UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BODEGA LATINA CORPORATION **Case 21-CA-183276**
d/b/a EL SUPER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

BODEGA LATINA'S REPLY TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

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INTRODUCTION

The Counsel for the General Counsel's and the Union's Answering Briefs cover much of the same ground with a few noted exceptions. To avoid repetition, Bodega Latina addresses in this Reply the CGC's and Union's failure to point to evidence or law supporting the ALJ's erroneous and prejudicial evidentiary rulings, improper adverse inferences, refusal to accept a reasonable settlement agreement, erroneous finding on the March 29 email, and improper ordering of several extraordinary remedies unsupported by the evidence or Board law. Bodega Latina addresses the CGC's and Union's repetition of the ALJ's erroneous *Wright Line* findings in its Reply to the Union's Answering Brief.

On the former issues, the CGC and Union do little more than restate the ALJ's faulty conclusions and reasoning if they address the issues at all. They certainly do not shed any new evidentiary or legal light in support of those erroneous conclusions and reasoning.

I. THE ALJ PROHIBITED FUNDAMENTNAL CROSS EXAMINATION OF THE KEY WITNESS, VIOLATING BODEGA LATINA'S DUE PROCESS RIGHTS.

The ALJ committed reversible error when he prohibited Bodega Latina from cross examining Beltran—the alleged discriminate and key witness—about her perception, memory, and state of mind during a critical time period in the case: March 25 and 26, immediately after Beltran's surgery, during which time she purportedly took multiple phone calls where Store Director Luna—according to Beltran—both granted and denied Beltran's vacation payout request. The CGC, like the ALJ, claims that questions about whether Beltran took powerful post-surgery pain and other medications during the critical time period lack relevance because Beltran did not exhibit memory lapse while testifying. [CGC Br. 31.] The CGC, like the ALJ, misses the point. Questions about Beltran's state of mind on March 25 and 26 do not to call into question Beltran's memory *at trial*; they explore whether Beltran would have heard, understood, and remembered the alleged phone calls accurately at the time they happened, *on March 25 and 26*. Indeed, Beltran could have taken medications that caused hallucinations or short term memory loss (which might explain why her testimony about the purported March 25 or 26 phone call with

Perez makes no sense). But we don't know because the ALJ prohibited that inquiry altogether. Neither the CGC nor the Union respond to that point.

The CGC tacitly acknowledges that Beltran's testimony about the alleged March 25 or 26 phone call between Beltran and Perez makes no sense as the CGC goes on to claim that the ALJ did not rely on the conversation. [CGC Br. 28-29.] But that claim is patently false and it—again—misses the point: Beltran's nonsensical testimony about that alleged conversation highlights the fundamental reason to question Beltran's memory of the critical events on March 25 or 26. But the ALJ prohibited cross examination about drugs affecting her state of mind *and at the same time* fully credited Beltran's testimonial recollection of events on those days. Moreover, the ALJ relied on that conversation at least *seven* times in concluding that "Luna denied Beltran's March 22 time-off request *again* on March 25 or 26 when he called her at home." [ALJ Dec. 17 n.19; *see also id.* 8 n.9, 11, 21, 22, 27, 28.] In the face of the direct contradictions to Beltran's testimony and the ALJ's refusal to allow cross examination on a key point, the ALJ's evidentiary rulings and factual findings based on the phone calls that day cannot stand.

The CGC further claims that Beltran's confused testimony about the March 25 or 26 phone conversation with Perez "in no way undermines her credibility" because it is "common practice" for witnesses to use their Board affidavit "to refresh their recollection." [CGC Br. 31.] But no one used Beltran's affidavit to "refresh her recollection." To the contrary, Beltran failed to testify to the purported March 25 or 26 phone call *at all* on the CGC's direct exam, and said nothing about any such call when asked directly about it by the CGC. Beltran did not testify about any March 25 or 26 call until impeached with her prior inconsistent Board affidavit, and then she suddenly "remembered" an exchange with Perez that contradicts other testimony and documentary evidence. That sequence alone establishes the importance and relevance of Bodega Latina's due-process right to examine Beltran about medication factors that could have affected her ability to perceive, encode, or retain information from the post-surgery March 25/26 time period.

