

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

833 CENTRAL OWNER'S CORP.

and

Case 29-CA-70910

**LOCAL 621, UNITED WORKERS OF
AMERICA**

**RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE**

Respectfully submitted,

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PRELIMINARY STATEMENT

Respondent 833 Central Owners Corp. (hereinafter referred to as the “Respondent” or the “Company” or “833 Central”) hereby respectfully excepts to the rulings in the decision of Administrative Law Judge William Nelson Cates (the “ALJ”) in the above-referenced matter in accordance with Section 102.46(b), (c) and (e) of the Rules and Regulations of the National Labor Relations Board (“NLRB”). The hearing in this case was held in Brooklyn, New York on May 7 and 8, 2012. All parties participated in the proceeding, including the Company, the Union and the acting General Counsel of the National Labor Relations Board, (“General Counsel”). Thereafter the parties submitted post-hearing briefs. The ALJ rendered his decision on or about September 14, 2012, finding the Respondent violated the Act by terminating Ezra Shikarchy as the Superintendent of 833 Central because of his participation in Union activities. Neither the General Counsel, nor the Charging Party filed any exceptions.

EXCEPTIONS

A. Exceptions Regarding ALJ’s Finding That Walter Berger Was An Agent Of 833 Central

1. The ALJ erred when he found that “the parties, in a post trial document received in evidence, stipulated Walter Berger was Company Board treasurer and an agent of the Company.” (ALJ p. 2, l. 27-28).¹

The Respondents never stipulated that Mr. Berger was an Agent as appropriately defined under Section 2(2) of the Act.

2. The ALJ erred each time he referred to Walter Berger as “Board Treasurer Berger” and/or “Board Member Berger” and treated him as an “Agent” of the Company. (ALJ p. 16, l. 7, 14, 27-28, 41; p. 17, l. 14).

The Respondents did not stipulate that Mr. Berger was an Agent as defined under Section 2(2) of the Act. The General Counsel did not prove that Mr.

¹ Citations to the ALJ Decision are in the form “ALJ p. ____, l. ____” indicating the page and relevant lines, if applicable. Citations to the hearing transcript are “Tr. ____,” indicating the page.

Berger was a Board Member or that he was an Agent of 833 Central. (See Tr. 32-33, 34-35).

3. The ALJ erred when he imputed the following comments made by Walter Berger to 833 Central and held that the Employer violated the Act:

“In exchange Berger told Shikarchy if he would drop his charge with the Union against Board Member Friedman and not attend a mediation on the matter scheduled for December 7, they would know he no longer was having anything to do with the Union but rather was back on the Company’s side and things could then be worked out for him. Berger explained that with Shikarchy back on the side of the Company the Company would have better bargaining power with the Union to get whatever it wanted. Berger told Shikarchy, more than once, that if he did as they asked ‘we can work it out,’ he would not ‘be harassed... anymore,’ and would ‘have a job.’ When Shikarchy asked what would happen if he stayed with the Union Berger responded the Company would probably fire him. It is clear Berger threatened Shikarchy with discharge if he did not abandon his support for the Union. Berger also specifically promised employee benefits to Shikarchy if he dropped his support for the Union namely he would no longer be harassed, everything would be worked out, and he would continue to have a job. Berger’s promises and threats violate the Act and I so find.” (ALJ p. 14-15, l. 43-09).

The General Counsel did not prove that Mr. Walter Berger was a Board Member of 833 Central or that he was an Agent (nor did the Company Stipulate that he was an Agent under the Act as define under Section 2(2)). Therefore, his comments to Shikarchy could not be imputed to 833 Central (See Tr. 32-33, 34-35).

4. The ALJ erred when he credited and found that “Mr. Shikarchy testified, without contradiction [Berger testified but did not address these matters], that between mid-August and early December, Berger spoke with him several times about his employment with the Company.” (ALJ p. 14, l 24-26).

Mr. Shikarchy’s testimony was in fact contradicted by Mr. Berger’s testimony that he did not speak to Mr. Shikarchy in December or at any other time while he was in Florida. (Tr. 44).

