

**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 REPLY BRIEF TO GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, Respondent Cordua Restaurants, Inc. files this Reply Brief to General Counsel’s Answering Brief to Respondent’s 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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/s/ Daniel N. Ramirez
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I. The ALJ improperly excluded Respondent’s post-hearing exhibits.

General Counsel (“GC”) claims that Respondent’s argument that extra-record exhibits were improperly excluded is “nonsensical” by suggesting if the extra-record exhibits were already part of the record, “Respondent would have no need to enter additional *extra-record* exhibits.” Board precedent is rife with instances where extra-record evidence is acceptable, rendering GC’s “nonsensical” and confusing argument meritless. *See Horizon Contract Glazing, Inc. & Dist. Council of Painters No. 16, Glaziers, Architectural Metal & Glass Workers Local Union No. 767, Int’l Union of Painters & Allied Trades, Afl-Cio*, 353 NLRB 136 (N.L.R.B. 2008); *Alaska Pulp Corp.*, 326 NLRB No. 59 (N.L.R.B. 1998). The test is whether the extra-record evidence is “in the nature of arguments based either on record evidence, the judge’s decision, or reasonable interpretations of record evidence.” *Horizon*, 353 NLRB 136, at fn. 1.

GC did not include Respondent’s Exhibit B and C as part of the “formal papers.”¹ Regardless, the Board’s Rule 102.45(b) states that both Respondent’s Exhibits B and C are, in fact, part of the record themselves, regardless of whether they are introduced as evidence at hearing.

II. The ALJ improperly permitted GC’s last-minute amendments.

GC claims Respondent failed to produce its handbook when subpoenaed. However, the ALJ reviewed GC’s subpoena and did not agree.² According to the GC, only Request 7 of the subpoena allegedly requested the entire handbook—but it only requested documents Respondent reviewed in making determinations regarding the Charging Parties. Those documents were produced.

GC’s claims the issues were “fully litigated” is untrue. When Respondent tried to preemptively defend against potential amendments, Respondent was barred by the ALJ, who

¹ Hr’g Tr. 6:19-22.

² Hr’g Tr. 762:20-764:6.

instructed Respondent to move on because “[GC] hasn’t moved to amend the complaint.”³ Because GC amended the complaint after all witnesses had been called and the ALJ had forbidden Respondent from presenting evidence on potential amendments, the issues were not “fully litigated.”

III. The ALJ improperly found Respondent’s handbook rules are unlawful.

GC makes numerous arguments that Respondent’s challenged policies are unlawful, but fails to counter with any relevant legal precedent to support her position. Consequently, Respondent would simply remind the Board that its Exceptions Brief presents the fully cited legal basis for its Exceptions to the ALJ’s decision.

IV. The ALJ improperly found Respondent’s arbitration policy unlawful.

GC argues merely that the ALJ is not bound by legal precedent in the region. This is incorrect. The Board’s non-acquiescence policy is only appropriate when it will not be reviewed by the same circuit. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015), cert. granted, (U.S. Jan. 13, 2017). As pointed out by Respondent previously, the Fifth Circuit is the only available venue for review for Respondent and the one it has expressly indicated it would appeal to.

V. Ramirez was lawfully terminated (Exceptions 1-12, Section III).

A. Ramirez committed perjury.

GC claims that Respondent’s statements that Ramirez was internally inconsistent and committed perjury were “generalized” and “unsupported.” To the contrary, Respondent provided the following specific examples of Ramirez’s lies, with citations to the record:

- Ramirez testified he gave truthful responses to Espinoza during the first interview in relation to questions regarding communications with Reichman.⁴ He later

³ Hr’g Tr. 1012:1-11.

⁴ Hr’g Tr. 108:10-16.

admitted – only after being confronted with the text messages revealing his lies – he did not give truthful responses.⁵ As such, his original testimony was perjury.

- Ramirez admitted under oath he lied to his supervisor.⁶
- Before the recording of the interview between Ramirez and Espinoza was introduced into evidence, Ramirez falsely testified Espinoza asked him who else was involved in the lawsuit during the interview.⁷ Ramirez’s perjury is proven by the recordings.⁸

Because Ramirez’s testimony was inconsistent and because he committed perjury, his testimony cannot be the basis for finding a violation. *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988) (“The testimony of a perjurer is inherently unreliable and, absent corroboration, should not be the basis for finding a violation of the Act”); *Overnite Transportation Co.*, 245 NLRB 423 fn. 1(1979) (upholding non-reliance upon witness with internal consistencies in testimony). GC cites no precedent to contradict this point.

