

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 87 (METRO SERVICES
GROUP)

And

Case 20-CB-206863

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BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This case is before the Administrative Law Judge upon a Complaint alleging that Service Employees International Union, Local 87 (Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by: 1) failing to inform Alejandro Varela (Varela or Charging Party) of the status of his work dispute grievance in a timely manner; 2) misinforming the Charging Party that his employer, Metro Services Group (the Employer), had not responded to Respondent's inquiry regarding the workload dispute; and, 3) failing to instruct the Charging Party to return to work despite knowing that the Charging Party was waiting for a resolution of the workload dispute or a response from the Employer before returning to work. Respondent's failures to communicate with the Charging Party after undertaking to assist him with his workload dispute caused the termination of the Charging Party's employment. (GC Exh. 1(d), pgs. 3-4).¹

Varela has been employed as a janitor and represented by Respondent for 43 years. On June 27, 2017, he presented Respondent with a workload dispute he had with the Employer.² That same day, Respondent's Business Agents Abdo Hadwan and Sergio Estrella, Vice President Ahmed Abozayd, and the Charging Party discussed the workload issue with the Employer's Director of Operations, Martin Larios, by telephone. At the conclusion of the meeting, the Employer agreed to look into the matter further and follow up with Respondent, and Respondent agreed to inform the Charging Party of the answer it received from the Employer.

¹ All references to the General Counsel's Exhibits are noted as "GC Exh." followed by the exhibit letter(s) and the page number(s). All references to the Respondent's Exhibits are noted as "R Exh." followed by the exhibit letter(s) and the page number(s). All references to the Transcript are noted as "Tr." followed by the page number(s) and, if relevant, line numbers. All references to the Administrative Law Judge are noted as "ALJ."

² All dates, unless otherwise stated, occurred in 2017.

On June 28, the very next day, the Employer emailed Respondent information regarding the workload dispute that Respondent used to resolve the workload dispute. Yet, from June 28 to July 25, Respondent failed to inform the Charging Party that it had received the Employer's response. Moreover, during that same period of time, the Charging Party and his daughter, Jacqueline Varela, communicated with the Respondent approximately 15 times, consistently informing Respondent that the Charging Party was not working and was still waiting for the Employer's response regarding the workload dispute and repeatedly asking Respondent whether the Employer had responded. The Board has stated that a union's duty of fair representation includes the duty not to willfully misinform employees about their grievances or matters affecting their employment and the duty not to willfully keep them uninformed. See *In re Local 307, Nat. Postal Mail Handlers Union*, 338 NLRB 1154 (2003). Nonetheless, Respondent, knowing that the Charging Party was not returning to work while the dispute was pending, failed to instruct the Charging Party of the need to return to work, failed to inform the Charging Party that it had received the Employer's response, and even misinformed the Charging Party that the Employer had not responded.

II. STATEMENT OF FACTS

A. JURISDICTION

The Employer is a California corporation with an office and place of business located at 436 14th Street, #150, Oakland, California 94612. (GC Exh. 10, pgs. 1, 2, 23-33). The Employer provides maintenance and janitorial services, including for clients and properties located outside of the State of California. (GC. Exh. 10, pg. 1). In conducting its business, the Employer has purchased and received at its California facilities goods valued in excess of \$50,000 directly from points outside of the State of California during the calendar year ending in December 31,

2018. (GC Exh. 10, pgs. 2, 4-21). More specifically, in calendar year 2018, the Employer received revenues of \$60,831.14 for providing services at a property in Scottsdale, Arizona. (GC Exh. 10, pgs. 9-12).³

B. CHARGING PARTY PERCEIVES AN INCREASED WORKLOAD.

Varela worked as a janitor for the Employer from about 2009 until his termination in 2017. (Tr. 25:11-23). It is undisputed that Respondent is the exclusive collective-bargaining representative of the Employer’s employees performing work under the terms of Respondent’s collective-bargaining agreement with the San Francisco Maintenance Contractors Association effective August 1, 2016 through July 31, 2020. (GC Exhs. 1(d), pg. 2; 1(f), pg. 2). It is also undisputed that, prior to his termination, the Charging Party was employed by the Employer in the bargaining unit represented by Respondent. (GC Exh. 1(f)).

During the last four months of his tenure with the Employer, Varela worked at a building located at 100 Montgomery Street in San Francisco, California, where he reported to Foreman Jose Calero. (Tr. 26:1-12). When Varela began work at the 100 Montgomery Street, he was responsible for cleaning floors 6 and 17. (Tr. 26:13-18). Because both floors had empty offices, he was also responsible for cleaning the gymnasium. (Tr. 26:18-19). However, the Employer

³

Date	Location	Amount
5/1/2018	Scottsdale, AZ 85251	\$14,538.00
6/1/2018	Scottsdale, AZ 85251	\$14,502.16
7/1/2018	Scottsdale, AZ 85251	\$16,373.99
8/1/2018	Scottsdale, AZ 85251	\$15,416.99
5/1/2018	Scottsdale, AZ 85251	\$14,538.00
2018	TOTAL	\$60,831.14

thereafter increased his workload, first adding another office on the 6th floor and, on June 26, adding another office on the 17th floor, both of which had previously been vacant. (Tr. 27:9-14; 27:22-25-28:3). Varela objected to the additional workload, citing to the condition that the gymnasium had been part of his assignment because there were vacant offices on floors 6 and 17. (Tr. 27:22-28:16). The Charging Party informed Calero that he would go to Respondent to resolve the dispute. (Tr. 28:17-29:6).

C. CHARGING PARTY PRESENTS RESPONDENT WITH HIS WORKLOAD DISPUTE.

Varela has been represented by Respondent for 43 years. (Tr. 24:25-25:2). During that time, he has filed several grievances pertaining to workload issues. On each occasion, he did not return to work until his grievance was resolved. (Tr. 63:9-22; 70:3-16). On the most recent occasion prior to the issue herein, in 2015, the Charging Party returned to work only after Respondent instructed him to return. (Tr. 66:22-67:1).

