

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

NATIONAL CAPTIONING INSTITUTE, INC.

Respondent

and

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS –
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO**

**Cases 16-CA-182528
16-CA-183953
16-CA-187150
16-CA-188322
16-CA-188346**

Charging Party

**RESPONDENT’S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS¹**

I. GC’S ANSWERING BRIEF REVEALS THE FACTUAL AND ANALYTICAL HOLES IN THE ALJD.

A. The Evidence Shows Hall Would Have Been Terminated Regardless of Union Activity

As part of the Dallas facility closure, NCI evaluated its Dallas in-house employees’ letters of intent “in light of organizational and departmental needs and on the basis of a number of factors related to overall performance, including productivity, quartile raking [quality and reliability], disciplinary record and seniority.” GC 26, 27, 28; TR 90-92. NCI never claimed that the terminations of Hall, Lukas and Tomy Duke were part of a layoff. NCI has consistently stated that they were part of the assessment of NCI’s needs and objectives. NCI also never claimed that it chose the ultimate criteria for termination (fourth quartile ranking with discipline in the previous six months) and *then* applied it to Tomy Duke (an employee not involved in union organizing),

¹ Respondent apologizes to the Board for the numerous editing errors contained in Respondent’s Exceptions. As a non-profit, Respondent has an obligation to commit resources to best use. The magnitude of the problems with the ALJD required Respondent to focus on substance to preserve its appeal rights and to compromise time spent on editing. Respondent respectfully requests that the Board fairly consider the merits of the Exceptions without regard for the less than stellar presentation.

Hall and ultimately Lukas. The ultimate criteria resulted from the assessment of the employees' productivity, quartile ranking, (quality and reliability) discipline and seniority. *Id.* Beth Nubbe testified that NCI wanted to fire Hall independent of the closure but given "everything that was going on" management decided to do it as part of the facility closure personnel evaluation process. TR. 500: 2-11.² In fact, the Dallas facility closure and Hall's union involvement *extended* her employment. But for the closure and Hall's union involvement (and NCI's assumption that Hall would file fraudulent charges with the NLRB just as she had done with the EEOC) Hall would have been terminated for her disruptive, malicious and unlawful communications, insubordination and poor performance at the time Nubbe issued the June 15 discipline letter. Hall's nasty and dishonest response to her coworker's request that she stop talking about her and her medical condition to others was the breaking point for Nubbe. TR: 493:8-25; TR 495:1-20.

GC is correct that Nubbe communicated to Toschi on June 12 her intent to formally discipline Hall for her interactions with management because Hall had not remedied her behavior as Nubbe had counseled Hall to do four months earlier on February 25, 2016 (months before NCI learned of the Union organizing effort). The February 25 counseling memo was in direct response to Hall's accusatory, insubordinate and disruptive communications with management related to the service dog matter (R 41, 41A-D; TR 480) and it expressly referenced Hall's previous "handling of the domestic partner matter" as being troublesome. Nubbe told Hall: "While you are entitled to certain rights under the law, you are not entitled to dictate the terms and conditions of your employment or what information you will or will not provide and when." R 41; *See also*, TR 444-445, 452-453 (testimony of Rochelle Johnson regarding the strain Hall's conduct put on the two-person HR department responsible for 200 employees).

² Answering Brief p. 25.

The February 25 counseling memo regarding Hall's insubordination and inappropriate mode of communication with management is expressly referred to in the first line of the June 15 discipline (GC 12) because Hall's disruptive communications continued in the "ensuing four months" after Nubbe issued to Hall the February 25 counseling memorandum. The offensive communications in the ensuing four months included (1) Hall's emails accusing Toschi of lying to Hall and breaching her agreement with Hall regarding the terms of her employment upon her return from San Antonio (R 11)³ and, most importantly, Hall's nasty denial to her coworker that she told anyone about the coworker's medical condition. TR 491-494; GC 16. Hall's nasty denial occurred on July 13, the day after Nubbe notified Toschi that Hall's communications with management necessitated formal discipline. (GC 17).⁴ Nubbe found Hall's abusive email to the ill coworker intolerable. Nubbe therefore expanded the scope of discipline to include (1) Hall's aggressive and hostile complaining about and demanding additional pay for having to fill in for the coworker as she was required to do as a Hybrid Steno-Captioner⁵(2) the spreading of personal medical information about her coworker; and, (3) Nubbe's concern about Hall's having asked a coworker to connect her lap top to NCI's network in violation of the telecommunications policy

