

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)

COUNSEL FOR THE GENERAL COUNSEL'S
MEMORANDUM IN OPPOSITION TO RESPONDENT'S RESPONSE TO
EXCEPTIONS

Emily A. Cabrera, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 29
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201-4201

In its Response to the General Counsel's ("GC") Exceptions, Respondent misunderstood and mischaracterized many of the GC's arguments and also mischaracterized the record testimony and evidence. In addition, Respondent inserted purported facts that are not part of the record evidence. This Memorandum in Opposition will address these issues.

I. MICHARACTERIZATIONS OF THE RECORD

The discriminatees did not reveal to Respondent that they were cousins.

At various points its Response,¹ Respondent referenced what it denoted as "fact" that Respondent's managers knew that discriminatees Castillo and Gomez were cousins and/or "really close." (Response pgs 10, 16, 27) Respondent argued that it "doesn't make sense" that Respondent would divulge its intent to terminate Castillo to someone like Gomez who was "very close" to Castillo, and a family member of Castillo. This argument should be rejected since it is not based on the record. Rather, the record shows that Manager Palacios did not know that the two discriminatees were cousins at the time that he threatened Gomez and Castillo and then terminated Castillo.

Castillo was clear in his testimony that he did not tell anyone, including Manager Palacios, that he and Gomez were cousins. (Tr. 147) Manager Palacios testified that at the time they worked at the car wash, he only knew that Castillo and Gomez were "friends." Palacios testified that he did not know until after Respondent fired Castillo that Castillo and Gomez were cousins. (Tr. 381) Thus, there is no evidence in the record that Palacios knew anything more than that the two were "friends" at the time they both worked for Respondent.

There was no testimony that Respondent knew that Castillo had left for another job as of December 22.

¹ The GC's Exceptions will be referred to as the "Exceptions," Respondent's Response to the GC's Exceptions will be referred to as the "Response."

In its Response, Respondent claims that it did not call Castillo back to work because it already knew that Castillo had a job elsewhere. Respondent contends that it became aware that Castillo had left for another job on December 22nd (Response pgs.15,32) However, there is no evidence in the record to support that claim. First, probative record evidence that Manager Palacios engaged in various text messages and a phone conversation with Castillo on December 22nd and 24th in which the two discussed Castillo's desires to continue working for Respondent completely undermines Respondent's claim that it knew that Castillo found another job on December 22nd. Second, in response to a question by Respondent's counsel regarding whether Manager Palacios had "found anything out about Castillo after December 25 or December 26," (Tr. 381) Palacios testified that he had found out that Castillo was working elsewhere. Thus, in light of Palacio's testimony that he learned about Castillo having another job after December 25 or 26, it is a complete fiction that Respondent knew that Castillo had found another job on December 22nd. Thus, Respondent's argument that it did not call Castillo back to work on the key days of December 24th through December 27th because it already knew Castillo was working elsewhere is without merit and should be rejected.

There was no testimony that Manager Palacios told Castillo that he should not rely on his job at Respondent as his sole source of income.

In its Response, for the first time, Respondent argues that the reason why Palacios told Castillo to look for another job was because Castillo should not have relied on Jamaica Car Wash as his sole source of income because the work is seasonal. (Response pg. 31) This argument has no basis in the record. There is no such testimony by any witness in the record. Rather, Respondent created new "testimony" which should be rejected.

Palacios never testified that he told Castillo that Castillo should not rely on employment with Respondent because of the weather, nor did Palacios testify that this was what he “meant” when he told Castillo that he should look for another job. The transcript of the audio recording of the December 24th conversation between Palacios and Castillo establishes that Palacios only told Castillo that he should look for another job – without any qualification.

II. MISCHARACTERIZATIONS OF THE GC’S ARGUMENTS

The GC’s Reliance on Board case Stevens Creek, was neither misguided nor dishonest.

With regard to credibility, Respondent argued that the GC’s reliance on *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633 (2011), was “misguided at best, and dishonest at worst,” because the Board in *Stevens* did not set forth a general rule that a judge must make a detailed analysis of all credibility findings. (Response pg. 4.) Respondent’s argument mischaracterizes the GC’s position. The GC did not argue that there was such a general rule. Rather, the GC argued that *Stevens* dictates that the Board may now engage in its own credibility analysis since there is no evidence that the ALJ herein based any credibility findings on witness demeanor.