For its part, the Union claims that evidence regarding Beltran's state of mind during the March 25 or 26 phone call "would have created undue prejudice that far outweighed the minimal probative value in this line of questioning." [Union Br. 21.] Setting aside that the ALJ made no such ruling, the Union claims "undue prejudice" would have resulted from Beltran losing privacy over her health information. [*Id.*] "Prejudice" does not mean "evidence that the witness would prefer not to discuss." Prejudice in the context of Rule 403 means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See, e.g.*, FRE 403 Advisory Committee Note. And evidence is not unduly prejudicial because it suggests the witness could not accurately remember key events. *See, e.g., United States v. Looking Cloud*, 419 F.3d 781, 785 (8th Cir. 2005) ("Evidence is not unfairly prejudicial because it tends to prove guilt, but because it tends to encourage the jury to find guilt from improper reasoning."); *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (stating that FRE 403 "does not offer protection against evidence that is merely prejudicial, in the sense of being detrimental to a party's case").

Thus, in prohibiting Bodega Latina from cross examining the key witness about her post-surgery drug intake, the ALJ deprived Bodega Latina of its due process right to defend itself. That decision constitutes reversible error.

II. THE ALJ ERRED IN ADMITTING SETTLEMENT COMMUNICATIONS.

The ALJ admitted settlement communications over Bodega Latina's objections despite the Board's strong policy against doing so. *See* NLRB Casehandling Manual § 10402; Bench Book § 16-408. Both the CGC and the Union focus their arguments in support of the ALJ's decision exclusively on the attachment to GC Exhibit 1(l). The CGC and Union ignore the fact that the ALJ admitted *five* exhibits containing settlement discussions, GC Exhibit 1(j), (l)-(o), including emails between the CGC and the Company's attorney. [GC Exhibit 1(m) at exhibit B.] The CGC and the Union offer no explanation for why the ALJ could properly admit such core settlement documents. The Union claims that the exhibits do not deserve protection under FRE 408 because Bodega Latina "was not trying to reach a resolution" of the case. [CGC Br. 22.] But

that is precisely what Bodega Latina was trying to do: resolve the case short of litigation. That Bodega Latina filed a motion to approve the settlement proves Bodega Latina's desire to settle the case with the offered terms. And the Board's process contemplates that ALJs facilitate settlement, even in cases where the CGC and charging party will not agree to settle on reasonable terms, and the only way to put an issue before the ALJ is to file a motion. Here, if the Board upholds the ALJ's ruling admitting the settlement communications, it will substantially impact parties' ability to engage in free and frank discussions with the ALJ to settle cases.[1]

III. THE ALJ IMPROPERLY IMPOSED ADVERSE INFERENCES.

The ALJ erred when he imposed an adverse inference based on the absence of testimony from (1) a *former* manager, and (2) the chief legal officer of the entire corporation, whose communications are protected by the attorney-client privilege. As to the former manager, neither the CGC nor the Union cite a single case for the proposition that the Board will impose an adverse inference for an employer's failure to call a *former* manager. Indeed, each of the cases the Union cites in its brief (at 23) involved managers who still worked for the employer "at the time of the hearing." *See, e.g.*, *Parksite Grp.*, 354 NLRB 801, 803 (2009) (imposing an adverse inference for failure to call a manager "who was still employed by Parksite at the time of the hearing"); *Int'l Automated Machines*, 285 NLRB 1122 (1987) (same, for manager who "was still the Respondent's production manager at the time of the hearing").

The Union also cites *Property Resources Corp.*, 285 NLRB 1105 (1987), but that case actually supports Bodega Latina's position. There, the Board held that the ALJ erred in drawing an adverse inference against the employer for not calling two witnesses because one witness "was the president of the Charging Party Union" and the other "had been fired by the

[1] The Union claims that Bodega Latina inconsistently argues that the ALJ should have accepted the consent order. [*See* Union Br. 23.] But there is no inconsistency. The ALJ should not have admitted settlement documents into the record, and the ALJ should have granted Bodega Latina's motion to approve the Consent Order settlement. Both are true. As discussed below, Bodega Latina offered a full standard-remedy settlement, excepting only to the CGC's demand for default language. Per GC Memo 18-02, default language cannot serve as an impediment to settlement.

