

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

**GLOBAL CONTACT SERVICES**

**and**

**Case 29-CA-211765  
29-CA-216547  
29-CA-218276**

**TRANSPORT WORKERS UNION, AFL-CIO  
LOCAL 100**

**RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

The Consolidated Complaint asserts that Global Contact Services (“GCS” or “the Company”) violated Section 8(a)(5) of the National Labor Relations Act (“NLRA” or “Act”) by failing to furnish “physical copies” of audio recordings in connection with the now-resolved arbitrations of Danika Downey and Lorraine Williams. The allegation also extends to an eight second recording the Union requested concerning a former employee, Minkaru Kaira. It is undisputed the Union made that request after withdrawing Kaira’s grievance. Moreover, the purpose of the request was solely to explore Kaira’s now dismissed NYC Department of Consumer Affairs complaint. The Union did not represent Kiara in that Agency matter. The final allegation relates to a document GCS actually provided to the Union in a timely manner. For the reasons discussed herein, the Complaint must be dismissed because GCS has at all times met its obligations under the Act.

First, the Complaint must be dismissed because GCS timely provided the information by repeatedly making the audio recordings available to the Union to listen to and take notes. In fact, the parties stipulated at the hearing that GCS has never refused a Union request to listen to calls. Moreover, Laine Armstrong, counsel for the Union, (“Armstrong”), testified that she was able to have the calls replayed as often as needed and could take breaks to discuss the recordings with grievants. In the circumstances presented, this method of providing information to the Union is lawful under extant Board law. See, e.g. *Roadway Express*, 275 NLRB 1107 (1985); *Abercrombie & Fitch Co.*, 206 NLRB 464 (1973).

Second, GCS has repeatedly apprised the Union in writing that the audio recordings are the sole property of its client, the New York City Transit Authority (“NYCTA”). The Union has, at all times relevant to this Complaint, been in possession of that contract and on notice that providing physical copies of the recordings would constitute a breach of the contract, triggering the NYCTA’s right to levy monetary fines against GCS and/or terminate the one-hundred-fifty million dollar (\$150,000,000) contract. GCS introduced into evidence and explained the contract’s extensive confidentiality provisions. Moreover, it is undisputed that in response to GCS’ inquiry, NYCTA issued a written directive that GCS not provide copies of audio recordings to third parties including the Union. Board law does not require GCS to disregard the instructions of NYCTA, the owner of the recordings.

Third, the undisputed evidence established that GCS does not even have the computer privileges necessary to provide audio recordings to the Union or any other third party.

Fourth, **Union counsel Laine Armstrong conceded that with respect to Williams and Downey that she did not even need copies of the calls!** In addition, Armstrong testified that the Union would be willing (but apparently never attempted) to make transcriptions of the calls in lieu of receiving physical copies of recordings. Armstrong’s admissions and, frankly, unbelievable testimony throughout the hearing demonstrate that the instant charges should never have been filed. Moreover, the Union’s entire approach to the issue was antagonistic and not in good faith.

Fifth, the Complaint must be dismissed because the Union's information requests were issued a matter of days prior to scheduled arbitrations and, therefore, constitute improper pre-arbitration discovery. Indeed, the issues for which the information requests were made became moot long ago primarily because GCS has met its obligations under the Act by providing the information to the Union (i.e. the opportunity to listen and take notes of the recording upon request).

In the case of Minkaru Kaira, the request was rendered moot when the Union withdrew his grievance before the unfair labor practice charge was even filed. The Union's articulated need for the eight second audio recordings in connection with Kaira's Agency complaint filed with the NYC Department of Consumer Affairs ("DCA") has been specifically rejected by the Board. See, *S. California Gas Co.*, **342 NLRB 613 (2004)**. Aside from this determinative precedent, Kaira was no longer a GCS employee at the time he filed that complaint, there was no grievance pending by which he could seek reinstatement, the DCA dismissed his complaint in May 2018, and the Union never represented him in that matter..

The requested audio tapes respecting Lorraine Williams and Danika Downey are likewise moot because those underlying grievances were resolved by final and binding arbitration decisions issued pursuant to the grievance and arbitration procedure of the applicable collective bargaining agreement. The arbitration decisions and undisputed testimony constitute proof positive that the overwhelming majority of the calls contained little or no audio content and were simply "dead air". Neither the Union nor the General Counsel have ever articulated a legitimate reason for requesting what amounts to the "sounds of silence".

Finally, the parties have a long-standing practice whereby the Union has requested and been permitted to listen and take notes since the inception of the collective bargaining relationship in September 2016. In addition, the underlying charges in this matter were untimely filed under Section 10(b) of the Act as the Union has been on notice since April 2017, when it first started requesting physical copies of the recordings, that (a) GCS was contractually prohibited from providing the recordings and (b) was specifically instructed by the NYCTA it was not permitted to do so.

Accordingly, based on the record evidence and the legal arguments that follow, GCS respectfully asks the Administrative Law Judge to dismiss the Complaint in its entirety.<sup>1</sup>

## **II. STATEMENT OF FACTS**

### **A. The Call Center**

In 2013, GCS entered into a contract with the NYCTA to provide call center services in connection with the City's Access-A-Ride Program. (TR. at 272; Resp. Ex. 8). GCS operates the call center services on a 24/7 basis out of a facility located in Long Island City, New York. (GC Ex. 5) The program provides pre-planned bus services to elderly and disabled ("customers") throughout the five boroughs. GCS employs approximately 800 employees, referred to as "associates", who are responsible for answering eight to nine million calls per year from customers throughout the five boroughs. GCS associates handle customer calls and reserve their transportation, often to critical medical appointments, on the NYCTA Access-A-Ride buses to and from home. GCS associates also handle same-day customer calls seeking to change pending reservations or to address any issues that may arise with customer reservations. (TR. at 289)

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<sup>1</sup> References to the record are set forth as "TR at \_\_\_\_". References to the exhibits in the record are set forth as "Resp. Ex. \_\_\_\_", "Jt. Ex. \_\_\_\_" and GC Ex. "\_\_\_\_".

**B. GCS' Contract with the NYCTA**

GCS' multi-year contract with the NYCTA is valued at over 150 million dollars. (TR. at 290). The Company faces fines under the contract if it does not meet established benchmarks and is subject to termination of the contract if it does not live up to the NYCTA expectations. (R. at 290; Resp. Ex. 8; GC Ex. 5).