B. There is no competent evidence of animus.

GC’s evidence of animus is founded upon Ramirez’s own self-interested testimony, which cannot be relied upon because he committed perjury. *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988) (“The testimony of a perjurer is inherently unreliable and, absent corroboration, should not be the basis for finding a violation of the Act”). Thus, GC cannot show animus.

C. Ramirez’s testimony should not be credited.

Despite Ramirez’s perjury, the ALJ erroneously credited his claim that he only requested his own pay records from Reichman.⁹ No corroboration supported this finding, as required to rely on the testimony of a perjurer. *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988). GC makes a conclusory statement that Respondent’s Exhibit 9 allegedly corroborates Ramirez’s

⁵ Hr’g Tr. 1184:1-1185:17; 1186:16-23.

⁶ Hr’g Tr. 1184:1-1185:17; 1186:16-23.

⁷ Hr’g Tr. 44:11-21.

⁸ Respondent’s Exhibits 27, Hr’g Tr. 28.

⁹ Decision, JD-117-16, page 25.

testimony. Instead, Respondent's Exhibit 9 directly contradicts Ramirez's testimony: it is a text message from Reichman, which includes a statement that "Steven asked me if I can get other of peoples [sic] payrolls" and that the documents Ramirez requested "had other people's Social Security numbers on it."¹⁰

D. No adverse inference should be taken based on Reichman.

GC does not contest that Reichman was not employed by Respondent during its investigation of Ramirez, and was not employed by Respondent at the time of the hearing. GC also does not address the fact that Respondent did communicate with Reichman after her termination regarding Ramirez's misconduct. (Respondent's Ex. 9.)

An adverse inference cannot be taken against Respondent for failing to call Reichman as a witness at the hearing, because as a non-employee she was not "within Respondent's control" during its investigation of Ramirez or during the hearing. *See Michael Cetta, Inc. d/b/a Sparks Rest. & United Food & Commercial Workers Local 342*, 2-CA-142626, 2016 WL 6833430 n. 15 (N.L.R.B. Div. of Judges Nov. 18, 2016) (drawing an adverse inference based on restaurant's failure to call its manager as a witness, noting the manager was still employed by the restaurant at the time of the hearing). The GC misapplies the applicable standard for taking an adverse inference, and fails to cite any case law at all.¹¹ Accordingly, the ALJ erred in drawing an adverse inference against Respondent based on any decision to call Reichman in its case in chief or interview her during its investigation of Ramirez.

E. Espinoza's testimony should be credited.

¹⁰ Respondent's Exhibit 9.

¹¹ Furthermore, GC's argument is inconsistent. On one hand, GC asserts an adverse inference should be taken because Reichman is supposedly within Respondent's control; on the other hand, GC asserts an adverse inference should be taken because Respondent's counsel had a conversation with Reichman about her late uncle during a break in the hearing. These assertions are incongruous – does Respondent have control over Reichman, or does GC have such exclusive control over Reichman that Respondent is not permitted to speak to her?

A clear preponderance of relevant evidence shows the ALJ's credibility determination regarding witness Fred Espinoza is incorrect. The ALJ makes a conclusory statement that she does not credit portions of Espinoza's testimony that are allegedly evasive or respond to leading or speculative questions. However, the ALJ fails to specifically identify which portions of Espinoza's testimony are credited or not credited.

Espinoza established that Cordua informed the general managers about the lawsuit to instruct them that there must be no retaliation against Ramirez and other involved employees.¹² He testified that he had no animosity toward Ramirez.¹³ He explained what triggered the investigation of Ramirez, and specifically detailed his concerns with the text messages from Ramirez and Reichman.¹⁴ He explained Cordua's investigative process, including informing Human Resources, instructing the IT department to investigate, and consulting with attorneys.¹⁵ He explained that he waited to talk to Ramirez until he received information from the IT department, and that it was a very busy time of year for Cordua.¹⁶ Although the transcripts of the interviews with Ramirez are in evidence,¹⁷ Espinoza provided additional details regarding the interviews, explaining that he could not trust Ramirez after he lied to Espinoza in both interviews.¹⁸ Espinoza's responses were not vague and were not in response to leading or speculative questions. Accordingly, Espinoza's testimony on these matters should be credited.

F. The ALJ erred in her evidentiary findings.

GC's representation that Respondent merely excepted to the ALJ's confusion of emails versus text messages between Reichman and Ambroa is misleading. Instead, Respondent excepted

¹² Hr'g Tr. 1015:22-1016:7.

¹³ Hr'g Tr. 1016:18-1017:5.

¹⁴ Hr'g Tr. 1018:16-1029:10.