³ GC 13 is a Summary Index of Hall's personnel file that Nubbe (as VP of HR and Finance) prepared and submitted in response to the Investigator's document request. The Summary includes communications related to Hall's position change to Hybrid-In House upon her return from San Antonio. R 28A-B The communications between management and Hall regarding the terms of her remote work from San Antonio started on November 7, 2014. Id. GC's mocking of the inclusion of those communications in NCI's document production during the investigation because of its November 7, 2014 date suggests GC did not actually review the underlying documents referenced in the Summary that confirm NCI's position and exposes Hall's dishonesty, insubordination and abysmal interpersonal relationships. For example, the emails regarding the terms of the remote work do not include any representations from Toschi or anyone else that Hall was guaranteed a return to her same salary and vacation pay.

⁴ On Saturday, June 11, Ms. Nubbe sent an email to herself in which she crafted a draft email to Ms. Toschi stating she thinks that Ms. Hall should be disciplined for the manner and tone of the communication she has sent to management because it was undermining management's authority. TR. 492-493. On Sunday, June 12, Ms. Nubbe sent Ms. Toschi an email relaying her concerns about Ms. Hall's conduct. That email incorporated the advice Ms. Nubbe received from legal counsel. GC 17. On June 13 the ill employee called Nubbe very upset about Hall's spreading information and rumors about her medical condition and told Nubbe she had emailed Hall and asked her to stop. R 43B. Later, on June 13, Nubbe learned of Hall's nasty response to the ill employee. R 43C.

⁵ These communications were directly with management (R 36) and not those Hall had with another employee in the Spark logs as suggested by GC.

because she remained concerned about the report that Chris Novembrino and Hall had discussed leaving NCI with one of its clients. (GC 12, June 15 discipline; TR 484-486). Nubbe emotionally testified that by not disciplining Hall previously for her offensive communications she felt she allowed Hall to abuse her vulnerable coworker and damage moral. TR 492-494. As stated above, Hall's nasty response to the coworker was Nubbe's breaking point. *Id.* Hall had become a liability and her termination necessary. *Id.*

Nubbe prepared Hall's June 15 discipline as the first formal step toward documenting Hall's pattern of conduct that led to the decision to terminate Hall. Given Hall's history with threatening and filing of false claims of discrimination,⁶ and "everything else that was going on, including the office closing, and trying to get that taken care of, it seemed best to just wait until the closing" to terminate Hall's employment along with any other employees who would not be part of the restructure. TR 500:7-11; R 39F (Two weeks before the Dallas facility closure meeting, Nubbe prepared notes for her weekly meeting with Toschi wherein as part of her discussion about "Top Organizational Goals" she noted "Marie Hall" and "Tomy Duke" as items for discussion.)

Ultimately, after assessing its employees' productivity, quartile ranking, discipline record and seniority, NCI decided that in addition to Hall, Tomy Duke was not an employee that NCI needed or wanted as part of the restructure. Both Tomy Duke and Hall were fourth quartile performers and had discipline within the previous six months. Those latter two criteria, therefore, became the ultimate final factors for carrying out the terminations.⁷ Lukas found himself in that same category after being disciplined for his breach of duty and/or poor judgment for allowing former employee Michael Baker to attend the company meeting. The criteria were strictly applied

⁶ R 35; TR 496

⁷ GC's assertion that Toschi's and Nubbe's testimony were inconsistent is at odds with any fair and thorough reading of their testimony and the documentary evidence.

to Lukas because management thought it important to be consistent in its application of the criteria chosen,⁸ but more importantly because management believed Lukas' poor judgment was a liability and there were no mitigating factors to justify altering the criteria. *See*, Exceptions 4,18-20.