The Board in *Stevens* reiterated that it “has consistently held that where credibility resolutions are not based primarily upon demeanor. .the Board itself may proceed to an independent evaluation of credibility.” *Stevens, supra* at 635. In analyzing the facts of that case, the Board found, “The judge gave no indication, in either of his decisions that he relied on Garcia’s demeanor in crediting his testimony. Although the judge generally referred to demeanor, he did not specifically refer to Garcia’s demeanor or that of any other witness. See *El Rancho Market*, 235 NLRB 468 , 470 (1978) (reversing judge’s credibility findings where,

although the judge generally referred to demeanor, it did “not appear that. .[the findings] were based on his observations of the witnesses’ testimonial demeanor.”) *Id.* at 635-636.

It was only after this legal analysis that the Board noted further that the judge had disregarded the Board’s instructions to reanalyze the discriminatee’s discharge by making clear credibility determinations. Thus, the point is that in both of his decisions, the judge in *Stevens* failed to make proper credibility resolutions, which included failing to make demeanor-based credibility findings, and because of this failure to make demeanor-based credibility resolutions the Board engaged in its own analysis of the witnesses’ credibility.

Similarly, the ALJ in the instant case did not base credibility resolutions on the witnesses’ demeanor. Just as the judge did in *Stevens*, the ALJ here merely referred in passing to “demeanor,” but did not actually discuss or analyze any witnesses’ trial demeanor. Thus, to the extent that it can be argued that the ALJ based his decision on the credibility of witnesses, (which the GC argued in its Exceptions that he did not), the ALJ did not make demeanor-based findings. Therefore, the Board should engage in its own evaluation of the witnesses’ credibility.

Manager Palacios’ failure to specifically deny the mid-December and February 28th meetings, and the commentary attributed to him during those meetings, warrants an adverse inference.

Respondent misunderstood and/or mischaracterized the GC’s argument regarding Palacios’ alleged denial that the mid-December and February 28th meetings took place. The mid-December meeting was crucial to the GC’s case because it was during this meeting that Manager Palacios told Gomez that he was going to fire Castillo because he heard he was with the Union. The February 28th meeting was important because during that meeting, Palacios interrogated Gomez about Castillo’s Union activities. In his decision, the ALJ found that Palacios generally denied that the meetings took place. In reaching this conclusion, the ALJ relied on Palacios’

answer of “no” to Respondent’s question of whether Palacios “said anything” to the discriminatees about the Union after their initial interview. (Tr. 381) The GC contends that Palacios’ “no” response does not amount to a denial, general or otherwise, of the two key meetings or the contents thereof. In its Response, Respondent misunderstands the GC’s reasons for raising this issue and fails to understand how a general denial of adverse testimony can lead to an adverse inference that the adverse testimony is true.

Under Board law, an adverse inference can be drawn where a witness fails to specifically deny adverse testimony. See e.g. *Asarco, Inc.*, 316 NLRB 636,640 fn. 15 (1995) (Even though respondent generally denied the allegation, the ALJ drew an adverse inference against respondent’s witness who failed to specifically deny commentary attributed to him. The ALJ noted, “An adverse inference is warranted from the failure of a party to elicit testimony about a matter concerning which its witness would normally testify. *Advanced Installations*, 257 NLRB 845 (1981). As it is from the failure of a party to question its own witness about matters which would normally be thought reasonable. *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977).”

In light of this case law, the GC argued that since Palacios did not specifically deny that the meetings took place nor deny the statements that Gomez attributed to him at those meetings, the ALJ (and now the Board) should draw an adverse inference. Palacios never specifically denied telling Gomez that Palacios was going to fire Castillo because he with the Union. In addition, Palacios never denied asking Gomez about Castillo’s Union activities during the February 28th meeting in Palacios’ car. Pursuant to *Asarco*, and cases cited therein, the ALJ should have drawn an adverse inference against Palacios and Respondent based on Palacios’

failure to specifically deny that he threatened to fire Castillo and that he interrogated Gomez about Castillo's Union activity and upon Respondent's failure to elicit such testimony.