Respondent by the time of the hearing." *Id.* at 1105 n.1. The Board explained: "An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness *may reasonably be assumed to be favorably disposed to the party*." *Id.* (emphasis added). But where the witnesses do not work for the employer, "[i]t cannot reasonably be assumed that [the former manager and the union president] were favorably disposed toward the Respondent." *Id.* Thus, the Board held: "it was improper to infer that the only reason for the Respondent's failure to call those witnesses was a fear that they would truthfully testify in a manner adverse to its version of events." *Id.* In its recent decision in *Heart and Weight Institute*, 366 NLRB No. 53, *1 n.1 (March 30, 2018), the Board similarly held that the ALJ improperly "drew an adverse inference against the Respondent for its failure to call former sales manager John Finley" because "[a] former employee, such as Finley, however, is not generally considered to be under a party's control."

As to General Counsel Angulo, the Union claims Angulo "was free to avoid discussing attorney-client protected communications." [Union Br. 26.] But that argument fails to address Bodega Latina's legitimate concern that merely putting an employer's chief legal counsel on the witness stand potentially exposes the organization's attorney-client communications. Thus, imposing an adverse inference in those circumstances forces an employer to choose between risking those communications and risking an adverse inference. That is particularly so in a case like this where Bodega Latina presented non-privileged evidence that Angulo did not know about Beltran's union activities, and the Union and the CGC presented no evidence (other than speculation) to contradict that evidence. Thus, the ALJ did not merely fill an evidentiary gap, but went further and discredited uncontroverted evidence through an adverse inference. Further, the CGC and the Union do not explain how the ALJ could have imposed an adverse inference to conclude *both* that Angulo did not make the decision on the vacation payout *and* that Angulo knew about Beltran's union activities. Those inconsistent holdings cannot withstand scrutiny.

IV. THE ALJ ERRED BY REFUSING TO ACCEPT THE SETTLEMENT AGREEMENT.

In response to Bodega Latina's exception to the ALJ's failure to accept the consent agreement, the CGC claims that the settlement agreement offered did not meet *Independent Stave Co.*, 287 NLRB 740, 743 (1987). [CGC Br. 30.] Significantly, the ALJ did not evaluate the settlement agreement under *Independent Stave* but evaluated it under the now-overruled *USPS*, 364 NLRB No. 116 (2016). Under *Independent Stave*, the ALJ should have accepted Bodega Latina's reasonable consent order, which offered a 60-day notice posting at Beltran's store and $550 in back pay (that the CGC later admitted was not owed). [GC Ex. 1(j) at exhibit B; *see also* GC Ex. 1(m) at 3 and exhibit B (CGC stating that "no money is owed to this employee").]

Bodega Latina "agree[s] to be bound" by the settlement. "The settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation," which is "the most important consideration." *UPMC*, 365 NLRB No. 153, *12 (2017). The settlement agreement addresses all of the standard remedies that the Board would order in such a case. There is no evidence of fraud, coercion, or duress. The CGC claims that Bodega Latina has a history of violating the Act, but the only evidence in that regard is a statement in a previous settlement agreement. Moreover, before trial, the CGC offered only one objection to the agreement: it did not include "default language." [*See* GC Ex. 1(l) at 2 n.2, (m).] Since the CGC took that position, General Counsel Peter Robb instructed Regions not to require default language in settlement agreements. GC Mem. 18-02. Given those facts, the ALJ should have accepted the consent agreement, and the Board should do so now.

The CGC argues that "it would serve no purpose" for the Board to accept the settlement agreement "now that the case has been litigated." [CGC Br. 30 n.5] But the parties continue to litigate the case, and may continue to litigate it through the courts of appeals. Thus, accepting the settlement agreement now would "greatly expedite[] resolution of this proceeding" and conserve Board resources, "permitting the Agency to devote its limited resources to more intractable disputes, often involving nuanced or difficult issues of law." *UPMC*, 365 NLRB No. 153, *4,

*13 (noting that the "process could take years, and the outcome is anything but certain"). It would further provide guidance to ALJs on how to evaluate such agreements, particularly in cases like this where there is no union organizing, no discharge, no financial harm, and no widespread violations affecting multiple employees.

Notably, the Union does not argue that the ALJ should not have accepted the settlement, even though it acknowledges Bodega Latina's exception on this issue. [Union Br. 23.]