Relevant Provisions of the contract include, but are not limited to, the following:

**Article 106 (Credits for Performance Deficiency) Section H (Conditions Precedent to Payment)**

Unless otherwise stipulated in writing by the parties, the **Authority shall make payment subject to the following conditions**, which are, unless waived in whole or in part by the Authority in writing, conditions precedent to payment:

**The Contractor is not, in the NYCT Project Manager's and/or Contract manager's opinion, in breach of any terms or provisions of this Contract...**

**Article 115 (Contractor's Expertise and Personnel) Section B**

...[Contractor] shall adhere, among other things to the confidentiality restrictions set forth in Article 128... and the provisions of all applicable Nondisclosure Agreements

**Article 128 (Confidentiality of Personal Information and Compliance with Personal Privacy Protection Laws)**

...The Contractor shall not disclose the Personal Information to anyone other than Authorized Users as defined below....

\*\*\*

In no event shall the Contractor otherwise provide, make available, provide access to or convey, with or without consideration, Personal Information to any third party, except as otherwise provided by law.

**Article 235 (Confidentiality/ Advertising Limitation )**

Contractor... shall keep confidential all information furnished to it (them) by the Authority or otherwise learned by it (them) in the course of performance hereunder.

**Scope of Work -- Section 2 (Operations) Subsection F (Personnel Requirements)**

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3. NYCT requires that all Contractor personnel treat all Customer information as confidential. The Contractor shall prohibit the inappropriate use, unauthorized release and/or dissemination of customer information.

**Scope of Work -- Section 3 (Administrative Functions) Subsection C (Error Investigation/Resolution)**

The Contractor shall provide a comprehensive plan to investigate errors regarding quality of service issues and report their findings and action taken in writing... If a complaint investigation request is made by the NYCT PM staff, the complaint investigation shall include comprehensive research of the reason for the complaint, including listening to recordings and revising AVL and ADEPT records. The Contractor shall keep daily, weekly and monthly reports generated by the Call Management System (CMS) to identify specific telephone extensions that individuals are logged into at any given time on a daily basis... NYCT shall be the arbiter as to responsibility for any error or mistake.

**Scope of Work – Section 4 (Systems and Software Platforms) Subsection E (Other Hardware/ Software)**

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No unauthorized software (software not approved by Transit) shall be installed on workstations connected to the NYCT Enterprise Network. Contractor shall submit waiver request to install any required software in order to operate the system under Contract. Approval of such request is at the discretion of NYCT.

**Attachment 9 (Non-Disclosure Agreement)**

... We agree that we shall have acquired no rights to the Paratransit Information except to use in connection with respect to Work under this Contract.

\*\*\*

**We shall not disclose, provide or otherwise make available the Paratransit Information... In addition, we shall... not... disclose their source or copy or duplicate the paratransit information or portions thereof... except as expressly permitted in writing by NYCT for any purpose not related to the contract...**

We further acknowledge (i) that any breach or attempted or threatened breach, by [contractor] of the obligations contained in this agreement could result in irreparable injury to the Authority for which there would be no adequate remedy at law

Frank Camp, GCS' Senior Vice President ("Camp") discussed these provisions in detail at the hearing. Camp acknowledged that confidentiality provisions are "covered several times in the agreement" because GCS has access to sensitive customer information" and "there's a variety of data that we see to be able to be able to provide the service that's covered under the confidentiality agreement." (TR at 292, 293). Camp summarized that pursuant to the contractual provisions GCS "agreed.. not to share it with third parties" including the Union. (TR at 203).

**C. The Audio Recordings Belong to the NYCTA and GCS is contractually prohibited and is denied the capability of saving and making copies of the calls**

It is undisputed that NYCT owns the equipment that GCS uses to perform the call center services. Camp testified credibly as follows:

So the physical facility, the furniture, the actual call-taking system, the call-recording system, the PCs that sit on the desktops, anything associated with the physical facility and its equipment to provide the service belong to New York City Transit. We are -- in this case are a staffing service who provides the human resource to perform the tasks every day.

TR. at 291.

Camp further testified that the New York City Transit-owned desktops “contain[] all of [NYCTA] systems on it” and those desktops house the systems the call center uses. One such NYCTA system is called NICE. Mr. Camp testified as follows regarding that NYCTA system:

Q What does your NYCT-provided computer system allow you to do with regards to associate calls at the call center?

A The system itself, the NICE system, does the call recording itself. And there's a database that we can access where we can search for and find information related to a particular associate, or if we can relate it back to a particular call, and then we can access the recording and play it on the New York City Transit desktop.

**Our access privileges are restricted because it is not our property. So, as an example, I cannot physically save a recording myself. I have to go to New York City Transit and ask that they do it because they don't give us those privileges because it's not our information.**

Q And when you say you don't have those privileges, does that mean that the system doesn't permit you to do it...?

A It means that **if I attempted to save a call, it just will not be available to me to save.** The save option, if you know Windows, would just be grayed out for me. **It's not allowable because my user privileges, and I'm the project manager, don't allow for it. No GCS employee has the ability to save a recording.**

Q **So is it correct that your access to associate calls is limited to your ability to listen to those calls?**

A **That's right.**

Q **And have you allowed, upon request, the Union to have the same access that you have to the calls, which means listening to the calls?**

A **Yes, absolutely.**

(R. 293, 294)

The General Counsel offered no evidence to contradict Camp's testimony on these critical points. Thus, the ALJ should conclude that GCS does not own the recording equipment and has no ability to record calls or provide copies of recordings to the Union.

**D. The parties' long-established past practice of listening and taking notes of Associate calls**

The parties executed the current collective bargaining on September 9, 2016. (Resp. Ex. 11). The Union commenced requesting the opportunity to listen to calls in connection with pending grievances almost immediately upon execution of the CBA. As Camp testified:

Q. So from the inception of the contract, the Union has always requested to listen to calls?

A Yes. Even prior to that.

(R. 363, 364).

As irrefutably demonstrated in the 19-pages of emails that make up Respondent Exhibit 1, either the Union's elected officials requested to listen to calls or GCS invited the Union officials to listen to the calls even without the Union's request. Those emails start on September 8, 2016 and continue through June 6, 2018. (Resp. Ex. 1). The Union continued to request listening to the calls, without requesting receipt of physical copies of the recordings, until April 2017.

The parties stipulated at the hearing that GCS has never refused a Union request to listen to calls. (R. at 138) Further, Armstrong testified on cross examination, albeit evasively, that whenever she availed herself of the opportunity, she was permitted to take notes of the calls, ask to have the calls stopped and have them replayed as often as necessary.

Q. ...it's a fact that you've made numerous requests to listen to calls at the call center, correct?

A I have made requests to listen to calls at the call center.

Q And the company has made those calls available to listen to, isn't that also true?