¹⁵ Hr'g Tr. 1031:21-1034:7.

¹⁶ Hr'g Tr. 1035:23-1037:1.

¹⁷ Respondent's Exhibits 27, 28.

¹⁸ Hr'g Tr. 1037:2-1040:19; 1052:2-1055:25.

to the ALJ's finding that in addition to Respondent's text message exhibits, Respondent possessed and should have produced email exhibits. Any subsequent adverse inference or credibility determination that occurred was affected by the ALJ's incorrect conclusion that Respondent was withholding evidence. The ALJ's mistaken belief that Respondent withheld evidence is absolutely relevant and material, and taints all of the ALJ's analysis and conclusions.

G. Respondent's investigation of Ramirez was thorough and authentic.

Contrary to GC's assertion that Respondent failed to consult Reichman, Respondent did possess and rely upon direct communications from Reichman regarding Ramirez's misconduct.¹⁹ Additionally, the length of the investigation only points to its thoroughness: Respondent engaged a technology expert to investigate a security breach. There were also other factors that contributed to the investigation's timing, such as the investigation falling to the busy COO due to the Human Resources Director's vacation, the consultation with attorneys, and the restaurants' busiest season.²⁰

Finally, the questions during Ramirez's interviews were not designed to "trap" him. For example, during the first interview,²¹ Espinoza asked Ramirez if he texted Reichman, and Ramirez said, "Yeah, whenever she tells me to come in or don't come in or we have a show at this location or that location." Espinoza asked, "What do you text her about?" Ramirez responded, "Like I said, either I come in or don't come in" and continued elaborating regarding work-related texts. Espinoza asked whether that was the only type of text, and Ramirez said yes. Espinoza asked again, "That's the only thing?" Ramirez responded, "Yes sir." Espinoza gave Ramirez yet another chance, asking, "Did you text her earlier in August for any other particular reason?" Ramirez said

¹⁹ Respondent's Exhibit 9.

²⁰ Hr'g Tr. 1031:21-1037:1. Respondent is being penalized for conducting a thorough investigation. If Respondent had not conducted an investigation, GC would cite the failure as evidence the reason for termination was pretextual. Having conducted the investigation, GC accused Respondent of unlawful interrogation.

²¹ Respondent's Exhibit 27.

no. Espinoza specifically asked Ramirez whether he texted Reichman about getting records, or a flash drive, or asking for *any records whatsoever*, and Ramirez said no, in contrast to his testimony at the hearing that he *did* ask Reichman for records.²² Espinoza's questions in the second interview were similarly specific and were met with similar denials from Ramirez.²³ Ramirez testified at the hearing that he lied to Espinoza; Ramirez clearly understood that he was lying and was not "tricked" into giving false answers.²⁴

H. Based on the evidence, Respondent reasonably believed Ramirez lied and stole.

Respondent had a reasonable belief that Ramirez engaged in or tried to engage in theft of information. GC's erroneously states that a technology expert "verified to Respondent that no information breach occurred." In reality, the technology expert could not tell Respondent whether Ramirez "tried" to steal information, and concluded that there was "nothing conclusive."²⁵ Thus, it was *not* certain whether a breach occurred. Furthermore, Respondent possessed other reliable evidence that Ramirez did, at a minimum, try to steal information.²⁶ It was also clear to Respondent that Ramirez lied to his supervisor.²⁷

I. The evidence shows Respondent treated Ramirez like any other employee.

GC nakedly asserts that Respondent acted upon a "drunken, incoherent text" of Reichman. First, there is no evidence that Reichman was drunk when she sent the text message. Second, the texts coherently and explicitly state that Ramirez asked Reichman to procure other employees' payroll information, which contained their Social Security numbers.²⁸

²² Hr'g Tr. 1202:17-25.

²³ Respondent's Exhibit 28.

²⁴ Hr'g Tr. 1184:1-1185:17; 1186:16-23.

²⁵ Hr'g Tr. 1032:9-1033:21.

²⁶ Respondent's Exhibits 8, 9.

²⁷ Respondent's Exhibits 8, 9, 27, 28.

²⁸ Respondent's Exhibit 9.