On June 27, the day after his workload was increased for the second time, Varela went to Respondent's office located at 240 Golden Gate Avenue in San Francisco, California at approximately 4:00 p.m. (Tr. 29:7-16). He spoke with Business Agent Sergio Estrella at the front desk and presented Estrella with a letter he had drafted with the assistance of his wife. (Tr. 30:9-12; GC Exh. 1(f), pg. 2; GC Exh. 2). Varela explained that the Employer was increasing his workload by adding offices that had once been vacant on his floors while refusing to take away the gymnasium. (Tr. 30:15-33:5; 277:21-23; GC Exh. 2). At that time, Business Agent Abdo Hadwan joined Estrella at the front desk. Estrella presented the Charging Party's letter to Hadwan and translated its contents, as it was written in Spanish. (Tr. 34:1-17). After Varela completed and submitted an intake form regarding the purpose of his visit, Hadwan moved the meeting to Vice President Ahmed Abozayd's office on the second floor. (Tr. 33:18-37:6; 38:1-7;

278:18-24; and GC Exhs. 1(d), pg. 2; 1(f) pg. 2; 3).

At Vice President Abozayd's office, Abozayd called the Employer's Director of Operations, Martin Larios, by speaker phone with the Charging Party and Business Agents Hadwan and Estrella present in the room. (Tr. 38:8-14; 277:2-4). Abozayd and Larios discussed the workload issue, with Abozayd asking Larios the number of work hours paid to the Employer for each floor and the gymnasium. (Tr. 38:18-24; 278:6-11). However, it remained unclear whether the 6th and 17th floor assignments included the formerly vacant offices. The conversation concluded with Larios stating that he did not have all the answers and would call Abozayd with the answers to the workload questions or with a solution. (Tr. 38:8-13; 202:3-9; 278:12-15). After the conclusion of the phone call, which lasted 20 to 30 minutes, Abozayd informed the Charging Party that they would wait for the Employer's answer and call the Charging Party when they received it. (Tr. 38:16-20; 39:14-15).

As the Charging Party left Respondent's office, he expressed to Business Agent Estrella that the phone call reflected that the Employer had indeed increased his workload and that he was going to wait for the Employer's response. (Tr. 40:1-3). The Charging Party then informed Estrella that he was not going to return to work and asked Estrella to inform Hadwan and Abozayd that he was not going to return to work, or, if Estrella would not, the Charging Party would inform them. (Tr. 40:6-7). Estrella agreed to inform Hadwan and Abozayd that the Charging Party was not returning to work. (Tr. 38:7-11). According to the Charging Party, neither that day nor during any of his subsequent communications with Respondent in the days following the meeting did anyone from Respondent instruct him to return to work. (Tr. 38:17-18).

Respondent's witnesses Ahmed Abozayd, Abdo Hadwan and Sergio Estrella tell a

different story. According to Abozayd, at the conclusion of the call in his office on June 27, he affirmatively instructed the Charging Party to return to work. (Tr. 202:17-21). According to Hadwan and Estrella, at the conclusion of the June 27 phone call, Hadwan, Estrella and Abozayd each told the Charging Party to return to work. (Tr. 269:21-24; 279:18-19). Although Hadwan also testified that the workload dispute was resolved on June 27, he provided conflicting testimony regarding whether Respondent informed the Charging Party that the dispute was resolved. (Tr. 264:19-22). He first stated on direct examination that Respondent said nothing more to the Charging Party than to go back to work (Tr. 234:17-18 “Nothing – nothing more to discuss;” 234:17-18 “Nothing really except that we told him he go back to work, and that’s it”). Then, during cross examination, on questioning by the ALJ, Hadwan claimed that he additionally informed the Charging Party that the problem was solved. (Tr. 270:3-5: “...nothing more than he has to go back to work, and it was problem solved.”). No other witness for Respondent testified that the workload dispute was resolved on June 27 or that any of Respondent’s agents informed the Charging Party on June 27 that the workload dispute was resolved.

Despite the conflicting testimony about whether any, how many, and which ones, of Respondent’s agents instructed the Charging Party to return to work at the conclusion of the call with Larios on June 27, it is undisputed, at the very least, that when the Charging Party informed Estrella that he would not return to work, Estrella provided no contrary instruction. (Tr. 279:21-280-2). It is also undisputed that at the conclusion of the June 27 meeting, the Employer informed everyone present that it would follow up with the workload dispute by finding answers to Respondent’s questions or a solution. Because the matter was left pending, and hearing no contrary instruction, the Charging Party, as on previous occasions when he had a workplace dispute, did not return to work that day or the following day pending the resolution of his

workload dispute. (Tr. 38:19-20; 62:8-63:19).

D. EMPLOYER RESPONDS TO RESPONDENT.

It is undisputed that on June 28 at approximately 4:45 p.m., Larios sent an email to Business Agent Hadwan and Vice President Abozayd with the subject line, “100 Montgomery St. – Alejandro Varelas [sic.] job station concern.” (GC Exh. 9). The email, referencing the once-vacant office that was recently added to the Charging Party’s assignment, explained, “[s]uite 1700 became vacant and we did not cut time and when became [sic] occupied we did not add time.” (GC Exh. 9). It is also undisputed that neither Vice President Abozayd, Business Agent Hadwan nor Business Agent Estrella informed the Charging Party of the Employer’s response. (Tr. 159:23-160:14).

E. CHARGING PARTY INQUIRES ABOUT EMPLOYER’S RESPONSE DAILY FROM JUNE 28 TO JUNE 30.

On June 28, 29 and 30, the Charging Party called Respondent’s office and spoke with Business Agent Estrella. (Tr. 41:8-17; 43:1-44:21). On each of these occasions, he explained to Estrella that he was not working and asked Estrella whether there was an answer from the Employer regarding his workload issue.⁴ (Tr. 41: 20-23; 43-1:44:21). Rather than inform the Charging Party that the Employer had emailed Respondent on June 28, or that Respondent considered his workload issue resolved, Estrella, after asking Hadwan, simply informed the Charging Party that the Employer had not responded and that the Charging Party should continue to wait. (Tr. 44:21).