A Sometimes they have, yeah.

Q And when you have these listening sessions, the company does not -- prevent you from taking notes of the content of the call, correct?

A Prevent us? No.

Q So if you wanted to take notes of whatever the substance of a recording would be, you're entitled to do that, correct?

A If I could write fast enough, sure.

Q Has the company -- well, the company doesn't stop you from-- stop you from requesting to play the call a second time? Do they?

A I mean, I guess not.

(TR. at 127)

Armstrong attempted to cloud the record with respect to her ability to have calls “paused”, before begrudgingly admitting on cross examination that she had never asked for that to occur:

A I mean, did the calls start at some point and stop at some -- some point, yes. If you're asking whether I know if there's a function by which Mr. Camp on his tablet can pause them I don't know if he can or if he can't.

Q Is that because you've never asked him to stop a call --that you have no knowledge of this?

A I don't -- I don't recall ever asking for a call to be stopped. We've re-listened to calls -- listened to them more than one time, but I don't recall ever having the calls paused. That doesn't mean that it's never happened or that it can't be done. I just don't know.

(R. at 129)

Armstrong's evasive testimony continued:

Q So there are multiple occasions that you can request to listen to the calls, correct?

A **No. We can only request once.** It's just whether in the timeframe -- **I mean, I guess I could request to listen to the calls every day, yes, I could.**

(TR. at 134)

Just minutes later, Armstrong again backtracked testifying on cross examination:

Q ... there's nothing -- nothing has prevented you from listening to the recording on more than one occasions comparing your notes to the accuracy of your -- of what you listened to, correct?

A **We generally are only played the recording on one date.**

Q You previously testified that Mr. Camp has played recordings more than once at your request, isn't that right?

A When we sit at the table at one time, yes.

Q **In response to your request for copies of recordings, the company invited you to come back and listen to the recordings again if you wanted, isn't that right?**

A **I don't know if they have every time**

\*\*\*

they have said the accommodation they will make is for us to go to Frank Camp's office or the conference or GCS with a GCS employee present and listen to the calls.

(TR. at 144, 145)

Despite her previous admissions and the parties Stipulation on the record, Armstrong persisted providing wavering, self-contradictory answers to straight-forward questions on cross examination regarding the Union's access to calls and ability to take notes:

Q So since we've been speaking about listening to recordings, would you agree that there have been dozens of occasions when the Union has been given access to listen to recordings and to -- and to take notes of those recordings?

A **We're never -- we're never given access to them.** Frank Camp always has access. He will play them for his office or in the conference room. **In terms of take notes, yes I -- I'm not sure exactly what you mean by we've been given the opportunity to take notes. Nobody takes paper away from us or anything like that.**

**(R. at 143, 144)**

Administrative Law Judge Gardener's follow-up questions further probing this line of questioning, revealed the Union's failure to explore other means of obtaining the information:

Q. JUDGE GARDENER: Are there any rules that you're given?

A. No. Just -- there are no -- I mean, there are no rules.

Q. Can you record it on your iPhone?

A. I suppose I could because New York is a one-party state, but I never have.

(TR. at 144).

In addition to permitting the Union to listen to the calls as often as necessary and to take notes of the calls, Currie testified on cross-examination that in lieu of Camp and Currie sitting in with the Union to play the calls, non-supervisory, non-bargaining unit employees may play the calls:

Q. So you're saying that there have been situations where recordings of phone calls have been played in the presence of a GCS employee, a bargaining unit employee, a union representative, and zero GCS supervisors, zero GCS managers?

A. Yes.

Q. Okay. On what device in those instances is the recording played?

A. A New York City computer.

Q. Okay. In what room?

A. It depends. There is -- quality assurance has space. And I know that they have Wi-jacked in, which is a device where there's two sets of headphones that can go into one earphone plug. They call that Wi-jacking in. That's how employees are

coached. So I know that they do it that way. I know that they've done it in the workforce room, which is another space that's available, that they can close the door in that room, and that [] doesn't have any supervisors in it.

(TR at 379, 380)

Notably, Armstrong failed to provide this critical information to the Board Agent in her Board-sworn affidavit when she discussed GCS's accommodation to allow the Union to listen and take notes of the recordings:

I again explained why the Employer's proposed accommodation is insufficient by stating, "in response to your offer to play the audio for us at a mutually convenient time, we again note that this offer does not appear to be a good faith attempt by GCS to comply with its legal obligations with respect to information requests, but instead seems intended to disadvantage the Union at arbitration. As common sense dictates, we cannot meaningfully prepare for arbitration with our client in GCS's offices with you and Frank Camp present.

(Resp. Ex. 5)

Had Armstrong been honest in her affidavits the Region may not have even issued the instant complaint.

**E. The NYCTA has expressly forbidden GCS from providing physical copies of audio recordings to any third party, including the Union**

Commencing in about April 2017, the Union requested, in addition to the opportunity to listen to audio recordings, that GCS provide it with physical copies of the recordings. Cognizant of the express restrictions prohibiting GCS from providing audio recordings to third parties and the severe penalties associated with breaching the contract, Toni Currie, GCS General Counsel reached out to her MTA contact Pat Abargwin in April 2017:

Q. What was your discussion with Ms. Abargwin?

A My discussion with her was whether or not we could provide audio copies to the Union for arbitration information request purposes.

Q And why did you have that conversation with her?

A Ms. Armstrong had mentioned it in a grievance requesting copies. And I knew there were certain portions of our contract that had prevented that ...

Q And what, if any, information did she give you in connection with your request?

A **She said it would be a breach of our contract. It's not our property, and that if the Union wants the information, they can go to Transit to get it.**

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Q. Did you advise Ms. Armstrong of the MTA's position?

A I did.

Q Did you -- what else did you explain to her, if anything?

A I explained to her that, you know, they can listen to calls as many times as they want -- and which they have done in the past -- and you know, they can take notes and they could sit with the employee and do what they needed to do, but I couldn't give them a physical copy.

Despite the contractual restrictions and the MTA's express instructions to GCS not to provide physical copies of the audio recordings to any third party, Armstrong persisted with her demands and related barrage of unfair labor practice charges.