V. THE MARCH 29 EMAIL DID NOT VIOLATE THE ACT UNDER THE TOTALITY OF THE CIRCUMSTANCES.

The ALJ found that Luna's March 29 email string violated Section 8(a)(1) of the Act, despite that the facts surrounding Luna giving Beltran the email demonstrate that no reasonable employee in similar circumstances would interpret the email as a threat. The CGC argues that Luna's intention in handing Beltran the email is irrelevant. [CGC Br. 26.] That argument misses the mark. From an objective view, the facts show that Beltran went to the manager and requested information from the manager, and the manager assisted her with that request by handing her the only source of information he had to answer her question. How can that undisputed sequence constitute a threat? *See, e.g., Riverside Indus., Inc.*, 208 NLRB 311, 320 (1974) (fact that employee initiated the conversation weighs against finding a threat). The facts also show that the employee did not understand English and did not understand the allegedly threatening comment buried in the email chain until months later. Well-established Board law requires the Board to evaluate the totality of the circumstances. *See, e.g., Extruded Metals, Inc.*, 328 NLRB 82, 84 (1999) ("[I]t is elemental that the standard in determining whether an 8(a)(1) violation has been established is whether the alleged statement, *in the totality of circumstances*, would reasonably induce fear of reprisal for union or other protected activity.") (emphasis added). Objectively evaluating all of the surrounding circumstances, no reasonable employee would view the email as a threat.

VI. BOARD LAW DOES NOT SUPPORT THE SEVERAL EXTRAORDINARY REMEDIES THE ALJ IMPOSED.

The Union does not devote one word to defending the several extraordinary remedies the ALJ imposed. The CGC superficially defends those extraordinary remedies without directly addressing any of the cases or arguments in Bodega Latina's briefing. Those omissions are significant where Board law places the burden of proving the need for extraordinary remedies on the charging party and general counsel. Simply put: Board law does not support the *five* extraordinary remedies the ALJ imposed—many of which *no party requested*.

The ALJ found only two discrete violations involving only one employee at only one store. The alleged violations involved the highly unique situation of an employee requesting a vacation payout (an unusual request at the Company) at the precise time Bodega Latina processed a complex settlement payment on vacation pay. The ALJ failed to explain how such discrete, unique facts amount to a "serious" violation under the Act. The CGC similarly offers no explanation.

The CGC argues that the ALJ appropriately ordered a notice posting and reading at seven stores because the prior settlement agreement that culminated in the April 8 payment "closely related" to the allegations in this case. [CGC Br. 36.] But the CGC offered no evidence that the alleged violations here affected employees in other stores or that other employees even knew about the alleged violations. And the CGC cites no case law to support the proposition that the Board can order notice postings and readings at stores other than where the violations occurred. Under *Consolidated Edison*, 323 NLRB 910, 911-12 (1997), the Board must reverse the overly broad remedy.

As to the ALJ's decision to order General Counsel Angulo to read the notice, the CGC fails to address any of the arguments or case law cited in Bodega Latina's briefs. The CGC offers no cases to support the idea that the Board can order a specific individual to read a notice where the ALJ also expressly found that the individual had no involvement in the alleged violations. The CGC simply cites more cases ordering a reading by the manager specifically involved in the

violations. [CGC Br. 38.] Further, the CGC offers nothing to explain how she met her burden to prove the necessity of such an extraordinary remedy, particularly where the CGC never asked for that remedy in the first place.

The CGC tries to paint Bodega Latina as a recidivist because the Company settled other cases. But the CGC and the ALJ cannot rely on settlements to show violations of the Act. *Parker Seal Co.*, 233 NLRB 332, 335 (1977). Moreover, even assuming those settlements established violations of the Act, such settlements do not show the Company disregards employee rights. Rather, they show the Company accepts ownership of alleged mistakes and takes steps to remedy them without requiring the NLRB to expend resources on full-blown litigation. Board law promotes settlement, and thus requires rewarding rather than punishing such conduct; otherwise the Board will send a strong signal that employers must litigate every case to the fullest extent to protect their rights.

For the foregoing reasons, including those stated in Bodega Latina's Brief in Support of Exceptions and Reply to the Union's Answering Brief, Bodega Latina requests that the Board dismiss the pertinent Complaint allegations or modify the ALJ's Order accordingly.

DATED this 4th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on April 4, 2018, to:

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The undersigned certifies that I served a copy of the foregoing via email on April 4, 2018, to:

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