⁴ Respondent’s witness Sergio Estrella admits that the Charging Party called the Respondent’s office, but states that the Charging Party simply made small talk with Estrella and did not discuss anything related to the workload dispute.

Although Business Agent Hadwan testified that the Charging Party did not call Respondent regarding his workload dispute any time after June 27 prior to his termination, Estrella acknowledged that the Charging Party called Respondent's office on at least one or two occasions later in the week of the June 27 meeting. (Tr. 236:21-237:2). Estrella, however, did not acknowledge telling the Charging Party that the Employer had not responded and that the Charging Party should continue to wait. Incredulously, Estrella claims that rather than discussing the pending workload dispute or his request to file a grievance, the Charging Party engaged in 10-minute long conversations about issues not related to his workload dispute at all.

F. CHARGING PARTY MEETS PERSONALLY WITH HADWAN AND ABOZAYD ON JULY 5.

On July 5, the Charging Party went to the Respondent's office in person and found Business Agent Abdo Hadwan and Vice President Ahmed Abozayd. (Tr. 45:1-9). The Charging Party approached Hadwan and Abozayd after they were done with a presentation in the hall. (Tr. 46:21-25). Speaking first with Hadwan, the Charging Party asked whether he had an answer from the Employer regarding his workload problem. (Tr. 46:2-5). Hadwan, evading the question, asked whether the Charging Party had reported to work, and the Charging Party, consistent with his earlier communications with Respondent, replied that he could not return to work without any information about his workload dispute. (Tr. 46:5-8). Hadwan ignored Charging Party's response, so the Charging Party then approached Abozayd. (Tr. 46:8-9). Again, the Charging Party asked whether the Employer had responded, and again, rather than informing the Charging Party that the Employer had responded or that Respondent had decided to no longer pursue his grievance, Respondent simply ignored the Charging Party. (Tr. 46:11-47:10). Despite the Charging Party's statements that he needed to understand how the workload issue had been resolved in order to return to work, neither Hadwan nor Abozayd informed the

Charging Party of the Employer's response or Respondent's position on the workload issue in light of the Employer's response.⁵ (Tr. 46:10-17).

Respondent's misinformation to the Charging Party continued into the following week, July 10 to 14. (Tr. 49:3-16). During that week, the Charging Party again asked Estrella by phone on two occasions whether Respondent had received an answer from the Employer, and on both occasions, Estrella stated that Respondent had not received any answer from the Employer and that the Charging Party should wait. (Tr. 49:17-50:7). That same week, the Charging Party also went again to Respondent's office in person and spoke with Abdo Hadwan, who likewise informed him that Respondent had not received an answer from the Employer. (Tr. 50:8-20).

Indeed, Respondent's misinformation continued when the Charging Party's daughter, Jacqueline Varela, began communicating with Respondent on her father's behalf. (Tr. 113:17-23). Starting the week of July 17 to 21, both the Charging Party and Jacqueline Varela made efforts to elicit information from Respondent, but to no avail. From July 17 to July 21, the Charging Party communicated with Respondent two or three times by phone. (Tr. 53:4-7). On each occasion, the Charging Party spoke with Estrella and asked whether there was any answer regarding his workload issue; on each occasion, Estrella responded that Respondent had not received an answer. (Tr. 52:22-53:15).

With the help of his daughter, the Charging Party drafted a letter to Respondent, and on July 20, he gave the letter to Respondent, along with another intake form that he submitted in

⁵ Ahmed Abozayd, Abdo Hadwan and Sergio Estrella either do not remember or did not testify as to whether the Charging Party visited Respondent's office on July 5. (Tr. 286:23-25.). Hadwan stated that he never received a "call" from the Charging Party as to whether the workload dispute was resolved. (Tr. 236:21-237:2). However, he provided no testimony as to whether the Charging Party met him in person on July 5. Abozayd testified to the June 27 meeting and then the August 30 mediation, but he did not testify to any other direct communications with the Charging Party.

person at Respondent's office. (Tr. 51:7-52:6, 52:14-21; GC Exh. 4). The letter summarized the Charging Party's understanding of what had occurred since the June 27 telephone conference between Respondent and the Employer regarding his workload dispute:

"I was sent home and told to wait for a phone call from the union once the issue at hand was resolved.

The problem now is that I have been without work for 18 days, which is an equivalent of 135 hours. My last check was short and I was told by the union not to worry about the pay because I was covered and the union was waiting for the issue to be resolved. I called the union on several occasions in those 18 days and was told that the issue was not solved yet. I even went into the union office to check on the status of my workstation and was told that the issue was that I never reported to my company. I was not supposed to report to the company because the union was going to resolve the Issue with the workstation.

I would like to know what is being done to resolve the issue with my workstation at 100 Montgomery St.?

When will I get the paycheck for the days and hours missed due to this issue?" (GC Exh. 4, pg. 2).

During the July 20 visit when he gave his letter to Respondent, the Charging Party spoke with Business Agent Hadwan, who again informed him that there was no response from the Employer. (Tr. 53:16-54:2).

From July 18 to 21, Jacqueline Varela also went in person to Respondent's office three times and spoke by phone with Sergio Estrella once. (Tr. 114:3-115:10; 115:11-116:16; 117:24-118:15). On those occasions when she spoke with Estrella, either by phone or in person, she specifically informed him that the Charging Party was not working, requested information regarding the Charging Party's workload dispute, reminded him that the Charging Party had not heard anything back from Respondent regarding his workload dispute, and/or requested to meet with Business Agent Abdo Hadwan. (Tr. 114:21-118:15). Despite waiting in the office during each of her three visits, on two occasions for nearly an hour, Hadwan never met with Jacqueline Varela. (Tr. 114:21-116:16, 117:24-118:15).