In order to seek a resolution, Currie raised the issue again with the MTA and received the same answer in writing on April 24, 2018 in a letter from James Kerwin, Esq., Executive Agency Counsel for the NYCTA, which states in relevant part as follows:

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As we understand it, a union representing some GCS employees has requested that GCS produce copies of AAR call center recordings for use in arbitration proceedings. **Please be advised that call center recordings are NYCT's property and should not be distributed by GCS to third parties. While there may be circumstances under which NYCT will directly provide copies of call center recordings to third parties; such as**

**in response to a duly authorized subpoena, determinations as to whether production is warranted and, if so, whether certain information is subject to redaction or withholding under the PPPL or other law should be made by NYCT, not GCS.**

(Resp. Ex. 10)

The General Counsel did not offer any contradictory evidence on GCS' inability to provide the information in the form the Union was requesting. As explained infra, Board law does not require an employer to disregard the express instructions of the owner of private property and breach a multi-million dollar contract, particularly when the information has been made available to a labor organization and union counsel concedes under oath that the information was not even required, as Armstrong did here.

**E. The information requests pertaining to associates Danika Downey, Minkaru Kaira, and Lorraine Williams**

As the parties stipulated, GCS has provided the Union with the information at issue in this case by making the audio recordings available upon request for the Union to listen and take notes. There is no credible evidence indicating that the Union could not become informed of the content of the subject calls by listening to the recordings. This is particularly true because the majority of the subject calls HAVE NO AUDIO CONTENT!

**1. Danika Downey**

On December 7, 2017, Armstrong sent Currie an email pertaining to several employees, including Danika Downey who was discharged for call avoidance and whose arbitration was scheduled for December 27, 2017. Among the requests pertaining to Downey, Ms. Armstrong requested the "audio recording of 'bad' call" and "records demonstrating Ms. Downey's alleged

call avoidance...” (Joint Ex. 1 A). Ms. Currie responded via reply email the next day, December 8, 2017 reiterating that GCS is prohibited from providing physical copies of the recordings:

As you are aware, GCS does not own the recordings of the calls and therefore cannot provide them to you. I know in the past you have subpoenaed information from NYCT. IN the immediate instance, the Union and Ms. Downey have listened to the recordings and have had time to discuss them...

(Joint Ex. 1 A)

In response to subsequent emails from Armstrong Currie responded on December 14, 2017 via letter attached to an email to Ms. Armstrong. The letter states as follows:

This letter responds to your request for physical copies of recordings of phone calls conducted by GCS associates during their employment at the Call Center.

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As you know, **the Union was specifically advised at the first arbitration regarding job performance, that GCS does not own the equipment at the Call Center. Furthermore, GCS does not own the recordings. To the contrary, you are aware that MTA owns the equipment and all recordings. Based upon this understanding you agreed to, and in fact issued subpoenas to MTA seeking this information.** Based upon the above we assumed you would follow the established procedure.

Aside from the above, and as you have been advised previously, **GCS considers the actual recordings confidential information.** The calls contain the personal information of New York City residents and we are strictly prohibited by our contract with MTA from providing copies of calls to anyone pursuant to Article 128 CONFIDENTIALITY OF PERSONAL INFORMATION AND COMPLIANCE WITH PERSONAL PRIVACY PROTECTION LAWS, wherein it specifically states, "All Personal Information shall be appropriately safeguarded and kept in a secure environment that is not shared with, or made accessible to, anyone or any entity other than Authorized Users."

Nevertheless, **we have sought to reasonably accommodate the Union's request by: 1) Playing the calls for the involved employee as well as the designated Union representative at the Call Center, 2) Playing the calls for you and other union representatives (and the involved employee) at the various grievance meetings, 3) Making the recordings available to be listened to, upon request, at other mutually convenient times, 4) Making the recordings available at the arbitration hearings.** To the

extent you have some other suggestion that does not involve providing a "hard copy" please let us know so we can consider your request.

**In closing, the Union has always had access to associate phone calls.**

There has never been any issue during the grievance procedure or in arbitration regarding the Union's access to physical copies of the calls and several arbitrations have proceeded under the procedure that has been established now for some time.

We look forward to continuing to work with you and to reasonably accommodate your requests.

(Joint Ex. 1B)(emphasis added)

Ms. Armstrong responded to Ms. Currie's letter the next day, December 15, via a sarcastic, condescending email, which even more troublingly consists of obvious untruths. First, Armstrong hurls childish insults:

- "...as always I find your revisionist history delightfully whimsical...". (Joint Ex. 1A -- Armstrong December 15 email para 1)

Second, Armstrong misleadingly complains about the alleged insufficient time to access the recordings prior to arbitration, knowing full well, as the parties stipulated, that she has the opportunity to listen and take notes of calls upon request at any time:

- "Providing access the day of an arbitration hearing is insufficient and appears calculated to cause delay." (Joint Ex. 1A -- Armstrong December 15, email para 2)

Most disturbing, however, is Armstrong's blatant lie that the Union did not receive the subpoenaed audio recording from the NYCTA in the Sabrina Jackson arbitration until over a month after the arbitration:

- "The Union did not receive a response to our subpoena from MTA until over a month after Ms. Jackson's arbitration hearing." (Joint Ex. 1A -- Armstrong December 15, email para 2)

Ms. Armstrong reiterated that falsehood in her Board-sworn affidavit provided to the Region on May 22, 2018, wherein she stated:

On or about December 15, 2017, I sent an email to Currie...In addition, I wrote that issuing a subpoena to the MTA will not work, as evidenced by the fact that, on the one occasion that the Union pursued this route, "the Union did not receive a response to our subpoena from MTA until over a month after Ms. Jackson's arbitration hearing"

(Resp. Ex. 5)

Ms. Armstrong's lies were exposed on cross examination:

Q Would you just identify the specific date that you received [the audio recording from the NYCTA]?

A June 28th. Wait. I'm sorry. I received -- there was still back and forth. I received the call first on the 21st, it looks like, June 21st.

Q June 21. And that was -- and that was well prior to Ms. Jackson's arbitration; isn't that correct?

A I don't know if arbitration went forward on the day it was originally scheduled.

Q I'm sorry.

A And I can't remember when it went forward.

Q You -- regardless of when it went forward, you received that information well prior to the day that Ms. Jackson's arbitration hearing was conducted; isn't that right?

A This information, yes. Actually, I said yes because I didn't want to keep talking about it. I can't remember exactly when her arbitration was conducted, so --

(TR at 215)

Despite Ms. Armstrong's testimonial gymnastics, it is irrefutable that the arbitration was conducted on August 23, 2017, over two months after Ms. Armstrong received the subpoenaed audio recording from the NYCTA. (Resp. Ex. 4)

Ms. Currie, sent a second letter on December 15 to Ms. Armstrong highlighting the inaccuracies in Armstrong's email received earlier that day. Currie stated:

**...Unfortunately, you continue to ignore the fact that GCS does not own the recordings, our MTA contract prohibits disclosure, and the information (including but not limited to the identify of MTA customers) is confidential.**

You have likewise failed to indicate why the established procedures are now inadequate for your purpose, or why you even need a "copy" of the recordings. We did previously furnished to you a list of the calls (including date, time, duration and description) that lead to Ms. Downey's discharge. There is no dispute regarding the content of the subject calls or the fact that Ms. Downey is the agent who participated in the calls.