To the extent that Respondent argues that his witnesses were not "given the opportunity to deny" making certain statements, (Response pg. 15,16,22), such an argument is completely absurd. Respondent's counsel engaged in extensive examinations of both Manager Palacios and GM/Owner Magalhaes, yet neglected to question these witnesses about key events such as the mid-December meeting. Whether Respondent's counsel overlooked these issues or intentionally failed to elicit testimony on these issues is immaterial. Moreover, this failure is not the result of anything that the GC did or did not do. The fact remains that Respondent's witnesses did not testify about key events and failed to deny significant adverse testimony. Under current Board law, such a failure warrants an adverse inference that Respondent's witnesses in fact made the alleged statements and that the mid-December and February 28th meetings took place as alleged.

Palacios' Testimony Was Evasive and Inconsistent

Respondent claims that the GC was "totally incorrect" in stating that Palacios denied that he spoke and texted with Yovani Castillo during the week that Castillo was fired. However, the transcript shows that Palacios was evasive and feigned ignorance with regard to whether he engaged in these crucial communications with Castillo. The GC avers that by giving evasive testimony and by feigning ignorance, Palacios effectively denied the communications. Palacios recalled that Castillo purportedly never showed up for work again, (Tr. 34-35) in addition to remembering specific conversations with Gomez in which Gomez allegedly told Palacios that Castillo was working elsewhere. (Tr. 85-86) However, when it came to the GC's questions about whether Castillo had ever communicated with Palacios about wanting to return to work, Palacios claimed that he could not remember. (Tr. 36) It wasn't until Palacios was confronted with

Castillo's texts and a recorded phone conversation that Palacios admitted that Castillo in fact texted and called Palacios begging for work.

In addition, contrary to Respondent's contention, Palacios admitted that he told Castillo to call Palacios in order to return to work. Palacios testified, "in the recording it said that he [Castillo] had to call me back and he never did." (Tr. 57-58) Palacios continued with this fiction later in his testimony by stating, "So I said if you want, you can go, go ahead and look for something else and then later, you come back, you come back, but he never called." (Tr. 84) Palacios' alleged statement that Castillo should call him back if Castillo wanted work does not appear in the audio recording of the conversation between Castillo and Palacios. Therefore, Palacios' assertions that. .[add what he asserted] show that Palacios was not being truthful during his testimony. Respondent attempts to diminish this glaring contradiction by asserting that Palacios was only testifying to what he "meant." (Response pg. 13) Contrary to Respondent's assertion, Palacios did not testify that he only "meant" that Castillo should come back. Rather, Palacios clearly testified – falsely - that he told Castillo to "come back" for work. That Palacios testified untruthfully is unequivocally exposed by the [add date] recorded phone conversation and shows Palacios' willingness to lie during his testimony.

The record revealed that the relationship between the Union and Respondent was not harmonious and that Respondent harbored animus towards the Union.

Respondent claims that it had an amicable, harmonious relationship with the Union. (Response pg. 19) In making this argument, Respondent once again mischaracterized the GC's argument and claimed that the GC relied on one "isolated out of context statement about a minor dispute about bonus payments" to support the GC's claim of anti-union animus. This is simply untrue. Not only did the GC rely on the myriad 8(a)(1) threats, interrogations, and promises of

benefits to support its allegation of anti-Union animus, but the GC also relied on testimony given by shop steward Diego Hernandez and the testimony of GM/Owner Fernando Magalhaes.

Although Respondent does not seem to understand the legal concept of an admission, the testimony given by Diego Hernandez established that Magalhaes thought the Union was “fucking with” him in their efforts to protest Castillo’s termination and that Magalhaes threatened employees with reprisals if they continued to protest. (Tr. 251-252) Magalhaes himself stated on the stand that he had problems with Union representative “Nick.” (Tr. 311) Magalhaes also admitted that he refused to reinstate Castillo because the Union was accusing him of something he did not do. (Tr. 335) Respondent admits in its Response that Magalhaes did not deny making these comments. Consequently, the un-rebutted testimony established that Respondent harbored animus towards the Union and that the relationship between Respondent and the Union was not as harmonious as Respondent would have the Board believe.

Respondent’s decision not to lay off Gomez does not undercut the GC’s theory that it clearly harbored animus towards Castillo.