The evidence shows that NCI did consistently apply the criteria and that an employee's union leanings was not a factor. In the Answering Brief, GC suggests that NCI's retention of Hybrid Steno-Captioner Maria [Lupe] Rojo, who had two disciplinary actions related to her accuracy in January 2016, discredits NCI's position regarding its termination of Hall. To the contrary, it shows a consistent application of the chosen criteria. GC admits that Rojo's disciplines were not within six months of the termination decisions and admits that Toschi had asked department directors for input on each employee ranked in the third and fourth quartiles, and considered this input in making her decisions.⁹ Answering Brief p. 24. Darlene Parker, the director of steno-captioners, wrote of Rojo:

[Rojo] is very helpful to Scheduling and almost always picks up programs on her day off and sometimes at early morning hours, when she normally does not work. She has a good attitude and is a team player. She is still trying to complete her ESPN requirements for all programs. However, she captions everything well, including three ESPN programs. She captions in the High 98's to low 99s. Since January 11, she has worked remotely 95% of the time.

GC 34. With such a strong endorsement, even if Rojo's disciplines had fallen within the six-month period, Toschi would have been justified in retaining Rojo given Parker's recommendation and, in addition, because Rojo's disciplines suggest that her accuracy problems were an anomaly and the consequence of an isolated issue. (GC 36, 37). A comparison of Parker's information regarding

⁸ TR 98-99; see, e.g. TR 389.

⁹ GC's representation that "Toschi admitted that Darlene Parker's comments regarding the steno-captioners, dated August 11, 2016, were not submitted until a week after she had already recommended Hall's discharge" is disingenuous. Toschi also testified that "just prior to submitting [her comments], Darlene had been on vacation, and I had had this discussion with her before she left for vacation, and as a follow-up, and of course, I wanted the documentation, and so she sent the document [G 34] to me upon her return. TR 396:14-19.

Rojo and her disciplines to Parker's comments about Hall and Hall's disciplines clearly shows that NCI's management was competent, genuine, fair and consistent and did not make decisions based on an employee's union leanings.¹⁰

1. The Evidence Demonstrates That Hall Is Dishonest

Respondent's Exceptions presented numerous instances demonstrating Hall's dishonest character.¹¹ GC's Answering Brief exposes additional examples and relies on evidence that is not credible.

a. Hall's Nasty Denial to Coworker Exposes Another Lie.

In addition to being cruel, Nubbe knew from multiple employees, including Client Concierge, Christy Roney, that Hall's denial to her coworker that she told employees about her medical information was a lie. TR 488:1-25; TR 489-490. Hall's dishonesty is also revealed in the May 24 Spark logs provided to Nubbe by Toschi on May 31, wherein Hall, while complaining about having to fulfill the obligations of her Hybrid position and cover for the coworker on medical leave, revealed the coworker's medical condition in detail along with serious inaccurate information. TR 487-490.¹²

b. Hall's (and GC's) Testimony Is Not Credible.

Hall's testimony that she discussed the coworker's absence with several other employees out of "concern" for the coworker is also incredible. The evidence demonstrates that Hall showed utter disregard for the well-being of her coworkers, in general, and the ill coworker, in particular. On June 1, NCI's Christy Roney called Nubbe to report a disturbing discussion she had with Hall

¹⁰ Parker expressly told Toschi: "I cannot make the same strong argument for Marie Hall."

¹¹ See Respondent's Exceptions e.g. footnotes 38 and 47.