G. CHARGING PARTY LEARNS THAT HE WAS TERMINATED.

On July 25, the Charging Party emailed the Employer regarding an old vacation request he had submitted in May 2017 for a trip to Mexico. (Tr. 54:24-55:2; 54:6-9). To the Charging Party's surprise, the Employer, by Martin Larios, informed him that he was considered a "voluntary quit." (GC Exh. 6, pg. 1). On July 29, Charging Party responded to Larios by email, informing him that he had not quit and that there was a pending workload issue to which the Charging Party and Respondent were still "waiting to hear back from you." (GC Exh. 6, pg. 1).

Sometime in early August, the Charging Party received a letter postmarked July 27. Enclosed were a termination letter dated July 7, a copy of a voided paycheck dated July 7, and a reissued paycheck dated July 26 for the same amount. (GC Exh. 7). Prior to that letter, the Charging Party had not received any termination letter from the Employer.

The termination letter dated July 7 stated, "[p]lease be advised you have been no call/no show since 06/26/2017. We consider you voluntary quit. We are providing your final paycheck." (GC Exh. 7, pg. 2).

III. CREDIBILITY

This case involves several factual disputes on key conversations. While not all underlying facts are in dispute, Respondent's and General Counsel's witnesses presented different versions of important communications. However, as explained below, Respondent's witnesses should not be credited because their testimony was characterized by vague and conclusory descriptions of conversations and plagued by lack of personal knowledge.

A. RESPONDENT'S WITNESSES SHOULD NOT BE CREDITED BECAUSE THEY PROVIDED CONCLUSORY TESTIMONY INCONSISTENT WITH DOCUMENTARY EVIDENCE.

1. Martin Larios

Respondent's witness Martin Larios should not be credited. Throughout his testimony, Larios admitted insufficient recollection of the operative facts (Tr. 179:5 – "Because I don't remember the intake in here," 180:11-12 – "I don't remember right now, the details"), including who participated in the June 27 phone call (Tr. 171:9-12 – "That's what I don't remember") and only vaguely recalled when certain conversations or events occurred (Tr. 180:11-12; 181:5-9 – failing to provide any dates or even approximate dates), even when Respondent's counsel tried to refresh his recollection with documents (Tr. 178:6-8 – "Witness: ...based on what I wrote back here;" 179:21-180:1) or by interrupting the witness and directly testifying on his behalf. (Tr. 170:10-13 "Witness: I do remember, but it was like May, June, from what I remember. And right away--// Respondent's Counsel: No. We'll show you exhibit...GC 6"). Furthermore, Larios' testimony was elicited by numerous leading questions by Respondent's counsel during direct examination.

2. Ahmed Abozayd

Respondent's witness Ahmed Abozayd also should not be credited because he was evasive, providing vague and biased testimony. Abozayd's role as Vice President of Respondent and his familiarity with the duty of fair representation (Tr. 143: 18-20) explain his bias in favor of Respondent's case and his selective, evasive testimony. Abozayd's evasiveness was most apparent when he was asked whether he informed the Charging Party of the June 28 email response from the Employer. (Tr. 159:23). Abozayd was unable to deny that he was a recipient of the email and that the email was indeed a continuation of the June 27 discussion. However, when confronted about whether he informed the Charging Party of the email, Abozayd backtracked, disavowing any knowledge of the email. (GC Exh. 9).

"Q And this email is a continuation of that conversation; isn't that correct?

A Yes.

Q Okay. Did you inform Mr. -- you didn't inform Mr. Varela of this email did you?

A This email between Martin and Abdo, no, I was not aware of that.

Q Okay. So the question was, you did not inform Mr. Varela of this email; isn't that correct?

A I'm telling you the email between Abdo and Martin.

Q So is your answer no, you did not tell Mr. Varela regarding this email?

A I just answered the question. The email is between Abdo and -- you should ask Abdo because he's the one who --" (Tr. 159:23-160:8).

Only after being admonished by the ALJ did Abozayd finally admit that he had not informed Varela of the email. (Tr. 160:9-14). Abozayd understands the legal theory underpinning this duty of fair representation litigation (Tr. 143: 18-20), and the exchange above clearly demonstrates that his testimony was biased by his understanding of which facts would be unfavorable to Respondent's case and his desire to avoid admitting to such unfavorable facts. Indeed, the record is rife with other examples where Abozayd became non-responsive, inserting facts that appeared favorable to Respondent rather than answering the question at hand. (Tr. 185:20-22). Only a few questions after the exchange recounted above, Abozayd was non-responsive yet again, resulting in the ALJ striking his testimony (Tr. 162:3-7). In fact, throughout his direct examination, despite having his testimony stricken several times, Abozayd exhibited his bias by providing testimony not elicited by the question at hand and testifying over objections. (Tr. 207:13-15; 212:15-19, 22-25).

Abozayd's testimony was also vague and, at best, provided conclusory descriptions that favored the Respondent's position. For example, he provided very little context or detail for the June 27 meeting between Respondent and the Charging Party, offering only the conclusory statement that he informed the Charging Party to return to work.⁶ Similarly, when speaking

⁶ It is worth noting that Ahmed Abozayd was Respondent's representative at the hearing. As a result, he was not subject to the witness sequestration order and sat through the first two of General Counsel's witnesses as well as one of Respondent's witnesses. (Tr. 8:12-13). It is also

about the federal mediation, his testimony eagerly disclosed the federal mediator's conclusion rather than answering the pending question. (Tr. 207:8-15 question regarding whether he participated in the union's decision not to pursue arbitration).