**You are well aware that Ms. Downey was discharged for "call avoidance" (essentially hanging up on customers and/or not performing her responsibilities) so a "copy" of the (short) recordings would be of, at best, limited value. Thus, nearly all of the calls do not even contain Ms. Downey's voice.** For example, the call log provided to you states with regard to the calls: "no sound from agent or client", "no sound from agent but client was on the line", "client was on the line waiting for the agent", "silence on the line", etc. **You have not provided any rationale explaining why allowing the Union additional access to the recordings is "insufficient". All of the above, as well as the tone of your email and refusal to consider GCS' proposed compromise, suggests that your position is not taken in good faith.**

In these circumstances, **we have attempted to reasonably accommodate the Union's request by: 1) Playing the calls for Ms. Downey as well Judy Meyers, the designated Union representative at the Call Center, 2) Playing the calls for you and other union representatives (and Ms. Downey) at the various grievance meetings, 3) Making the recordings available to be listened to again, upon request, at a mutually convenient time, 4) Making the recordings available at the arbitration hearings, as is customary and is the procedure we used in several prior cases with the approval of Arbitrator Licata.**

Please let us know if you would like to have the recordings played again for you at a convenient time prior to the hearing. At such time you or another Union representative could take notes of the calls, if desired.

Once again, if you have other suggestions that do not involve receiving a "hard copy" of the recordings please let us know so we can consider your request.

(Joint Ex. 1C) (emphasis added)

The Complaint allegation that GCS has failed to furnish “documentary records of all calls by Downey for the period reviewed by Respondent in deciding to terminate Downey” is without merit. First, there is no claim GCS failed to respond to all of the Union’s other requests for information during the years the CBA has been in existence. Armstrong testified that the parties have conducted at least twenty (20) arbitrations (TR at 62).

Second, the arbitration hearing in the Downey case proceeded on December 20, 2017 and the Arbitrator issued the final and binding award on December 27, 2017. (GC Ex. 5) and the Union made no mention that GCS failed to respond to its request for records.

Third, GCS did indeed provide the Union with a document detailing all of the call avoidance calls GCS relied on in making its decision. As Camp credibly testified:

Q. When Ms. Downey was discharged, what calls, if any, did you rely on in making the decision?

A. Primarily the ones that were noted as call avoidance...

Q. Were there any call avoidance calls that you relied on in the termination that were not provided to Ms. Armstrong or identified to Ms. Armstrong in this document [GC Ex. 4.]

A. No, these were the basis for the termination.

\*\*\*

It is all of the calls that were the basis for the termination.

Q. Were you ever advised that what you provided was not complete with regards to Ms. Downey and this list? Were you ever told that this list there should be other calls on it or it was somehow not a complete list of the call avoidance calls for which she was discharged?

A. No.

Q. If the Administrative Law Judge in this case ordered you to turn over a list of calls that Ms. Downey was terminated for, would it be any different than what's on [GC Ex. 4]?

A. No.

(TR at 317, 318)

Camp's testimony on this point is unrefuted.

## 2. **Lorraine Williams**

On March 30, 2018, Ms. Armstrong emailed Currie, requesting information pertaining to several employees, including Lorraine Williams who was discharged for call avoidance and whose arbitration was scheduled for April 14, 2018.<sup>2</sup> Among the requests pertaining to Williams, Ms. Armstrong requested "Records of her alleged call avoidance that are readable" and "Audio recordings of the alleged 'call avoidance' calls." (Resp. Ex. 2).

Ms. Currie responded to the Union's information request via reply email on April 3, 2018. With respect to the requested records, Ms. Currie responded "Enclosed please find the list" and attached the list of all calls GCS relied upon in making its decision to terminate Williams' employment. On cross examination, Armstrong admitted that she had obtained the list of calls GCS relied upon in making its decision to terminate Williams.

Q And Ms. Armstrong, the company provided you with a detailed list of all of Ms. Williams' calls, didn't they? And the duration of the calls, so you knew exactly the number of calls, how long they were, what the basic problem with the call was -- isn't that right?

A So you're asking me if -- if they provided a list. At some point, we did get a list that we could read of all of the calls and it identifies what the company believes

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<sup>2</sup> Williams was discharged for 57 instances of call avoidance where she either disconnected calls or lingered on the call after the call had ended. Lingered means the associate remains on the line after a call is completed, thereby failing to provide a service to Access-A-Ride customers waiting to make their reservations. (TR. at 163).

that the issue is. In terms of how long all the calls are -- if you're representing to me now that that information is on there, then it probably is, yes.

(TR at 153)

Armstrong was further questioned about the information contained in the list (Resp Ex 2) attached to Currie's April 3 email responding to the request for records of Williams' call avoidance that led to her termination:

Q ... The company was disclosing to you the date of the call, the duration of the call, and what the company believed the problem to be, correct?

A Correct.

Q And with regards to the first call, you could have but chose not listen to that eight second call and take notes of that call to obtain the information with regards to the content of the call, correct?

\*\*\*

-- and that would -- the same would be true with regards to every one of those calls that were identified by date with an identifying number and the duration of the call. So the first one was 8 seconds, the second one was 51 seconds, the third one was 11 seconds, and you made a conscious decision not to listen to those calls -- not to request to listen. That was your choice, isn't that right Ms. Armstrong?

A Was it my choice whether or not I listened to these calls -- I would've loved to listen to them.

Q And yet you didn't request to listen to them?

A No. I requested recordings of the calls.

(TR. at 159, 160)

Thus, the record is clear that Armstrong made the calculated decision not to listen to the subject calls and proceed to arbitration.

With respect to the Union's request for the physical copies of the audio recordings, Currie responded in her April 3 email to Armstrong: "**As GCS has stated on numerous occasions we**

**do not own, nor are we permitted pursuant to our contract with NYCT to distribute audio recordings, however, since you will be here for grievance hearings on Thursday of this week, please let me know if you would like to come in early to hear these calls.”** (Resp. Ex. 2).

As Currie testified, at no time during the two week period between the request for information and Williams arbitration did the Union avail itself of the opportunity to listen to the calls relied upon in making the decision to terminate Williams.

Q. Did Ms. Armstrong ask to listen to the Williams' calls?

A No.

Q Did you offer to play them for her?