¹² GC's suggests that Hall's discipline was unfair because other employees who discussed the coworker's medical condition were not disciplined. The other employees were Hall's supervisors who disclosed the information to obtain coverage while the employee was on leave. Their discussions were limited and purposeful; yet, they apologized to Nubbe and promised to be more careful in the future. Their conduct was not comparable to Hall's and discipline was unwarranted. R. 48.

the previous day, May 31, in which Ms. Hall complained about HR's refusal to change her Hybrid status to in-house captioner while the coworker was on medical leave. Roney told Nubbe that Hall showed no concern for coworker's well-being and cared only about how HR was denying her PTO. Nubbe asked Roney to write up what occurred on May 31 between her and Hall, which she did on June 14. In pertinent part she wrote:

She also brought up the fact the HR won't change her status from hybrid to in-house employee since [coworker] was out with a [medical condition]. She wanted her PTO to be a higher rate than a remote captioner. I was completely floored. She was talking about her dad and how he was out for like a year and [coworker] would be out for a very long time and HR won't give her more PTO hours. At that point, I said to her, "is [coworker] okay?" She said no she is not okay and then went back to her monolog about hours and said that it is like cutting your arm off and saying you'll be back captioning in a couple of weeks. She left after that.

The May 24 chat logs, too, show that Hall was concerned only about Hall. R 43.

GC's Answering Brief cites as authority numerous documented false statements by Hall. For example, Hall falsely testified that shortly before she was scheduled to return to Dallas, supervisor Darlene Parker notified her that she had to choose between working in-house (reporting daily to the Dallas facility), taking a new "hybrid in-house position or quitting." TR 170:6-15; *See* Answering Brief p.6. The documentary evidence clearly shows that the third option was not "quitting" but rather one day a week in-house. R. 29; TR 436. Another example is Hall's inaccurate testimony that Brenna Lampson was a Voice Writer Coordinator. TR 50-51; Answering Brief p.17. Lampson was a Voice Writing Supervisor, who was not protected by the Act. TR 132:20-22.

GC offers adjectives and a fanciful narrative to distract attention from NCI's numerous documents that demonstrate Hall's insubordinate, dishonest and combative communications.¹³

¹³ There is no evidence in the record to support GC's characterization of Hall as an "important link between the steno-captioners, who primarily worked remotely, the voice writers, and other employees." Answering Brief p. 32. The evidence shows Hall couldn't get along with anyone, including the voice writers interested in the Union. TR 228-230 (Hall admitted she had a falling out with Novembrino, was not part of the Union Facebook page and was not included in the letter response to Toschi.) Likewise, the notion that Lukas was terminated because he had the

GC's characterizations and disregard of unfavorable evidence is one thing. Offering *his* impressions of Toschi as a witness in the Answering Brief p. 26 is beyond creative advocacy; it is wrong. GC's statement must be stricken as inappropriate.

2. The June 15 Discipline Was Personal to Hall; It Was Not a Behavior Policy

For all the reasons stated in the Exceptions, the June 15 was a legitimate discipline, personal to Hall that did not require explanation. TR 506. The ALJ's distortion of the June 15 discipline as an overly broad "Behavior Policy" to justify a finding of an unfair labor practice is an abuse of discretion. The June 15 discipline shows Hall's pattern of bad conduct over the preceding six months and multiple independent bases for discipline that would have been issued regardless of Hall's union activity. The wrongdoing, which included conduct for which Hall had previously been advised to remedy months before NCI knew of her union activity justified the discipline. Add to the itemized reasons in the June 15 discipline Hall's two additional disciplines in the same six months for over sleeping and not calling in for six hours and the ALJ's finding that Hall's termination was a discriminatory unfair labor practice is flagrantly unreasonable. The ALJ did not expressly declare that the discipline was pretextual because the facts do not support that determination. Hall was terminated for legitimate reasons and is not entitled to reinstatement or back pay.