3. Abdo Hadwan

Business Agent Hadwan's testimony suffers from similar, if not greater, shortcomings. Additionally, it is contradicted by documentary evidence. Like Abozayd, Hadwan provided a conclusory description of the June 27 meeting. When testifying to what Respondent said to the Charging Party at the conclusion of the phone call with Martin Larios, Hadwan concluded, "We just told him to go back to work, and that's it. Nothing – nothing more to discuss." (Tr. 234:7-9). When asked during direct examination whether he remembered anything else from that conversation after the phone call on June 27, Hadwan emphasized, "Nothing really except that we told him he go back to work, and that's it." (Tr. 234:17-18). Hadwan, however, changed his testimony during cross examination. When asked whether he remembered saying anything separate from Ahmed and Estrella, he conveniently added, "There's nothing more than he has to go back to work, and **it was problem solved...**" (Tr. 270:3-5 – in reference to the resolution of the workload dispute). Hadwan's belated addition contradicts his two earlier emphatic statements that nothing more was discussed on June 27 other than instructing the Charging Party to return to work and illustrates his intent on justifying all of his actions rather than providing complete and accurate testimony. Additionally, Hadwan's testimony, like the rest of Respondent's witnesses, were elicited through leading questions during direct examination. At one time, even eliciting ALJ's comment on the leading nature of the questions. (Tr. 239:11-14).

clear from Abozayd's participation during the cross examination of Alejandro Varela, that Abozayd was actively listening and engaged with the testimony presented by General Counsel's witnesses. (Tr. 76:22).

Hadwan's statements are also contradicted by documentary evidence. For example, with regard to when Respondent learned of the Charging Party's termination, Hadwan's various explanations are contradicted by reason, by the email exchanges he had with Larios (GC Exh. 11), by the Charging Party's July 20 intake form and letter (GC Exh. 4), and even by Hadwan's own emails to Larios (GC Exh. 17).⁷ Hadwan's testimony there reveals his tireless effort to justify all of his actions rather than let the documents speak for themselves.⁸

Lastly, Hadwan provided unnecessary, self-serving testimony. At one point, Hadwan suggested that the Charging Party did not report to work because he wished to take a vacation to

⁷ Hadwan stated that he learned of the Charging Party's termination on about July 17 or July 20, when the Charging Party came to his office and informed him that he had been terminated (Tr. 246:1-10). Hadwan also stated that the Charging Party did not complete an intake form. (Tr. 256:7-10). However, those assertions directly contradict the documentary evidence and the Charging Party's testimony that he learned of his termination on about July 25. The Charging Party submitted an intake form on July 20, along with his July 17 letter to Respondent. (GC Exh. 4). Neither the intake form nor the letter mention termination, but refer only to the Charging Party's concern regarding the hours of work he has missed as a result of the pending workload dispute and requests an update on the dispute. (GC Exh. 4). Even Hadwan, in a July 20 email to Larios, fails to mention termination. (GC Exh. 11). Meanwhile, the Charging Party's lack of knowledge of his termination is the email he sent to Employer on July 25th, inquiring about his vacation request, which implies Charging Party's belief at that time that he was still employed by the Employer. (GC Exh. 6, pg. 1.) Hadwan's testimony that Charging Party had come to him about his termination on July 17 or 20 is contradicted by his own words in GC Exhibit 17, where Hadwan states that Varela stated that "he never received any calls nor mail from you or your company till this date." (GC Exh. 17). This corroborates Charging Party's version of events that he learned of his termination after the July 25 email, and contradicts Hadwan's testimony that Charging Party came to him on July 20 only about his termination.

⁸ Hadwan's tireless effort in providing testimony rather than letting documents speak for themselves is exemplified by his long testimony on why he failed to address the Charging Party's termination that he purportedly learned before he engaged in emails with Employer starting July 20. (Tr. 247:11-248:11). Hadwan, without any pending question, explained why the email exchanges between Hadwan and Larios failed to mention termination—"trying to solve the problem before I say he's terminated." (Tr. 248:9-11), suggesting that one way to solve a termination is by not stating to Employer it's a termination—an explanation that is both unreasonable and incredulous.

Mexico. (Tr. 268:14-17). The record shows that the Charging Party had already requested a vacation to Mexico in May, before the workload dispute; therefore, the Charging Party had no need to take unauthorized leave to go to Mexico. (GC Exh. 6). Furthermore, the Charging Party's 43-year history as a janitor and his subsequent work history showing that he consistently and diligently sought work after his termination (GC Exh. 16) reflect that the Charging Party has a strong work ethic and is unlikely to risk his employment by taking unauthorized leave.⁹ In the face of Varela's long work history, both before and after the incident involved herein, Respondent's scurrilous suggestion that Varela simply did not go to work after June 27 because he needed a "vacation" (Tr. 268:14-17) should not be credited.

4. Sergio Estrella

Business Agent Sergio Estrella's testimony also lacked credibility. He failed to recall whether meetings took place on the same day or on different days and whether conversations happened at all (Tr. 276:19-22; 284:15-16; 285:7-9; 286:21-25; 287:1-287:18; 288:22-25; 289:20-25; 290:1-13; 295:18-20; 296:6-7). When testifying about important communications between the Charging Party and Respondent, Estrella stated that the Charging Party called Respondent's office and spoke to him from five to 10 minutes, but never discussed the substance of the workload dispute. First, this is contrary to the Charging Party's clear and confident testimony, which detailed his conversations with Estrella, including the context and substance of those conversations, demonstrating that the conversations almost solely concerned his workload dispute. Second, Estrella was unable to recall many conversations that took place and changed his testimony regarding the frequency of communications he had with the Charging Party after

⁹ For example, it is clear from GC Exh. 16 that the Charging Party went to the hiring hall and accepted jobs shortly after the unfavorable mediation session that concluded he was terminated. (GC Exh. 16).

June 27. Third, Estrella's version of events is unreasonable and implausible. For one, Estrella testified that the Charging Party, being without work, called Respondent multiple times, engaged in near 10-minute conversations, and on each of those occasions failed to mention or inquire about the workload dispute that was keeping him from working. Estrella's version of the conversations is unreasonable and implausible.