A I specifically offered twice, yes.

Q So as we sit here today, do you know of any reason why she declined to listen to the calls and proceeded directly to arbitration without listening to them?

A I do not.

(R. at 375)

When questioned on cross examination about her failure to avail herself of the opportunity to listen to calls, Armstrong again provided rambling, extremely evasive answers:

Q. So with regards to Ms. Williams, there was nothing preventing you from listening to the calls and taking notes of those calls, correct?

A I'm not -- they were never played for me.

Q I'm sorry. That wasn't my question. You've had extensive testimony about the company making calls available and when it came upon request or otherwise. And when it came to Ms. Williams, there was no different procedure there. Had you requested to listen to the calls, the company would have made them available, isn't that right?

A So the company making calls available without request did not happen when I was involved, as far as I know with GCS. And in terms of calls being made available to us when we request them, yes, but I'm just saying that Ms. Williams was in a unique situation because of the volume of the calls.

In an effort to clarify Ms. Armstrong's disoriented testimony, ALJ Gardener interceded:

JUDGE GARDENER	So the Union didn't request to just listen. They requested for copies
ARMSTRONG	Right.
JUDGE GARDENER	-- to prepare for the arbitration?
ARMSTRONG	I believe so, yes.
JUDGE GARDENER	Is that right?
ARMSTRONG	Yeah.
JUDGE GARDENER	They didn't make a request that was denied by the company to listen at the step hearing and you say it's because that would've taken too much time at the step hearing. Is that -- am I understanding the testimony correctly?
ARMSTRONG	Right. I don't think we could have done it at the step hearing -- yeah -- because of the timing --
	***
JUDGE GARDENER:	-- after the step hearing you also did not request to -- to listen. You requested for copies?
ARMSTRONG	--we requested for copies --
JUDGE GARDENER	Okay.

(TR. at 151, 152)

The ALJ was compelled once again to intercede when Ms. Armstrong refused to provide a straightforward answer to simple questions regarding the Union's need to listen to a call to determine whether Williams was "lingering":

Mr. Stuart: you would need to listen to the call and to determine when the call ended, with the customer, and whether she remained on the line after that, correct?

A Well, what the company categorizes as lingering could be anything.

Q Excuse me. That's not what I asked you, what the company characterized. I asked you ...specifically was in order to determine if she lingered, you'd have to listen to the call to determine when it ended, and whether she remained on the line; isn't that correct?

A No.

JUDGE GARDNER: How would you know otherwise?

ARMSTRONG Well, I mean to determine if she lingered, I would have to know the context of the call. Sometimes –

JUDGE GARDNER: Would you have to listen to it?

ARMSTRONG Yes.

JUDGE GARDNER: Well, then the answer is yes... He's asking a question. It's yes or no. Sometimes you have to explain it and you can if invited, you know, the opportunity to do that. But can we please just have questions and answers to easy questions.

(TR. 253, 254)

Despite the ALJ's admonitions, Armstrong continued with her evasive testimony before finally admitting that due to the nature of the calls relied upon by GCS in making its decision to terminate Williams (i.e. hang ups) the information essentially consisted of DEAD AIR and she did not actually need the audio recordings:

Q And in situations where Ms. Williams was deemed to have hung up on the client, you would need to listen to determine whether the call was in fact disconnected, correct?

A That's actually not correct. The only way we can tell -- well, to determine if the call was disconnected, no. I mean the calls end at some

point, and there's a notation as to who released the call. They're not always accurate as to who released the call. I actually don't know if they're ever accurate as to who released the call. We get this list, it says call released from agent ends. But **there's no way for me to tell by listening to the call if that is the case.**

**Q So if there was no way to tell by listening to the call, whether Ms. Williams hung up or not, then surely you did not need a recording of that call to determine whether or not she hung up.**

**A I guess not.**

MR. STUART: I have no further questions.

(TR. 255, 256)

**3. Minkaru Kaira**

On March 2, 2018, Armstrong emailed Currie in preparation for the scheduled March 8 arbitration for Minkaru Kaira, requesting the “audio recording of Mr. Kaira’s call to GCS on or about January 17, 2018 reporting that he was ill and would not return to work.” (Joint Ex. 2). At that point, Armstrong had already filed the charges in Case 22-CA-211765 and was fully aware of GCS’ position regarding audio recordings.

Ms. Currie responded via email that same day:

As you know, we have requested that the Union explain why the content of Mr. Kaira's January 16, 2018 phone call is relevant to the Union's claims in arbitration and whether the Union disputes the content of the call, which was played for you (and Mr. Kaira) at the Step 2 grievance hearing. These are reasonable requests and the Union's refusal to provide information or engage in any type of dialogue on the issues speaks volumes. We have pointed out before that the Union's duty to provide information to GCS and discuss information requests is an obligation imposed under the National Labor Relations Act. To be clear, we are reiterating our requests again here.

Rather than explain in a transparent manner the sum and substance of the Union's claims on behalf of Mr. Kaira and why a copy of Mr. Kaira's January 16, 2018 phone call is relevant to such claims, you have once again

attempted to create a cloud of confused pandemonium to distract from Mr. Kaira's violations of GCS' Attendance Policy. To repeat, Mr. Kaira called out for his work shift on January 16. You know from listening to the recording that he did not indicate that "he was ill". If you have forgotten the content of the call, please let us know if you would like to hear it again.

Aside from the January 16 absence, Mr. Kaira also failed to report to work on January 17 and 18, 2018 and was No Call/No Show under the Attendance Policy. Again, there is no dispute that Mr. Kaira called out of work on January 16, and was No Call /No Show on January 17 and January 18. These are the simple undisputed facts, regardless of the Union's efforts to create irrelevant issues for arbitration. In order to prevent any confusion at the arbitration please let us know immediately what facts, if any, are in dispute.

To repeat, GCS is happy to play the short recording again for you at a mutually convenient time. You may take notes of the recording, if you wish. Your discussions with Mr. Kaira regarding the January 16 call and preparation for arbitration should of course take place at your office or some other location outside the Call Center.

In closing, much more can be accomplished if the Union is transparent regarding its claims, focuses on the relevant facts and expends less energy creating issues and diversionary disputes.

We look forward to your response so the parties can productively work out any differences regarding Mr. Kaira and the related information requests.

(Joint Ex. 2)

Five days later, on March 7, 2018, Armstrong notified Currie that the Union was withdrawing Kaira's the grievance. (Joint Ex. 2)(TR at 178). At that point, Kaira was a non-unit former employee with no expectation or possibility of reemployment.