"audacity" as a new employee to "step forward and bring complaints" would be laughable if the ramifications and costs of this case were not so dire. Other than Hall's and Lukas's self-serving, equally rambling testimony, there is no evidence that they were viewed as leaders of the organizing effort by other employees, let alone NCI management.

B. The Evidence Shows That Lukas' Union Activity Had No Bearing on the Decision to Terminate Him.

1. Lukas Was Terminated Because He Was a Fourth Quartile Performer Who Had Been Disciplined in the Previous Six Months.

Respondent's Exceptions provide significant evidence to show that Lukas was terminated because he was a fourth quartile performer who had been disciplined within the previous six months and that both Lukas' ranking and discipline were legitimate. It is notable that Lukas' union involvement is not mentioned in any of the emails concerning Lukas' performance and attitude problems that were exchanged among his managers and his supervisors. R. 25. Of greater significance is the absence of any mention of his union activity among Toschi, Nubbe, Patterson, Cappe or Johnson while discussing how they should respond to Lukas' having allowed Michael Baker to attend the company meeting. R. 49; GC 21. Lukas' performance and his discipline were the reasons he was terminated, not his union activity.

Illustrative for two reasons is Lukas' testimony about the work time "pow-wow" he had about unionizing with his trainee colleagues and Michael Baker and Patterson's knowledge of that gathering. TR 268. First, there is no evidence that Patterson took any action against any of the participants in the meeting or even mentioned it to anyone else in management. The evidence is clear that although Paterson was not happy about the Union organizing effort, she did not act on her feelings. Second, Lukas' testimony about the meeting undercuts his testimony that he couldn't pass his tests in a timely manner because he was unfairly overworked and wasn't given enough practice time. Perhaps if Lukas and his trainee colleagues spent the hours they were paid to work practicing their voice writing rather than complaining and chitchatting about forming a union, Lukas and his trainee colleagues could have passed their accuracy tests in a timely manner.

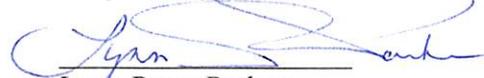
2. Lukas Was Not Terminated for Breaching an Overly Broad Prohibition on Discussing the Facility Closure; Reinstatement and Back Pay are Improper.

For the reasons stated in Respondent's Exceptions, Toschi did not promulgate an overly broad prohibition on discussing the facility closure. Toschi's direction was indisputably issued for a one-time, specific and limited purpose that was rendered moot within hours of its implementation. However, even if her instruction could be construed as a breach of what the ALJ construed to be an overly broad confidentiality policy, it is irrelevant to the central issues and does not support the remedies of back pay and reinstatement of Lukas. Lukas was not terminated for breaching Toschi's directive. He was terminated for allowing Michael Baker to attend the meeting, which, of course, happened before Toschi said anything about keeping the closure confidential until NCI could notify the remaining employees, clients and vendors. As there is no connection between the alleged overly broad confidentiality policy and Lukas' termination, an award of reinstatement and backpay is illogical and unjust.

II. THE ALJ ABUSED HIS DISCRETION AND VIOLATED LAW AND POLICY

NCI has been deprived of its rights under the laws of at-will employment and the Business Judgment Rule. Neither the Union, the ALJ nor GC is qualified to run NCI and neither has a right to interfere with NCI's operations, create and implement NCI's policies or dictate the qualifications of NCI employees. For these reasons, the ALJD should be overruled and neither Hall nor Lukas should be reinstated with back pay.

Respectfully submitted,



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CERTIFICATE OF SERVICE

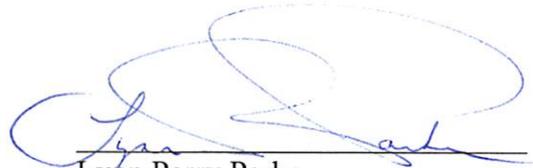
I HEREBY CERTIFY that on this 24th day of November 2017, a copy of RESPONDENT'S REPLY BRIEF was served by email to:

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