Estrella's testimony is also marked by his selective memory. Despite, Estrella's insufficient memory as to various five to 10 minute conversations with Charging Party where Charging Party inquired about his workload dispute, somehow Estrella remembers a word for word quote of what Varela "muttered" on the stairs as they were leaving the June 27 meeting, going as far as quoting Varela that Varela expressed that he did not want to return to work because the workload was "unfair." (Tr. 279:21-280:2). Estrella's testimony here clearly shows the bias in his testimony, providing only detailed information as to facts that support Respondent's case, but not having any memory of those facts that may be unfavorable to Respondent.

Furthermore, as Hadwan's suggestion that Varela refused to return to work because Varela wanted a vacation, by Estrella, Respondent suggests that Varela refused to return to work because Varela thought it was "unfair." As explained earlier, the record is rife with evidence that Varela was willing to work, and Respondent's testimony suggesting otherwise should not be credited.¹⁰

¹⁰ Respondent's suggestion that Varela did not return to work because he believed the workload was "unfair" should not be credited as it is contradicted by the facts in the record. Charging Party has continued working as a janitor, even after losing several decades worth of seniority, working at a lower wage, and with fewer benefits consistently going to the hiring hall and seeking new employment. By all accounts, losing seniority and getting lower wages as a result of the Respondent not providing him for requested updates on his workload dispute is "unfair," yet despite these circumstances the Charging Party continued to seek work. In light of these facts, Respondent's suggestion that Varela risked losing his employment because he thought the workload dispute was "unfair" is preposterous.

B. THE GENERAL COUNSEL’S WITNESSES SHOULD BE CREDITED.

General Counsel’s witnesses should be credited because they confidently answered the questions, and provided detailed testimony corroborated by documentary evidence.

1. Alejandro Varela

Alejandro Varela was able to recall events and confidently speak in detail about conversations, including the context and substance of the conversations, as well as when the conversations occurred, whether they were in person or by phone, and who participated. Varela’s testimony was also corroborated by documentary evidence.

Varela confidently testified on the details of the June 27 meeting between Respondent, Charging Party and the Employer, speaking clearly as to the approximate time he went to the Respondent’s office, who he spoke to, where he spoke to those individuals, and the conversation between him and the individuals. (Tr. 29:7-40:25). This is corroborated by GC Exhibits 2 and 3, and further corroborated by the Employer’s June 28 response (GC Exh. 9), which shows that, as Varela testified, the Employer was following up with Respondent regarding the workload issue.

Likewise, Varela’s testimony of his communications with the Union following the June 27 meeting were clear and confident, providing approximate dates of conversations, the context of the conversations, the individuals involved, and the substance of the communications. Additionally, Varela’s testimony on the communications after June 27 is corroborated by GC Exhibit 4, which details what transpired on June 27 and thereafter. For example, GC Exhibit 4 states that on June 27 “Larios then agree[d] to inform [] Abozayd as soon as he gets [sic] the information on those two floors and gym...I was sent home and told to wait for a phone call from the union once the issue at hand was resolved.” (GC Exh. 4 pg. 2).

GC Exhibit 4 also corroborates Varela’s testimony that he called the Respondent on

multiple occasions after the June 27 call and before July 20, including the exchanges he had with Respondent during his phone calls after June 27 and in person visit on July 5. (GC Exh. 4, pg. 2 - - “called the union on several occasions in those 18 days and was told that the issue was not solved yet...even went to the union office to check on the status of my workstation”).

Additionally, GC Exhibit 4 expresses concerns that he had not been working for 18 days, and that the union informed him the issue was not resolved yet, which corroborates that Respondent kept Varela uninformed or misinformed regarding the Employer’s June 28 email response and the Respondent’s decision not to pursue his workload dispute. (GC Exh. 4, pg. 2). Furthermore, GC Exhibit 4 also describes his exchange with Respondent (Id. -- “I was not supposed to report to my company because the union was going to resolve the issue with the workstation”) which mirrors the Charging Party’s testimony on the substance of his July 5 in person communications with Hadwan and Abozayd.

GC Exhibit 4 also corroborates the Charging Party’s general timeline of when events occurred. For example, GC Exhibit 4 fails to mention any termination issues, which corroborates the Charging Party’s testimony that he remained unaware of his termination until later in July. GC Exhibit 5, which was an email between Jacqueline Varela and Olga Miranda President of the Union and inquires as to the Respondent’s process in resolving work related issues and states “I feel that my father is not being helped adequately,” further corroborates that by July 25 the Charging Party was still uninformed as to the status of his grievance and that, even by July 25, understood that the Respondent was pursuing his workload concerns. Perhaps most significant is GC Exhibit 6, in which the Charging Party, by his daughter, inquires to Employer as to the status of a prior vacation request which clearly suggests that, even by July 25, the Charging Party still believed that he was employed by the Employer. Furthermore, GC

Exhibit 7 corroborates that the Charging Party had not received the termination letter dated July 7, 2017 until after July 27, 2017. (GC Exh. 7, pg. 1 -- the postmarked date; pg. 3 and 4 – voided and reissued check).

Finally, Varela also confidently testified that he would have returned to work had he known that Respondent had resolved his workload dispute. (Tr. 58:14-19). Varela’s willingness to work is corroborated by his 43 years as a janitor and his willingness to return to work as a janitor following his termination, despite the added burdens of returning without his prior seniority and with significantly reduced wages. (GC Exh. 16).

2. Jacqueline Varela

Jacqueline Varela also testified confidently and provided detailed accounts of conversations, including who she spoke to,¹¹ and the context and substance of communications she had in person and by phone. Her testimony was also corroborated by documentary evidence. (GC Exhs. 4, 5, 6 and 7). Ms. Varela’s willingness to testify to the truth was also exhibited by her willingness to correct her answers without any prompting. (Tr. 134:19-136:11). Indeed, after being dismissed as a witness at the conclusion of her testimony, Jacqueline Varela requested to go back on the record after she realized she had incorrectly answered a question.¹²

IV. ARGUMENT

A union owes its members a duty of fair representation, which is breached when the union’s conduct toward a unit member is “arbitrary, discriminatory, or in bad faith.” *Vaca v.*

¹¹ On those occasions she could not name the individual she spoke to, she was able to provide identifying characteristics. (Tr. 118:8-13).