Apparently undeterred that Kaira was no longer a GCS employee and that there was no longer a grievance or even an Agency charge pending by which he could seek reinstatement, Armstrong plowed ahead with yet another request to obtain a physical recording of the irrelevant seconds-long audio recording that GCS had previously made available for her to listen and take notes.

Specifically, on March 13, 2018, just six days after withdrawing the Kaira's grievance, Armstrong filed the unfair labor charge in Case 29-CA-216547 that is at issue in the instant Complaint (GC Ex. 1(e)).

Armstrong next emailed Currie on March 20, 2017, **seven days after** she filed the instant unfair labor practice charge, stating the Union was "still seeking production of the audio recording of Mr. Kaira's call out." Armstrong further stated the call was needed because "he has brought a complaint through the New York State Consumer Affairs." (Joint Ex. 2). On April 26, 2018, the New York City Department of Consumer Affairs email Ms. Currie to notify that the "Department is closing investigation." (Resp. Ex. 9) Armstrong conceded at the hearing that neither she nor the Union represented Kaira in that matter (TR 199).

Q. Is there any question in your mind, as you sit here today, that the case has in fact been closed, after investigation by the Department of Consumer Affairs?

A. I don't know if they did an investigation and – but no, I don't that that you would misrepresent that it had been closed.

(TR. 262)

### III. ARGUMENT

**A. GCS satisfied its obligation under the Act by timely providing the Union with the opportunity to listen to and take notes of the audio recordings.**

PLEASE STATE THE LEGAL PRINCIPLE

No obligation to provide information in the form the union requests.

Use the Advice memo and please cite it.

In Hyatt Hotels Corp., et al., 5-CA-32361, et seq. (October 20, 2005), the NLRB Division of Advice addressed the issue as to whether the employer violated Section 8(a)(5) of the Act by providing hundreds of pages of OSHA documents to the Union in paper rather than electronic form as the Union had requested. It concluded that the employer did not violate the Act reasoning that **an employer is not obligated to furnish relevant information in the exact form requested so long as it “is made available in a manner not so burdensome or time consuming as to impede the process of bargaining.”** Id. at 3 (citing *Roadway Express, Inc.*, 275 NLRB 1107, 1107 fn.4 (1985)). The Division Advice reasoned that “the form in which the information was provided ha[d] no immediate impact on the grievance process.” Id. at 4.

There is no dispute that since the inception of the collective bargaining agreement GCS has provided the Union access to the audio recordings without any restrictions on taking notes or listening to the calls over and over as needed. There is also no dispute that the Union is permitted to take breaks to review their notes and discuss the context of the audio recordings. Indeed, the Union has continued to represent its members in arbitration without objection to the arbitrator and without requesting an adjournment to argue it has been denied due process.

In *Roadway Express*, supra, the employer discharged an employee for complaints made in a one-page customer letter. The Union subsequently requested a copy of the letter to assist it in the processing of the grievance filed on the employee's behalf. The employer offered to allow the union to view the letter and take notes. The Board held the employer's offer to the union permitting it to examine the letter in lieu of providing the photo copy was sufficient under the Act. Id. In reaching that decision, the Board further found that unlike cases involving "voluminous and complex" information where employers have been found obligated to provide hard copies, the information at issue in *Rodway Express* could be "easily read and understood in a matter of minutes" and, therefore, the employer's offer to make the copies available for inspection was lawful. That case is on all fours with the facts in the instant case where, like the single-page letter, the audio recordings consist of very limited information, consisting of mere seconds or minutes of almost entirely dead air.

Likewise, in *Abercrombie & Fitch Co.*, 206 NLRB 464 (1973) the Board found lawful the employer's refusal to provide a hard copy of discharged employee's written "confession" where supervisor met with union representative to show him the employee statement and to discuss it with him. In reaching that decision, the Board noted that there was "no evidence that [the union representative] did not have ample time to read over and digest the information or was prohibited from taking notes." The Board further commented that there was no evidence the union representative "was not competent to evaluate the information." This case too is instructive to the case at hand. Counsel Armstrong, with her years representing the Union in traditional labor matters, is certainly capable of grasping the content of the calls.

The undisputed fact remains that the majority of the calls do not contain any sound and are essentially dead air. Camp and Curie provided credible, unrefuted testimony on this point. As well, the arbitration decisions entered into evidence compel the same conclusion.

**B. GCS is contractually prohibited from providing the Union or any other third party with physical copies of the audio recordings**

As shown above, GCS's contract with the NYCTA to perform call center services is replete with language that prohibits GCS from providing any third party with physical copies of NYCTA property, which includes the audio recordings. GCS has repeatedly apprised the Union, both in writing and orally, of this fact. Moreover, as Armstrong admitted, the Union has been in possession of the contract since well prior to the charges at issue in the complaint. Despite being on notice of the contractual restrictions and the draconian penalties GCS faces should it be deemed to have breached the contract, the Union has persisted in its narrow-focused demand for physical copies. Armstrong and the Union have been on notice of this since as early as April 2017 when Currie first notified the Union of the NYCTA's position and again after counsel for the NYCTA reiterated, in no uncertain terms, in a letter to Currie that the audio recordings were the sole property of the NYCTA and not to be distributed by GCS.<sup>3</sup> Regardless, GCS has provided the Union with the exact same access to the audio recordings that it has (i.e. listening to the audio recordings).

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<sup>3</sup> It is presumed the General Counsel will argue that the articulated restrictions on GCS's distribution of audio recordings is belied by the fact that GCS provided the Region with recordings in unrelated unfair labor practice charges in 2015. As has been explained to the Region in numerous submissions, GCS, with the authorization of the NYCTA, provided the Region with those copies in order to comply with a federal investigation and with the understanding that records provided to a government agency will not be released to the public.

Ordering GCS to provide the recording to the Union on the instant record, based on Armstrong's circular and incredible testimony would be a travesty of incredible magnitude. It is respectfully submitted that the ALJ need only rely on Armstrong's one honest statement, that is, that she really did need the recordings (Tr 255-256). Moreover, Board law does not require GCS to breach its contract and disregard the express directive of the owner of the recordings, NYCTA.

**C. The Union is not entitled to audio recordings in support Minkaru Kaira's complaint with the NYC Department of Consumer Affairs**

As discussed, the Union continued to seek the recordings of Minkaru Kaira even after it withdrew his grievance. Armstrong testified that the Union still needed the recordings in support of Kaira's dismissed complaint with the NYC Department of Consumer Affairs. The NLRB has long held a union is not entitled to information requested in furtherance of the union's pursuit of a pending unfair labor practice charge. Similarly, the Board has held an employer has no duty to furnish information requested solely in connection with a union's pursuit of a claim before a third party such as a state agency.