5. The ALJ erred when he imputed the following comments made by Walter Berger, a tenant and not an Agent of Respondent to the Respondent, and found that based on these comments the General Counsel “sustained his initial Wright Line burden of showing that Shikarchy’s involvement in the union and protected activities was a motivating factor in the Company’s decision to warn, suspend and discharge him.” (ALJ p. 17, l 4-7):

“Board Treasurer Berger told Shikarchy during the week of June 20 that at the Board’s most recent meeting Board President Hertzberg and Board Member

Friedman had stated they wanted Shikarchy out because he was switching his support to the Union and could do a lot of damage to the Company. Berger also told Shikarchy they felt his switching to the Union's side brought about employees Boykin and Gomez being offered reinstatement with back pay." (ALJ p. 16, l 7-12)

"...Board Treasurer Berger told Shikarchy to stop distributing the flyers...." (ALJ p. 16, l 14-15).

"Board Treasurer Berger told Shikarchy, between June and September, the Board was going to destroy him because he switched to the Union and told him the Board could do anything they wanted. Berger urged Shikarchy to leave the Company for his own benefit because he was with the Union and told Shikarchy he hated the Union. Berger also told Shikarchy the Board was going to do something to him that there was no way out for him and he could not win." (ALJ p.14, l 27-32)

"Board Treasurer Berger told Shikarchy on December 5 that if he would drop his grievance against Board Member Friedman and not attend a mediation session on the matter scheduled for 2 days later the Company would know he was no longer with the Union and on the Company's side and things could be worked out. Berger told Shikarchy the Company would have better bargaining power with Shikarchy on their side and the Company could get whatever [sic] it wanted in the negotiations and Shikarchy could have a job, but, if he stayed with the Union he would probably be fired."

The Respondent did not stipulate and the General Counsel did not establish that Walter Berger was an Agent of the Respondent defined under Section 2(2) of the Act. Therefore, the ALJ improperly found the statements made by Mr. Berger were attributable to the Respondent. (See Tr. 32-33, 34-35).

6. The ALJ erred when he found "[r]ather, the evidence shows, as clearly stated by Board Member Berger, the discipline against Shikarchy and his discharge was based on his union and protected activities. Berger told Shikarchy that everything involving him could be worked out, the harassment against him stopped and he could have his job, but, he had to make a choice and drop his support for the Union and be on the Company's side or be unemployed" (ALJ p. 17, l 13-17).

The Respondent did not stipulate and the General Counsel did not establish that Mr. Berger was an Agent of the Respondent as defined under Section 2(2) of the Act. Therefore, the ALJ improperly found the statements made by Berger were attributable to the Respondent. (See Tr. 32-33, 34-35).

7. We except to the ALJ's failure to address the Respondent's Arguments set forth in its Post Hearing Brief in Point I (D) at pages 9-11 regarding the status of Walter Berger as an agent of the Respondent.

As stated above, Mr. Berger was not a Board Member nor was he an Agent of 833 Central's as defined under Section 2(2) of the Act. Any comments Mr. Berger made to Shikarchy cannot be imputed to 833 Central.

B. Exceptions Regarding ALJ's Finding That 833 Central Knew And/Or Was Aware That Mr. Shikarchy Was Participating In Union Activities As Of June 20, 2011

8. The ALJ erred when he found that "Shikarchy's first support for the Union, established here, began when Shikarchy did not prepare for his anticipated testimony on behalf of the Company at an arbitration hearing on June 20 involving the discharge of employees Boykin and Gomez. Shikarchy not only did not testify but openly displayed his support for the Union's position by giving a thumbs up to the Union." (ALJ p. 15, l. 36-40).

The testimony does not support the ALJ's finding that 833 Central was put on notice that Mr. Shikarchy had begun to support the Union based on Mr. Shikarchy's failure to properly prepare to testify and his attempted "hand sign" that Mr. Shikarchy gave to the Union on the day of the arbitration. (Tr. 131, 135).

9. The ALJ erred when he concluded that "[t]he Company was aware of Shikarchy's union activities. Shikarchy's lack of preparation for the June 20 arbitration indicated to the Company Shikarchy no longer supported the Company's position." (ALJ p. 16, l. 4-6).

The failure of Shikarchy to prepare for his testimony at an arbitration with regard to his supervision of employees as part of his responsibilities as the Superintendent of the Respondent cooperative apartment building does not prove that he made the Company aware he no longer supported the Company's position in the arbitration or was a Union supporter. (See Tr. 131, 135).

