

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

JAMAICA CAR WASH CORP. D/B/A
SUTPHIN CAR WASH

Case 29-CA-169069

and

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION (RWDSU)

GENERAL COUNSEL'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files the following exceptions to the Decision of Administrative Law Judge Kenneth W. Chu, which issued on January 9, 2017.

<u>Exception Number</u>	<u>Page</u>	<u>Line</u>	<u>Exception</u>
1	16	16	Incorrectly finding that the General Counsel took the position and alleged that Castillo was terminated because he was a Union supporter.
2	18	38	Incorrectly finding that Manager Israel Palacios denied having a conversation in mid-December with Francisco Gomez in which Palacios told Gomez that Respondent was going to fire Yovani Castillo because Respondent heard that Castillo supported the Union.
3	18	41-45	Failing to make proper credibility resolutions, including failing to consider witnesses' demeanor, and conflicting and contradictory testimony.
4	19	5-7	Incorrectly finding that Yovani Castillo and Francisco Gomez became Union members upon hiring.
5	19	8-11	Misconstruing Board law in finding relevant to the analysis of the 8(a)(1) threat and interrogation allegations that

neither Castillo nor Gomez reported the alleged threats or interrogations to the Union or shop steward.

6	19	13-18	Misconstruing Board law in finding relevant to the analysis of the 8(a)(1) threat allegations that Respondent did not threaten employees other than Castillo and Gomez.
7	19	18-21	Substituting personal speculation for record evidence in finding that threats would have had more impact had they been made to more tenured employees.
8	19	26-32	Finding, contrary to record evidence, that the record was void of any evidence of ongoing labor conflicts or Respondent's animus towards the Union and ignoring the record evidence of Respondent's animus toward the Union.
9	19	34-47	Misconstruing Board law in finding relevant to the analysis of the 8(a)(1) threat and interrogation allegations the fact that Respondent did not threaten a particular employee, witness Eduardo Vazquez.
10	19-20	52-2	Ignoring record evidence in finding that Francisco Gomez did not explain why Respondent believed that discriminate Yovani Castillo supported the Union.
11	20	2-8	Misconstruing the record, and ignoring Board law, in finding that discriminatee Yovani Castillo did not engage in Union activity.
12	20	10-14	Ignoring Board law in finding relevant to the 8(a)(1) threat and interrogation allegations that Respondent did not also discharge Francisco Gomez.
13	20	16	Failure to find that Respondent, by Manager Israel Palacios violated Section 8(a)(1) of the Act by threatening employees with futility and termination if they supported the Union, by promising employees raises and additional work hours if they ousted the Union, and by instructing employees not to speak to the Union shop steward.
14	21	8-10	Failing to find that Respondent's General Manager Fernando Magalhaes threatened employees with unspecified reprisals by telling employees that if they continued engaging in protected activities, they would see what would happen.

15	21	10-14	Ignoring record evidence establishing that that General Manager Fernando Magalhaes threatened employees with reprisals by telling employees that if they continued engaging in protected activities, they would see what would happen.
16	22	35	Misconstruing Board law in finding relevant to an 8(a)(1) interrogation analysis that the unlawful interrogation was not corroborated when the evidence showed there were no witnesses to the interrogation.
17	22	37-43	Ignoring record evidence establishing that Respondent knew that the Union was fighting and grieving Castillo's termination prior to the February 28 th unlawful interrogation of Francisco Gomez by Manager Palacios.
18	22	45-48	Misconstruing Board law in finding relevant to the analysis of an 8(a)(1) interrogation the fact that discriminate Francisco Gomez did not report the interrogation to anyone.
19	22	48-50	Misconstruing and misapplying Board law in finding relevant to the interrogation analysis the fact that discriminatee Francisco Gomez did not <i>feel</i> intimidated or coerced.
20	22	49-52	Misquoting the record by stating that Gomez testified that the interrogation lasted for over forty minutes.
21	23	1-2	Failing to find that Manager Israel Palacios unlawfully interrogated employee Francisco Gomez in Palacios' car on February 28, 2016.
22	24	8-10	Ignoring Board law and incorrectly finding that the only way the General Counsel could establish a prima facie case was by proving that Castillo engaged in union or protected activity.
23	24	45-49	Ignoring Board law and record evidence in finding that discriminatee Yovani Castillo did not engage in Union activity.
24	25	26-27	Incorrectly finding that Castillo's discharge was not based on any anti-Union animus.
25	25	27-29	Failing to find that Respondent violated Section 8(a)(1)

of the Act contemporaneous to Castillo's discharge, and thereby ignoring record evidence of Respondent's animus.

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| 26 | 25 | 29-35 | Misconstruing Board law in finding that the only way for General Counsel to prove that Respondent's defense was pretext is by the existence of other contemporaneous unfair labor practice violations. |
| 27 | 25 | 46-47 | Mischaracterizing the record in finding that discriminatee Gomez "shed no light" as to why Manager Palacios thought that discriminatee Castillo supported the Union. |
| 28 | 25-26 | 49-4 | Misconstruing Board law in finding relevant to the 8(a)(3) discharge analysis of Yovani Castillo the fact that Respondent did not interrogate another employee, Francisco Gomez. |
| 29 | 26 | 5-9 | Misconstruing and misapplying Board law in concluding that discriminatee Castillo's enrollment in the Union could not be considered Union activity because employee Francisco Gomez was also enrolled in the Union and was not discharged. |
| 30 | 26 | 13-15 | Incorrectly finding that the only evidence of Respondent's knowledge of Castillo's perceived Union support was found during the mid-December meeting between Francisco Gomez and Manager Palacios and concluding that Respondent had no knowledge of Castillo's Union activity. |
| 31 | 26 | 17-20 | Mischaracterizing record evidence in finding that Manager Palacios denied meeting with discriminatee Francisco Gomez in mid-December and incorrectly finding that Palacios denied telling Gomez that Respondent was going to fire Castillo because Palacios heard that he supported the Union. |
| 32 | 26 | 22-23 | Ignoring compelling record evidence and incorrectly finding that Respondent did not fire discriminatee Yovani Castillo and that Castillo simply did not return to the car wash. |
| 33 | 26 | 24-26 | Misconstruing and ignoring critical Board law in finding relevant to the analysis of the 8(a)(3) discharge of Yovani Castillo the fact that Respondent never specifically stated that Castillo had been discharged. |