In *S. California Gas Co.*, 342 NLRB 613 (2004), a union requested information that it stated was relevant to a safety complaint the union had filed on behalf of its members with the California Public Utilities Commission (CPUC). A Board majority held the requested information was not presumptively relevant to the union's representational duties and the union "failed to meet its burden of showing that there are 'peculiar circumstances,' which make the requested information relevant to its role as collective-bargaining representative." *Id.* at 614. The Board specifically found "the Union's request, on its face, relates solely to an action outside the collective-bargaining context—a complaint filed with a State agency." *Id.* at 615. The Board explained:

[T]he issue of relevance, whether presumptive or not, is whether information is relevant to the collective-bargaining relationship. Thus, if safety information is sought for a grievance or for bargaining or for contract administration, it may well be presumptively relevant. However, the information sought here was for a matter before a state agency. The Union was essentially seeking discovery before that agency. The Respondent, in denying the information on February 27, relied on the fact that the information was not related to a grievance or negotiation. The Union gave no response to this valid point.

Ibid.

Therefore, the employer had no duty to furnish the requested information. The Board majority further held, “Even assuming the Union’s appearance before the CPUC was in a representational capacity, this fact would not change the result herein,” where “[t]he evidence fails to show that the information was being sought for bargaining, for administration of any part of the contract, or for any other purpose relevant to the collective-bargaining relationship.” Ibid.

The Union’s request for the 8 second recording is also improper because Kaira was no longer an employee of GCS at the time he filed the complaint and there was no grievance or agency charge pending by which he was seeking reinstatement. The U.S. Supreme Court has held, “the legislative history of s 2(3) itself indicates that the term ‘employee’ is not to be stretched beyond its plain meaning embracing only those who work for another for hire.” *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). Therefore, the Court held retirees were not “employees” within the meaning of the NLRA. Ibid. The Court further found:

In this cause, in addition to holding that pensioners are not ‘employees’ within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be ‘employees’ included in the bargaining unit. The unit determined by the Board to be appropriate was composed of ‘employees of the Employer’s plant \* \* \* working on hourly

rates, including group leaders who work on hourly rates of pay \* \* \*.' Apart from whether retirees could be considered 'employees' within this language, they obviously were not employees 'working' or 'who work' on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

Ibid. (Emphasis added.)

**D. The Union's requests for the audio recordings in support Lorraine Williams and Danika Downey's grievances are moot**

The requested audio tapes respecting Williams and Downey are moot because those underlying grievances were resolved by final and binding arbitration decisions issued pursuant to the grievance and arbitration procedure of the applicable collective bargaining agreement. The arbitration decisions constitute proof positive that the overwhelming majority of the calls contained little or no audio content and were simply "dead air". Neither the Union nor the General Counsel have ever articulated a legitimate reason for requesting what amounts to the "sounds of silence". For example, Camp responded that all of the call avoidance calls that led to Downey's termination consisted of dead air:

**BY MR. STUART: In your opinion, would listening to these calls allow -- for example, the first call, no sound from agent or client. Would listening to the call provide facts as to whether there was no sound or not?**

**A You can listen and hear that. I don't know that a recording copy would be any different than if you heard it before.**

**Q And would the same be true of all of those? No sound from agent or client?**

**A Correct. Once you hear it, you know that there's no sound.**

(TR at 322)

**E. The record evidence and testimony demonstrate that the Union's demands were made in bad faith**

Armstrong's testimony reveals the Union's unwavering demand for the physical recordings of the calls have been made in bad faith. In that regard, Armstrong conceded that with respect to Williams and Downey that she did not even need copies of the calls! In addition, Armstrong testified that the Union would be willing to make transcriptions of the calls in lieu of receiving physical copies of recordings. See, e.g. *United Parcel Serv. of Am., Inc. & Int'l Bhd. of Teamsters, Local Union 373*, 362 NLRB No. 22 (2015) ("the union may not ignore the employer's concerns or refuse to discuss a possible accommodation, even when the requested information is presumptively relevant.").

A union's refusal to engage in a dialogue or acknowledge a legitimate concern by an employer also can serve as evidence of a union's bad faith in making the information request. See *id.* (noting that where the respondent sought to lessen its burden by negotiating an accommodation based on the union's needs, and the union ignored the request for an explanation and merely repeated that it wanted every document requested "[b]oth the failure to explain and the refusal to compromise reflect on the Union's motivation."). Similarly, an employer may refuse to respond to a demand made in bad faith. See, e.g., *NLRB v. Wachter Construction*, 23 F.3d 1378, 146 LRRM 2193 (8th Cir. 1994). See also *NLRB v. Hawkins Constr. Co.*, 857 F.2d 1224, 129 LRRM 2486 (8th Cir. 1988) (disclosure not required where union demand was not in good faith, but to retaliate against employer for filing suit against union); *Snively Groves, Inc.*, 109 NLRB 1394, 34 LRRM 1568 (1954) (inconsistent and confusing requests by union relieved employer of obligation to furnish information) See also, *Ralphs Grocery Co.*, 352 NLRB 128, 134 (2008)

(“If the request’s timing and the information’s relationship to the charges show the union sought the information in order to bolster its charges, the Board will not find a refusal to provide the information unlawful.”)

Given that Williams and Downey’s arbitrations have been resolved and Kiara’s grievance was withdrawn (and his agency complaint dismissed) there is no collective bargaining purpose remaining in relation to these recordings. As such, the only purpose for the Union to continue seeking the recordings is in furtherance of the instant charges. In that respect, The NLRB has long held a union is not entitled to information requested in furtherance of the union’s pursuit of a pending unfair labor practice charge. *WXON-TV*, 289 NLRB 615, 617-618 (1988) (Employer had no obligation to furnish information where the Board found the union’s request “was akin to a discovery device pertinent to its pursuit of the unfair labor practice charge rather than to its duties as collective-bargaining representative.”); see also *Ralphs Grocery Co.*, 352 NLRB 128, 134 (2008) (“If the request’s timing and the information’s relationship to the charges show the union sought the information in order to bolster its charges, the Board will not find a refusal to provide the information unlawful.”)

**IV. CONCLUSION**

For all the reasons discussed herein, including the untimely filing of the charges, Respondent respectfully requests Your Honor dismiss the complaint in its entirety.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By /s/ Eric C. Stuart\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 9<sup>th</sup> of January 2019, the foregoing **RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** was filed electronically through the NLRB's E-Filing system, and one copy was served by e-mail upon:

By /s/Christopher R. Coxson

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