Respondent argues at various points in its Response that the fact that Respondent did not fire Gomez shows that Respondent could not have believed that Castillo supported the Union. Respondent claims, without any evidence, that Gomez “posed the same risk” as Castillo and, therefore, (Response pg. 22) since Respondent did not discharge Gomez for union activity, it could not have discharged Castillo for union activity. This argument is absurd. While it is true that the record does not reveal why Respondent believed that Castillo supported the Union, the record does establish that Respondent in fact held this belief.

That Respondent did not fire Gomez actually supports the GC’s theory. Implicit in Respondent’s argument is the idea that there was insufficient work for one car wash worker

during the Christmas week of 2015. (In its Exceptions the GC lays out how Respondent's punch records show that there was actually ample work for all employees that week.) Since Castillo and Gomez started working at the same time, if there truly was were insufficient work, Respondent could have chosen Gomez for "temporary layoff." Instead, Respondent chose Castillo without offering any explanation for why it chose Castillo over Gomez. However, the record evidence is clear on why Respondent chose Castillo for the alleged "temporary layoff"-- because it believed that he supported the Union. Clearly, Respondent did not believe the same of Gomez. Consequently, the fact that Respondent did not choose Gomez for the alleged temporary layoff actually shows that Respondent made a conscious decision to layoff Castillo based on its belief that he supported the Union.

The ALJ did not find that Donald Montezuma is a 2(11) supervisor.

Respondent claims that Donald Montezuma's testimony regarding the June interrogation should be disregarded because the ALJ "[found] that Montezuma is an Assistant Manager." (Response pg. 37) Respondent claims that Montezuma is, therefore, not an employee whose Section 7 rights could be violated and the GC's allegation that Montezuma unlawfully interrogated was properly dismissed. Respondent again misunderstood the GC's argument. The GC asserted that employee Eduardo Vazquez was unlawfully interrogated by Fernando Magalaha and Israel Palacios in June 2016, during Respondent's preparation for trial. Donald Montezuma's testimony corroborates Vazquez' interrogation and *may* serve as grounds for an independent interrogation finding because Montezuma was neither alleged nor found to be a supervisor under Section 2(11).

Though Montezuma may refer to himself as an Assistant Manager this does not make him a supervisor under the Act. In order to avoid the application of Section 7, the party asserting

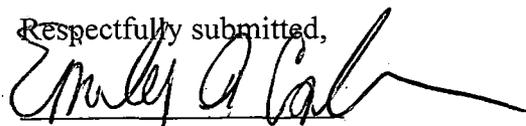
supervisory status must show that the individual in question is a supervisor under Section 2(11) of the Act. However, in this case no party alleged that Montezuma was a 2(11) supervisor and thus, the ALJ did not make any finding regarding Montezuma's supervisory status.

Rather, the testimony elicited at trial firmly supported the conclusion that Montezuma is not a 2(11) supervisor. Montezuma testified that he works the cash register, washes cars, and dries cars. Montezuma also testified that he does not have the power to hire or fire employees, discipline, or direct them. (Tr. 290-293) Thus, the record evidence actually supports the conclusion that Montezuma is not a 2(11) supervisor. Therefore, Section 7 does apply to Montezuma and the Board may find that he was unlawfully interrogated in violation of the Board's holding in *Johnny's Poultry*, 146 NLRB 770 (1964). In any event, even if an independent violation is not found based on the interrogation of Montezuma, Montezuma's testimony can be used to support the testimony of employee Eduardo Vazquez who also testified to a violation of *Johnny's Poultry*.

III. CONCLUSION

Based on the above, and the General Counsel's Exceptions, and Brief in Support of Exceptions the General Counsel urges that the Board sustain the General Counsel's Exceptions in their entirety, reverse the ALJ's findings of fact and conclusions of law.

Respectfully submitted,



Emily A. Cabrera
Counsel for the General Counsel
National Labor Relations Board-Region 29
Two Metrotech Center, Suite 5100
Brooklyn, New York 11201

DATED AT Brooklyn, New York April 20, 2017.

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Date of Emailing: April 20, 2017

STATEMENT OF SERVICE OF: Counsel for the General Counsel's Memorandum in Opposition to Respondent's Response to Exceptions

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in according with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

By Email:

Stephen Hans, Esq.
45-18 Court Square, Ste. 403
Long Island City, NY 11101
shans@hansassociates.com

Tara Jensen, Esq.
1350 Broadway, Suite 1400
New York, NY 10018
tjensen@careykanelaw.com