the NLRA, nor can one be inferred in the legislative intent of the act. As the Fifth Circuit is where Respondent would appeal a Board decision finding the arbitration agreement unlawful, its holdings are directly relevant here.²⁹ Because the NLRA does not contain the requisite congressional command to pre-empt the FAA, Respondent’s arbitration policy does not fall under the control of the NLRA or, consequently, the NLRB.

VI. GC’s pursuit of non-recoverable losses is sanctionable (GC’s Cross-Exception 5).

It is settled Board law that consequential economic harm is not recoverable. *Performance Friction Corp. & Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (Uaw), Afl-Cio*, ES 11-CA-16040, 1999 WL 33454704 (N.L.R.B. Div. of Judges Oct. 28, 1999); *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (N.L.R.B. 1995); *E. End Bus Lines, Inc. & Int’l Bhd. of Teamsters Local 1205 & Sharon Tarry, an Individual*, JD-111-16, 2016 WL 6876571 (N.L.R.B. Div. of Judges Nov. 21, 2016); *Advancepierre Foods, Inc., & United Food & Commercial Workers Union, Local 75 a/w United Food & Commercial Workers Int’l Union.*, JD-58-16, 2016 WL 3519322, at *2 n. 58 (N.L.R.B. Div. of Judges June 27, 2016). Despite acknowledging this, GC

²⁹ Because Respondent would appeal to the Fifth Circuit, the NLRB is required to adhere to the Fifth Circuit’s rulings. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015) (“An administrative agency’s need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit”).

makes a meritless argument to force Respondent to expend more time and legal fees responding to this issue. GC does not assert any fact to support recovery of collateral losses in the instant case. In court, such conduct would be sanctionable. *See F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566, 577 (5th Cir. 2008) (holding that sanctions under Rule 11 may be issued for “any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” when “its claims or defenses” are not plausible under existing or potential future law, and when there is no evidentiary support for the claim); FED. R. CIV. P. 11. Because GC seeks damages it knows the alleged discriminatees are not entitled to under Board law, the request should be denied in its entirety.

VII. Conclusion

For the foregoing reasons, Respondent requests the Board deny the GC’s cross-exceptions in their entirety, grant Respondent’s exceptions, and dismiss these proceedings against Respondent.