¹² Ms. Varela also credibly explained the reason why she had made an error, testifying that “the way [Respondent’s counsel] asked a question” referred to a letter that Charging Party purportedly received on July 7, which Charging Party did not, rather than the letter she received after July 27.

Sipes, 386 U.S. 171, 177-78 (1967). This duty of fair representation includes the duty that the union not purposely keep employees uninformed or misinformed concerning their grievances or matters affecting employment. See *In re Local 307, Nat. Postal Mail Handlers Union*, 338 NLRB 1154 (2003); *Teamsters Local 282 (Transit-Mix Concrete Corp.)*, 267 NLRB 1130 (1983); *Industrial Workers Union Local 310 (Toledo Scale)*, 270 NLRB 506 (1984); *Branch 629, NALC*, 319 NLRB 879 (1995) (explaining that “a union owes all unit employees the duty of fair representation, which extends to all functions of the bargaining representative”).

The Board has found a union’s conduct arbitrary if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior was so far outside a “wide range of reasonableness” as to be irrational. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union’s disposition of the grievance was perfunctory or motivated by ill will. *Bottle Blowers Assn. Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979). Applying this standard, the Board has consistently found violations where respondent unions fail to explain why it misinformed or kept employees uninformed. See *In re Local 307*, 338 NLRB 1154 (finding a violation where the union failed to apprise grievant of step 1 grievance meeting despite knowing grievant requested to be informed of the date and time of the meeting and stated she wanted to attend the meeting); *Local 471, UAW*, 245 NLRB 527 (1980) (finding violation where respondent misinformed employee of the status of her grievance); *King Soopers, Inc.*, 222 NLRB 1011 (1976) (finding a violation where the respondent union owed an affirmative obligation to clarify seniority provisions to the grievant, who based on the lack of information, decided not to return to work causing his

termination); *Transit-Mix Concrete Corp.*, 267 NLRB 1130 (1983) (finding violation where the union failed to provide employees with information that effectively reversed prior instructions the union had adopted, and which caused employees to be laid off).

A. RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY MISINFORMING OR KEEPING CHARGING PARTY UNINFORMED OF THE EMPLOYER’S JUNE 28 RESPONSE.

The Board has regularly upheld decisions finding a breach of the duty of fair representation where the union has failed to provide employees with a wide range of requested information, including the status of a grievance or information that would affect a matter of employment. *Groves-Granite*, 229 NLRB 56 (1977) (affirming violation finding where union failed to inform grievant that it had no intention of seeking grievant’s reinstatement); *National Association of Letter Carriers, Branch 529*, 319 NLRB 870 (1995) (failing to provide copies of grievance). Additionally, the duty of fair representation imposes on the union a duty not to willfully misinform an employee on the status of his dispute. *See Union of Sec. Personnel of Hospitals*, 267 NLRB 974 (1983) (affirming finding that respondent union breached its duty of fair representation by misinforming grievant that there was no news of the grievance when union had failed to pursue the grievance).

In *Local 471, UAW*, 245 NLRB 527, the Board found that respondent union breached its duty of fair representation where it misinformed employee of the status of her grievance by repeatedly keeping the grievant uninformed of the grievance proceedings and also misinforming the grievant by assuring her that the union was processing the grievance when it was not, which “effectively prevented [the grievant] from bringing the [grievance] matter up.”

Here, it is undisputed that 1) at the June 27 meeting, Employer informed Varela and Respondent that it would follow up on the workload dispute; 2) the Employer emailed

Respondent on June 28 seeking to resolve the workload dispute and 3) after June 27, none of Respondent's agents informed Varela or his daughter that the Employer responded on June 28. Additionally, according to Varela, on July 5 he specifically informed Hadwan and Abozayd that he was waiting on information on his workload dispute in order to return to work, but Respondent still failed to inform him that the Employer responded on June 28. Furthermore, there is credible evidence that both Varela and his daughter communicated with Respondent nearly 15 times after June 27 and on nearly each occasion (the Charging Party or his daughter) inquired about 1) the status of his workload dispute, including whether Employer had responded, and 2) informed the Respondent that he was not working. However, despite all of these communications, as in *Local 471, UAW*, Respondent, responding to these inquiries, consistently and repeatedly failed to inform Charging Party that the Employer had responded on June 28 thereby breaching its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

B. RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY FAILING TO TIMELY INFORM CHARGING PARTY OF THE STATUS OF HIS WORKLOAD DISPUTE.

Respondent states that it had disposed of the workload dispute on June 27 and thereby suggests that there was nothing more to report to Charging Party after June 27. However, even taking Respondent's assertion as true, Respondent fails to provide credible evidence that the Respondent informed Varela or his daughter of its decision not to pursue Varela's workload dispute on June 27 or thereafter.¹³ In fact, documentary evidence (GC Exh. 4-7, 11-14, and 17)

¹³ Hadwan belated testimony that he informed Charging Party of the workload dispute status on June 27th should not be credited, as argued previously. However, even Hadwan admits that the Respondent is generally apprised of a "serious" workload issue problem if an employee returns to the Respondent with the problem. (Tr. 236:12-14). It is undisputed that the Charging Party did so here, therefore, even had Hadwan informed Charging Party of the Respondent's disposition of the workload dispute on June 27 when Hadwan believed the issue was minor, he should have been apprised that this a more "serious" workload issue during the numerous

suggests that Varela was unaware that the workload dispute was resolved well after June 27. Furthermore, Respondent fails to provide any reasonable explanation as to why it failed to inform Varela of the Respondent's disposition of his workload issue during any of the near 15 communications between the Varela and Respondent. Therefore, the Respondent breached the duty of fair representation it owed to Varela in violation of Section 8(b)(1)(A) of the Act.

C. RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY MISINFORMING CHARGING PARTY THAT HE SHOULD NOT RETURN TO WORK PENDING RESOLUTION OF HIS WORKLOAD DISPUTE.