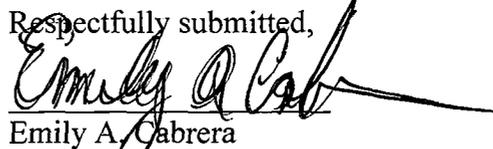
34	26	27-36	Ignoring crucial testimonial and documentary evidence and incorrectly finding that Respondent told Yovani Castillo that there was no work for Castillo only for that moment.
35	26	38-51	Misquoting the record in finding that Respondent told Yovani Castillo there was no work for Castillo only for that moment.
36	27	1-7	Ignoring key testimonial evidence and incorrectly finding that Yovani Castillo understood that there was no work for him for just that moment.
37	27	9-16	Ignoring crucial testimonial evidence and incorrectly finding that the car wash had a policy for workers whereby ninety percent of the time the workers had to call Respondent to inquire whether work was available.
38	27	20-32	Ignoring key documentary evidence including Respondent's punch records and incorrectly finding that there was insufficient evidence presented to establish that Respondent had enough work for Castillo after Castillo's employment ceased.
39	27	34-40	Misquoting record evidence in finding that Respondent hired only two additional workers after December 25, 2015.
40	27	45-49	Ignoring record evidence and incorrectly finding that there was no factual basis to conclude that the work schedule contained in Exhibit R-2 was fabricated or otherwise unreliable.
41	28	1-4	Incorrectly finding that Yovani Castillo did not engage or participate in any Union activity, that Respondent would not have had knowledge of such activity, and therefore dismissing the allegation that Castillo was terminated for his Union activity in violation of Section 8(a)(3).
42	28	9-11	Incorrectly concluding that the Union sought Yovani Castillo's reinstatement through shop steward Diego Hernandez.
43	28	12-13	Mischaracterizing testimony by finding that Manager Magalhaes did not call Castillo back to work solely because he was never discharged.

44	28	33-46	Incorrectly finding that the General Counsel argued that employee and shop steward Diego Hernandez requested reinstatement of Castillo.
45	28	49-51	Improperly relying on the content of Union's counsel's objections as opposed to record testimony to conclude that the petition seeking Castillo's reinstatement was never sanctioned by the Union.
46	29	1-3	Misquoting testimony in concluding that employee and shop steward Diego Hernandez testified that he did not know if the petition seeking Castillo's reinstatement was a union petition.
47	29	3-5	Incorrectly concluding, contrary to record evidence, that the Union letter was not identified as a Union petition.
48	29	6-8	Substituting personal speculation for record evidence in concluding that the Union letter was drafted by other workers and based on rumors and speculation.
49	29	10-15	Ignoring testimonial evidence in concluding that the General Counsel failed to show that there was any anti-Union animus in Respondent's refusal to rehire Castillo.
50	29	16	Improperly dismissing the allegation that Respondent unlawfully refused to rehire Yovani Castillo.
51	29	23	Misquoting the Amended Complaint in concluding that the General Counsel alleged that Manager Magalhaes interrogated employees during the first week of June 2016, in paragraph 7(a) of the Amended Complaint.
52	29	27-29	Misconstruing record evidence and erroneously finding that there were General Counsel witnesses who testified at the hearing that were present for the meeting with Manager Magalhaes during the first week of June 2016, yet did not testify about the interrogation at the June 2016 meeting.
53	29	29	Erroneously concluding that the June 2016 interrogation allegation was based solely on the testimony of Eduardo Vasquez.
54	29-30	31-2	Misapplying Board law in analyzing whether Respondent violated 8(a)(1) by interrogating employees in preparation for trial without first giving them the assurances required

by the Board in *Johnnie's Poultry*.

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| 55 | 30 | 15-34 | Misconstruing Board law in finding relevant to the analysis of an 8(a)(1) interrogation allegation, that a particular employee, Eduardo Vasquez, testified that Respondent did not threaten him or promise him benefits in exchange for taking a position against the Union. |
| 56 | 31 | 10 | Failing to find that employee Eduardo Vasquez was subjected to an unlawful interrogation. |
| 57 | 32 | 2-3 | Ignoring record testimony in finding that Manager Magalhaes did not question employees regarding Yovani Castillo's discharge at the June meeting. |
| 58 | 32 | 14-15 | Misquoting record testimony in finding that employee Vasquez testified that Manager Magalhaes told Vasquez that it did not matter how he testified at the trial. |
| 59 | 32 | 19-27 | Ignoring record testimony and Board law in finding that General Manager Magalhaes told employee Eduardo Vasquez that his participation in the trial was voluntary. |
| 60 | 32 | 34-35 | Ignoring record testimony and incorrectly finding that the General Counsel did not present any other witnesses to the June meeting. |
| 61 | 32 | 36-38 | Failing to find that Respondent violated Section 8(a)(1) of the Act by failing to give employees the assurances required by the Board in <i>Johnnie's Poultry</i> during the June meeting. |
| 62 | 32 | 40 | Improperly dismissing the entire amended complaint. |

Respectfully submitted,



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DATED AT Brooklyn, New York March 6, 2017.