Additionally, Respondent terminated other employees for stealing.²⁹ GC attempts to distinguish this evidence by pointing out that Respondent had photographic proof to support one of the thefts, as opposed to Reichman’s report that Ramirez tried to steal. However, Respondent did present evidence that it terminated at least one employee for stealing based on another employee’s report of stealing.³⁰

J. There is no showing of pretext.

First, GC failed to show that Ramirez’s lawsuit was a “motivating factor” in Respondent’s decision to terminate Ramirez. Second, GC cannot establish pretext. GC attempts to show pretext by asserting Respondent did not investigate Ramirez’s misconduct. The evidence does not support GC’s assertion: Respondent collected and reviewed relevant text messages from two employees, interviewed Ramirez twice, and engaged a technology expert to assess any security breaches.³¹ Additionally, Cordua knew – and Ramirez admitted under oath – that he lied during the interview with his supervisor, which was also sufficient to merit termination.³²

VI. The ALJ’s credibility determinations regarding Morales and LeBlanc should be overruled (Exceptions 1-3, Section IV).

In another manufactured “inconsistency,” GC incorrectly asserts that LeBlanc initially testified that she heard Morales use the word “roofie” and later clarified that another server used that word. The record directly contradicts GC’s assertion:

Q: What’s your recollection here today in relation to what Mr. X was talking about with Mr. Morales?

A: He said that they -- **Mr. X told Mr. Morales** that they had really pretty girls over at this nightclub the night before that he was over there, and that the only way he could get a girlfriend like that, beautiful ones, is to roofie them.³³

²⁹ Respondent’s Exhibit 10; Hr’g Tr. 397:22-403:17.

³⁰ Hr’g Tr. 401:1-5.

³¹ Respondent’s Exhibits 8, 9, 27, 28; Hr’g Tr. 1032:9-1033:21.

³² Hr’g Tr. 1184:1-1185:17; 1186:16-23.

³³ Hr’g Tr. 768:15-21 (emphasis added).

Q: And so how did Mr. Morales respond when Mr. X said he was going to show or give Mr. Morales some roofies? What did Mr. Morales say or react?

A: He didn't say anything about the roofies, but he said that he wanted to get in on it also. It sounded like a good evening, sounded like it'd be fun.³⁴

The clear preponderance of all the relevant evidence demonstrates that the ALJ should have credited LeBlanc's testimony. The ALJ erred in crediting an interested witness's testimony over a disinterested witness who provided consistent testimony.

VII. The ALJ incorrectly concluded Nguyen's December 2015 statement was coercive.

GC fails to address the fact that the ALJ misattributed statements of Damian Ambroa to Alex Nguyen in concluding that Nguyen's December 2015 statement was coercive. GC also fails to address that none of GC's witnesses found the statement coercive, and half of them testified positively about Ambroa's statements, which the ALJ mistakenly attributed to Nguyen. At the very least the fact the ALJ didn't know who said what when rendering her decision demonstrates clear error on the part of the ALJ.

VIII. The ALJ's credibility determinations regarding witnesses against Lewis are incorrect.

GC claims inconsistencies make Respondent's witnesses unreliable. However, every inconsistency cited is minor, at best. In virtually every case, GC extracted those inconsistencies under pressure or processed through a translator the parties struggled with throughout the hearing.³⁵ At one point Charging Party Morales and Respondent's Counsel needed to assist the translator with a witness testifying against Lewis.³⁶ Witnesses were harassed or intimidated, including derogatorily referring to a transgender witness's transition as a "sex change" until

³⁴ Hr'g Tr. 790:15-20.

³⁵ Hr'g Tr. 646:10-25; 550:11-16; 554:18-21; 610:5-10; 669:14-25; 678:22-24; 710:1-10.

³⁶ Hr'g Tr. 646:10-25.

confronted on it.³⁷ One witness was pointed and yelled at by the ALJ during her testimony.³⁸ Another was brought to tears by the GC's questioning³⁹ and GC refused to back down.⁴⁰ The events testified to occurred up to several years prior, with the most recent events still *four months old*. The GC and ALJ unreasonably expect employees' short written statements to cover every possible detail of their encounters with Lewis over her multi-year work history.

Minor inconsistencies, such as a witness not remembering precisely who presented their typed statement or what exact date they signed them, *four months after the incident in question*, are not significant, especially since the witness is able to confirm where the meetings took place, who conducted them, and what was said. The vast majority of the testimony was corroborated, including all relevant testimony and evidence about Lewis's verbal racial abuse. Some of the testimony was even corroborated by GC's own witnesses, and virtually all was consistent with the written statements of not only the witnesses, but also the written statements of all 14 of the 16 employees interviewed in March 2016.

IX. Conclusion

For the foregoing reasons, Respondent requests the Board grant Respondent's exceptions.

³⁷ Hr'g Tr. 803:4-6.

³⁸ Hr'g Tr. 557:13-558:6 (the ALJ explaining why she yelled and pointed at a witness as the witness simply not being "accustomed to [her] style").

³⁹ Hr'g Tr. 706:16-22.

⁴⁰ Hr'g Tr. 707:17-25.