In *Transit-Mix Concrete Corp.*, the Board determined that the union had violated its duty of fair representation where it had an affirmative obligation to publicize an arbitration award that effectively reversed instructions that the union had adopted. The failure to publicize the reversal in instructions resulted in employees being laid-off. The Board reasoned that because the union had “encouraged the laid-off [employees] to act upon the basis of the information conveyed at that meeting, we find that [r]espondent [union] was under an affirmative obligation to inform those employees when it learned that such information was no longer valid so that they could take actions to protect their interests.” *Id.* at 1131.

Transit-Mix is clearly applicable here. The Respondent here, as in *Transit Mix*, provided instructions to the Charging Party to wait on the Employer's response and, therefore, as in *Transit Mix*, had an affirmative obligation to at least inform the Charging Party of the Employer's June 28th response so that the Charging Party could return to work or instruct the Charging Party to return to work. On June 27th, the Respondent informed the Charging Party that he should wait for the Employer's response. Based on this instruction, and Charging Party's

subsequent communications with Varela and his daughter.

prior grievance experience, Charging Party did not return to work and informed Respondent of the same on various occasions: on June 27th, through daily phone conversations from June 28 to 30th and in subsequent communications by phone and in person. On each occasion after the June 27th meeting, the Charging party asked whether the Employer had responded. And on almost each occasion, the Respondent told the Charging Party either that the Employer had not responded and/or that the Charging Party should wait on the Employer's response. Therefore, the Respondent here, as in the respondent in Transit-Mix Concrete breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

D. ALTERNATIVELY, RESPONDENT VIOLATED SECTION 8(B)(1)(A) OF THE ACT BY FAILING TO INSTRUCT CHARGING PARTY TO RETURN TO WORK PENDING RESOLUTION OF HIS WORKLOAD DISPUTE.

Even if Respondent had not misinformed Varela not to return to work pending resolution of his grievance, the Respondent failed to instruct Varela to return to work despite knowing that Varela was not working and waiting on the resolution of his workload dispute. In *King Soopers, Inc.*, 222 NLRB 1011, the Board affirmed a violation where a shop steward failed to adequately inform the grievant of his seniority rights and correct grievant's erroneous understanding of seniority, which led to the grievant's loss of employment.

It is undisputed that, here, the Charging Party was terminated as a result of failing to return to work from June 27 to July 6. Furthermore, as in *King Soopers, Inc.*, the credible evidence on the record shows that the Charging Party did not to return to work because he did not have information integral to his decision whether or not to return to work, i.e. whether the workload dispute had been resolved, or whether the Employer had responded.

As in *King Soopers, Inc.*, the Respondent should have corrected Charging Party's failure to return to work, which was apparent from the various communications Varela and his daughter

had with the Respondent. Respondent here failed to correct the Charging Party.

In fact, even by Estrella's admission, Respondent failed to inform the Charging Party that he needed to return to work after Varela expressed to him that he would not return to work. Because the Charging Party and his daughter here continuously and consistently informed the Respondent that he was not working, inquired about the status of the Employer's response and because the Respondent told Charging Party neither that the Employer responded, that the Respondent disposed of his workload dispute, or that Varela should return to work, the Respondent here breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

Additionally, in *In re Local 307*, 339 NLRB 1154, the Board adopted the ALJ's decision that the union had breached its duty of fair representation because the respondent union had failed to inform the employee of a grievance step 1 meeting when the respondent was aware that employee wanted to attend the meeting even where the grievance meeting mitigated the underlying discipline. *Id.* at 1155. The Board noted that the employee had asked to be notified of the meeting, and the respondent failed to explain the lack of notification. *Id.*

On July 5 and other communications between Charging Party and Respondent, Respondent was informed by the Charging Party that he was waiting on Employer's response in order to return to work and that Charging Party wanted to know the status of his workload dispute. Therefore, as in *In re Local 307*, even if Respondent did not instruct the Charging Party to wait on the Employer's response on June 27th, Respondent here was aware that the Charging Party was waiting for an Employer response in order to return to work. Knowing that the Charging Party was waiting on the Employer's response or resolution of the workload dispute, Respondent had an obligation to inform the Charging Party of the Employer's response, its

decision not to pursue the workload dispute, or to instruct Charging Party to return to work. Despite the nearly 15 opportunities, the Respondent did none of the above, thereby failing to fulfill its affirmative obligation in violation of Section 8(b)(1)(A) of the Act.

V. CONCLUSION

The evidence and law support that Respondent violated Section 8(b)(1)(A) of the Act by: failing to inform Charging Party of the status of his work dispute grievance in a timely manner; misinforming the Charging Party that the Employer, had not responded to Respondent's inquiry regarding the workload dispute; and failing to instruct the Charging Party to return to work despite knowing that the Charging Party was waiting for a resolution of the workload dispute or a response from the Employer before returning to work. The evidence demonstrates that Respondent's failures to communicate with the Charging Party after undertaking to assist him with his workload dispute caused the termination of the Charging Party's employment. Accordingly, Counsel for the General Counsel respectfully requests that the ALJ find that 1) Respondent violated the Act as alleged, and issue an order requiring 1) Respondent to promptly request Employer reinstate Charging Party to his former position or, if the position no longer exists, to a substantially equivalent position and 3) Respondent make the Charging Party whole for any loss of earnings and other benefits suffered as a result of the Charging Party's loss of employment on July 7, 2017 until such time as the Charging Party is reinstated by the Employer or obtains other substantially equivalent employment.

Dated: November 5, 2019

Respectfully submitted,

/s/ **Min-Kuk Song**
Min-Kuk Song
Counsel for General Counsel.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 87 (METRO SERVICES
GROUP)**

And

Case 20-CB-206863

ALEJANDRO VARELA

**AFFIDAVIT OF SERVICE OF COUNSEL FOR GENERAL COUNSEL'S POST
HEARING BRIEF TO THE ALJ**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 5, 2019, I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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Name

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Signature