10. The ALJ erred when he determined that the following comment by Board member Friedman showed that the Company knew that Shikarchy was now supporting the Union:

"Board Member Friedman told Shikarchy, at the arbitration, that his not preparing to testify might result in the Board having to reinstate Boykin." (ALJ p. 16, l. 6-7).

The statement that Shikarchy's failure to prepare for his testimony at the arbitration might result in the reinstatement of the terminate employee did not establish the Company knew Shikarchy was a union supporter.

11. The ALJ erred when he concluded "[f]urther evidence demonstrates the pretextual nature of the Company's defense. Shikarchy's record was that of an attentive employee without discipline until he engaged in protected activities and shifted his support to the Union." (ALJ p. 17, l. 19-21).

The record evidence shows that Shikarchy was disciplined by 833 Central for his failure to perform his job duties prior to 833 Central being placed on notice that Mr. Shikarchy had begun to support the Union. (See Tr. 219-293).

12. The ALJ erred when he concluded that “[a]ll of the email evidence proffered by the Company to support its defense involved incidents that occurred after Shikarchy’s support for the Union was known to the Company.” (ALJ p. 17, l. 21-23).

As stated in prior exceptions stated above, the General Counsel failed to prove that 833 Central was put on notice that Mr. Shikarchy had begun supporting the Union at the arbitration on June 20th. (See Tr. 131, 135, 219-293).

13. The ALJ erred when he concluded “[t]he Company advanced no justifiable explanation for issuing four written warnings to Shikarchy on 1 day, September 7, for events dating back to June 21, 1 day after Shikarchy made his support for the Union known.” (ALJ p. 17, l. 23-25).

As stated in prior exceptions stated above, the record evidence fails to prove that 833 Central was put on notice that Mr. Shikarchy had begun supporting the Union on June 20th. (See Tr. 131, 135).

C. Exceptions Regarding The ALJ’s Failure To Address And/Or Discuss The Evidence Showing That Mr. Shikarchy & Board Member Steven Friedman Were Involved In a Personal Dispute Unrelated To Mr. Shikarchy’s Union Activities

14. The ALJ erred when he made the following finding of fact: “Shikarchy testified Board Member Friedman had not harassed him before the June 20 arbitration but afterward began to do so.” (ALJ p. 4, l. 34-35).

Mr. Shikarchy’s testimony and even a written grievance filed by Mr. Shikarchy directly contradict such testimony. (See Tr. 148, 183, 233; R. Ex. E).

15. The ALJ erred when he concluded Hertzberg acted against Shikarchy to stop Shikarchy from engaging in Union activities based upon his finding that “Shikarchy credibly testified, without contradiction [Hertzberg was not called to testify], that after he filed a grievance in August against Board Member Friedman for harassment that Hertzberg asked Shikarchy how he could do this to his friend Friedman, and told Shikarchy he was a bad evil person and directed Shikarchy to drop his grievance against Friedman or something bad was going to happen to him that he was going to be fired. ... Hertzberg’s threatening Shikarchy that bad things would happen to him if he did not withdraw his grievance constitutes a threat of unspecified reprisals for engaging in protected conduct and Hertzberg’s telling Shikarchy he would be fired if he did not withdraw his grievance constitutes an unlawful threat of discharge and I so find.” (ALJ p. 13, l. 27-36).

The record evidence proves that Shikarchy and Board Member Friedman had been friends for over twenty (20) years (ALJ p. 2) and that the grievance filed by

Mr. Shikarchy had nothing to do with Mr. Shikarchy's Union activities, but rather, was caused by a personal dispute between the long-time friends. (See Tr. 46, 148, 155, 183, 233, 242-43, 245-46, 254; R. Ex. E and I).

16. The ALJ erred when he concluded "[i]t is clear and I find that Friedman, on these occasions, unlawfully threatened Shikarchy with discharge if he did not withdraw his grievance against Friedman." (ALJ p. 13, l. 44-45).

The record evidence shows that Mr. Friedman made such comments, not because Mr. Shikarchy was engaged in union activity but because Mr. Shikarchy and Mr. Friedman were engaged in a personal dispute. (See Tr. 46 148, 155, 183, 233, 242-43, 245-46, 254; R. Ex. E and I).

17. The ALJ erred when he found "[o]n August 14, Shikarchy claimed harassment by Board Member Friedman because he supported the Union." (ALJ p. 15, l. 40-41).

