

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

NATIONAL CAPTIONING INSTITUTE, INC.

**Respondent
and**

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

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

Charging Party

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

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Counsel for the General Counsel’s Cross-Exceptions 1 and 2 were filed in regard to the ALJ’s failure to find that Respondent was unlawfully motivated in issuing a disciplinary warning to Marie Hall on June 15, 2016. Cross-Exception 3 took issue with the ALJ’s failure to make clear that Respondent’s criteria for assessing the retention of employees after the closure of its Dallas facility were entirely pretextual.

As discussed below, in its response to Cross-Exceptions 1, 2, and 3, Respondent largely failed to take on Counsel for the General Counsel’s arguments.

A. The Judge’ erred in finding that Respondent met its burden under *Wright Line* regarding Hall’s June 15, 2016 written warning (Cross-Exceptions 1 and 2)

In its Brief in Support of Cross-Exceptions, Counsel for the General Counsel noted that in finding the June 15, 2016 discipline lawfully motivated, the ALJ overlooked evidence of “disparate treatment, [Respondent’s] post hoc, kitchen-sink approach, the fact that many of the

reasons cited were, in fact, protected activity, and the fact that Respondent's evidence for the discipline was largely a byproduct of its unlawful surveillance."

With respect to the evidence of disparate treatment, in its Answering Brief, Respondent glosses over the discrepancy between its treatment of Hall and others who discussed a co-worker's medical condition. Although the supervisor had no reason to provide specifics about the co-worker's medical condition to Hall, Respondent dubs the supervisor's disclosure as "limited and purposeful" while using a list of adjectives to characterize Hall's discussions about the impact of the co-worker's medical condition as "not comparable." However, the discussion of the co-worker's medical condition are quite comparable and the inequity of Hall being disciplined for discussing the medical condition in the context of working conditions while the supervisor was not disciplined for unnecessarily providing Hall with the details to begin with is unsatisfactorily explained.

With respect to Counsel for the General Counsel's arguments regarding Respondent's kitchen-sink approach to the discipline, Respondent does not respond so much as double down. Respondent asserts that the June 16, 2016 discipline was in response to a variety of matters including: a year-long dispute concerning domestic partner healthcare coverage; a May 24, 2016 complaint about coming into the office; a service dog request; private conversations in the instant messenger system; and the discussion of the co-worker's medical condition. This classic "piling on" shows that Respondent Employer was using anything it could think of to justify disciplining Hall.

With respect to the fact that the private messages were only discovered because of Respondent's unlawful surveillance, Respondent's assertions that its surveillance was lawful are unavailing. As the judge found, and as has been fully briefed elsewhere, Respondent's obsessive

searches of private exchanges for keywords such as “union” and “CWA” were unlawful by traditional standards even if conducted through novel means.

Respondent’s attempts to downplay Hall’s involvement in the organizing campaign should also be disregarded. Contrary to Respondent’s assertions in its Answering Brief (at 14-16), the evidence clearly establishes that Respondent knew that a steno-captioner was involved in the organizing effort from the time it learned of the effort. (Tr. 136-37, LL. 21-17; GC Exh. 42). Hall was the only steno-captioner active in the effort at this time. (Tr. 179-80; LL. 14-3). Although Hall did later have a falling out with Chris Novembrino, this was related to personal issues between Novembrino and Aleya Vaughn. (Tr. 238; LL. 7-24). Contrary to Respondent’s assertions, it was ultimately Novembrino who pulled away from the organizing effort, while Hall remained involved even after her discharge. (Tr. 231-35).

Thus, Respondent has failed to rebut Counsel for the General Counsel’s arguments in support of Cross-Exceptions 1 and 2.

B. Respondent’s purported reasons for discharging Hall and Lukas were entirely pretextual (GC’s Cross-Exception 3)

In support of Cross-Exception 3, Counsel for the General Counsel emphasized two critical facts: (1) Respondent initially proposed retaining all captioners and (2) the same list which Respondent used to determine which employees would be discharged also included tabs regarding the eligibility for union representation. In its Answering Brief, Respondent simply fails to address either of those facts.

Respondent’s plans for the captioning employees could not have been clearer when Chief Operating Officer Jill Toschi submitted her initial proposal for the closure of the facility on March 15, 2016: “I propose that all employees be given an opportunity to relocate to another

NCI facility or to work as remote employees, with the exception of the Broadcast Support Staff. . . .” (R. Exh.1). In its Answering Brief, Respondent again points to no reason why those plans changed. Nor does it even address, let alone explain, why the unsanitized version of a spreadsheet that contained details regarding who would be retained also contained details of union support.

Respondent has alternatively argued that its decisions to discharge Hall and Lukas were based on the objective application of well-defined criteria to all of its employees and that it wanted to discharge Hall anyway and simply saw the closure as an opportunity to “make a clean break.” Respondent has expressly disavowed its most reasonable explanation for the reevaluation, to assess whether employees would be able to perform their work remotely, because this rationale is clearly absurd as applied to Hall. (R. Exception 29). Respondent asks the Board to simply accept that, for some unexplained reason unrelated to the Union, it decided to discharge two employees because they had received disciplinary actions (which were evidently not grounds for termination at the time they were issued) within an arbitrary six-month period.

Thus, it is clear for the reasons stated in Counsel for the General Counsel’s Brief in Support, that Respondent’s decision to implement criteria for assessing the continued viability of employees after the closure was made only in response to the organizing drive. The evidence supports a finding that the Employer’s retention test was concocted after the fact as a justification for its decision to discharge Union-supporting employees Hall and Lukas.

Based on the above, General Counsel again urges the Board to adopt the Judge’s findings in this matter except as modified based on the matters raised in the General Counsel’s Cross-

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief to Cross-Exceptions has been served this 26th day of December 2017, via electronic mail upon each of the following:

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