The record evidence shows that Mr. Shikarchy never alleged on August 14th that he was being harassed because of his Union participation. (See Tr. 148, 183, 233; R. Ex. E).

18. The ALJ erred when he concluded "I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company..." (ALJ p. 17, l. 32-33).

Respondent excepts to the ALJ's failure to properly consider or address the Respondent's reasons for the discipline and eventual termination of Shikarchy. See Argument set forth in Respondent's Post Hearing Brief at Point I (A) pages 5-7 and Point I (B), pages 7-8.

D. Exceptions Regarding The ALJ's Finding That The Government Established That The Company Harbored Union Animus That Motivated His Termination

19. The ALJ erred when he concluded "the government established the Company harbored animus specifically against Shikarchy's protected activities and against the Union in general. Starting in mid-March 2010, Board Member Friedman told Shikarchy union people were very bad and cost the Company lots of money and the Company was going to install security cameras, fire everyone, and no longer need the Union. Friedman also told Shikarchy he hated unions." (ALJ p. 16, l. 29-23).

Because the above statements were made over 19 months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman's comments and Mr. Shikarchy's termination.

20. The ALJ erred when he concluded that the government established the Company harbored union animus when "[i]n December 2010, Board President Hertzberg told Shikarchy the Union was no good, cost the Company money, prevented them from doing what they wanted, they did not like the Union and wanted to get rid of it." (ALJ p. 16, l. 23-25).

Because the above statements were made one (1) year prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Hertzberg's comments and Mr. Shikarchy's termination.

21. The ALJ erred when he concluded that the government established the Company harbored union animus when in December 2010 "BRG Manager Herskovitz told Shikarchy he did not like Union President Somborro [sic] and the union people and they were going to get rid of the Union." (ALJ p. 16, l. 25-27).

Because the above statements were made one (1) year prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Herzkovitz' comments and Mr. Shikarchy's termination.

22. The ALJ erred when he concluded that the government established the Company harbored union animus when in June and September, "Board Treasurer Berger told Shikarchy... the Board was going to destroy him because he switched to the Union and told him the Board could do anything they wanted. Berger urged Shikarchy to leave the Company for his own benefit because he was with the Union and told Shikarchy he hated the Union. Berger also told Shikarchy the Board was going to do something to him that there was no way out for him and he could not win." (ALJ p. 16, l. 27-32).

Because the above statements were made up to six (6) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman's comments and Mr. Shikarchy's termination.

23. The ALJ erred when he concluded the government established the Company harbored union animus when "Board Member Friedman repeatedly told Shikarchy in August and September he should drop his grievance against Friedman or something bad would happen to him that he would be fired." (ALJ p. 16, l. 32-34).

Because the above statements were made up to four (4) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Friedman's comments and Mr. Shikarchy's termination.

24. The ALJ erred when he concluded the government established the Company harbored union animus when "Board President Hertzberg told Shikarchy in August he was evil for filing the grievance against Friedman and to drop it or something bad would happen to him he would be fired." (ALJ p. 16, l. 34-36).

Because the above statements were made up to four (4) months prior to Shikarchy's termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Hertzberg's comments and Mr. Shikarchy's termination.

25. The ALJ erred when he concluded the government established the Company harbored union animus when “Shikarchy was given four written warnings on September 7, he was told by BRG Manager Herskovitz he had to drop the grievance against Friedman and he did not want to hear anything more about it.” (ALJ p. 16 l. 37-39).

Because the above statements were made three (3) months prior to Shikarchy’s termination, they are too remote in time to establish any kind of nexus or temporal proximity between Mr. Herskovitz’ comments and Mr. Shikarchy’s termination.

E. Exceptions Regarding The ALJ’s Finding That The Company’s Discipline, Suspension And Termination Of Mr. Shikarchy Was Pretextual In Nature.

26. The ALJ erred when he found “the Company failed to meet its *Wright Line* Burden showing Shikarchy would have been warned, suspended and discharged for legitimate business reasons even if he had not engaged in union and/or protected activities.” (ALJ p. 17, l. 9-11).

The record evidence shows that Shikarchy would have been disciplined by 833 Central, regardless of his Union activity, because he failed to adequately perform his job duties. (See Tr. 219-293).

27. The ALJ erred when he found “the Company’s proffered reasons for warning, suspending, and discharging Shikarchy were pretextual.” (ALJ p. 17, l. 12-13).

The record evidence shows that Shikarchy would have been disciplined by 833 Central, regardless of his Union activity, because he failed to adequately perform his job duties. (See Tr. 219-293).

28. The ALJ erred when he found the “evidence shows, as clearly stated by Board Member Berger, the discipline against Shikarchy and his discharge was based on his union and protected activities.” (ALJ p. 17, l. 13-15).

The record evidence shows that Shikarchy would have been disciplined by 833 Central, regardless of his Union activity, because he failed to adequately perform his job duties. (See Tr. 219-293).

29. The ALJ erred when he concluded “[f]urther evidence demonstrates the pretextual nature of the Company’s defense.” (ALJ p. 17, l. 19).

The record evidence shows that Shikarchy would have been disciplined by 833 Central, regardless of his Union activity, because he failed to adequately perform his job duties. (See Tr. 219-293).

30. The ALJ erred when he found “Shikarchy’s record was that of an attentive employee without discipline until he engaged in protected activities and shifted his support to the Union.” (ALJ p. 17, l. 20-21).

The record evidence shows that Shikarchy failed to adequately perform his job duties. (See Tr. 219-293).

31. The ALJ erred when he found “all of the email evidence proffered by the Company to support its defense involved incidents that occurred after Shikarchy’s support for the Union was known to the Company.” (ALJ p. 17, l. 21-23).

The record evidence shows that Shikarchy was disciplined by 833 Central for his failure to perform his job duties prior to 833 Central being placed on notice that Mr. Shikarchy had begun to support the Union. (See Tr. 131, 135, 219-293).

32. The ALJ erred when he found that “the Company advanced no justifiable explanation for issuing four written warnings to Shikarchy on 1 day, September 7, for events dating back to June 21, 1 day after Shikarchy made his support for the Union known.” (ALJ p. 17, l. 23-25).

The record evidence shows that the discipline received by Shikarchy appropriately reflected the fact that Shikarchy failed to adequately perform his job duties and that Shikarchy did not make the Respondent aware of his support for the Union on June 20, 2011. (See Tr. 219-293).

33. The ALJ erred when he found that “the timing of the Company’s actions is suspicious and the Company failed to satisfactorily establish sufficient details regarding complaints of residents being improperly treated or how Shikarchy’s job performance declined quickly. (ALJ p. 17, l. 29-32).

The record evidence shows that the discipline Shikarchy received was entirely justified and that such discipline began prior to 833 Central being placed on notice that Mr. Shikarchy had begun to support the Union. (See Tr. 131, 135, 219-293).

34. The ALJ erred when he concluded “I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company because the evidence is compelling Shikarchy was warned, suspended, and discharged for his union activities and that the reasons advanced by the Company was pretextual.” (ALJ p. 17, l. 32-35).

Respondents excepts to the ALJ’s failure to address and discuss the record evidence that was presented by the Respondent at the Hearing and in its Post Hearing Brief. Respondent’s Post Hearing Brief, Point II (A-F) pages 11-28.

UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

833 CENTRAL OWNERS CORP.

and

CASE NO: 29-CA-070910

LOCAL 621, UNITED WORKERS
OF AMERICA

DATE OF FILING: October 12, 2012

STATEMENT OF SERVICE:

I, the undersigned attorney for 833 Central Owners Corporation, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the dated indicated above:

Via E-File:

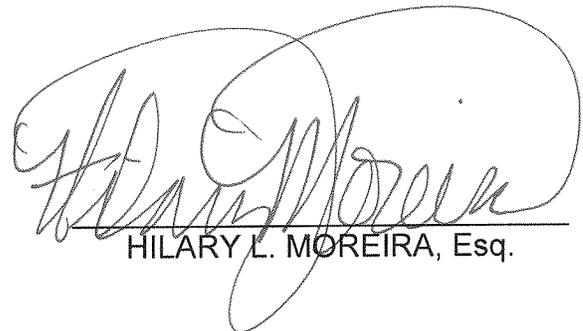
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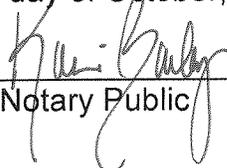
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HILARY L. MOREIRA, Esq.

Sworn to before me this
12th day of October, 2012.



Notary Public

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Notary Public, State of New York
No. 31-4916675
Qualified in Nassau County
Commission Expires December 28, 2012