

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

LATINO EXPRESS, INC.

and

CASE 13-CA-46528

CAROL GARCIA, AN INDIVIDUAL

and

CASE 13-CA-46529

PEDRO SALGADO, AN INDIVIDUAL

and

CASE 13-CA-46634

TEAMSTERS LOCAL UNION NO. 777,  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO

**GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION  
AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by:

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Now comes Jeanette Schrand, Counsel for the Acting General Counsel, who hereby files the Acting General Counsel's Cross Exceptions to the Decision issued by Administrative Law Judge Michael A. Rosas on July 12, 2011.<sup>1</sup>

## ***I. INTRODUCTION***

This case is about Respondent's swift and harsh response to its employees' efforts to unionize. In the fall of 2010, a core group of employees, including the two discriminatees herein, began an organizing campaign among the bus drivers at Respondent. By early winter 2010 the union effort was gaining momentum and on December 9, Respondent had clear knowledge of the union effort. On that day, Respondent's admitted supervisor and agent, Sara Martinez, saw a group of employees leaving a local restaurant with several union agents. The next day, in what was becoming an increasing desperate attempt to stifle any union activity, Respondent committed several independent 8(a)(1) violations, many of which were either admitted or went completely un rebutted by Respondent's supervisors and agents. The ALJ therefore properly concluded that these violations occurred.

Also on December 10, Respondent ratcheted up the pressure by firing known activist and union supporter Carol Garcia. Next, Respondent held a meeting on January 6, 2011, where Company Vice President Henry Gardunio announced a sudden and unprecedented across-the-board-wage increase, promised fairer distribution of bus charter assignments, and

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<sup>1</sup> Throughout this document, Latino Express, Inc. will be referred to "Respondent" or the "Company", and Charging Party Teamsters Local No. 777, Affiliated with the International Brotherhood of Teamsters, AFL-CIO, will be referred to as the "Union". Transcript references will be "Tr. " followed by the page number; the Acting General Counsel's exhibits will be referred to as "GC X" and Respondent's exhibits will be referred to as "R X" followed by the specific exhibit number. The Administrative Law Judge will be referred to as the "ALJ" and the National Labor Relations Act will be referred to as the "Act". The ALJ's Decision will be referred to as ALJD followed by the page and line number(s) of the decision. Finally, unless specifically noted otherwise, "Complaint" will refer to the First Amended Consolidated Complaint, as amended at the hearing.

solicited employees grievances. During this meeting, another known union supporter, Pedro Salgado, concertedly raised the issue of Respondent paying employees in cash for doing charters. Shortly thereafter, and without so much as attempting to investigate whether he actually engaged in any misconduct, Respondent seized upon Salgado's comment, twisted it into an admission of guilt, and summarily terminated him.

As the ALJ correctly found however, the excuses offered by Respondent for terminating Carol Garcia and Pedro Salgado were a blatant pretext designed to hide Respondent's true motive: their protected concerted activity and their involvement in the fledgling union organizing effort. As to both employees, Respondent's goal was to rid itself of employees who were stirring up other employees and threatening Respondent's non-union status. In Garcia's case, the ALJ saw through the completely incredible excuse offered up by Respondent regarding her termination. Instead of crediting Gardunio's assertion that she was fired for threatening him, the ALJ rejected it for the sham that it was and this finding is amply supported by the ALJ's credibility determinations against Gardunio. The ALJ's finding is also significantly bolstered by the highly suspicious timing: namely, Garcia was terminated the day after supervisor Martinez saw her leaving a union meeting.

Similarly, Respondent's claim that Salgado was involved in a theft scheme and that this conduct was the reason he was terminated was properly rejected by the ALJ. The ALJ correctly noted the complete lack of evidence that Salgado stole any money and recognized that the timing and the disparate way that Respondent treated him compared to similarly situated employees revealed Respondent's unlawful motivation.

The ALJ also credited the Acting General Counsel's witnesses who testified regarding Respondent's continued efforts, even after these two unlawful terminations, to interfere with

and coercively discourage its employees' union activity through a barrage of additional 8(a)(1) violations. As detailed in his decision, this included: 1) preventing employees from discussing terms and conditions of employment with one another; 2) creating an impression that employees' union organizing activities were under surveillance; 3) promising improved benefits to employees during a union organizing campaign; 4) soliciting grievances from employees during a union organizing campaign; 6) interrogating employees about their support of the Union; 7) threatening to discharge employees if they unionized; 8) threatening to close the facility and move the Company to a different location in the event the employees unionized; and 9) warning employees that it would be futile to form a union because the Company would never agree to allow a labor organization to represent them.

However, the ALJ failed to address one of the independent 8(a)(1) violations alleged in the Complaint and improperly denied the Acting General Counsel's request to amend the Complaint at the hearing to add an additional 8(a)(1) violation. Finally, the ALJ failed to address certain remedies sought by the General Counsel, including an additional monetary remedy to cover any added tax liability for the discriminatees, a public notice reading, and a broad cease and desist order. Accordingly, the Acting General Counsel files the following limited exceptions to the ALJ's decision.

## **II. THE GENERAL COUNSEL'S EXCEPTIONS**

1. The ALJ's failure to expressly find and remedy the allegation that Respondent unlawfully granted employees a wage increase in response to the Union's organizing campaign. (Complaint paragraph V(c)(iv); ALJD at p. 11, line 30 – p. 12, Line 21; p. 18, lines 33-34; Appendix)
2. The ALJ's denial of the Acting General Counsel's request to amend the hearing to allege that Respondent's duces tecum subpoenas to certain employees violated Section 8(a)(1) of the Act. (ALJD at p. 2, lines 39-47, FN 2)

3. The ALJ's failure to grant the Acting General Counsel's request for an additional monetary remedy to the discriminates to cover any additional tax liability.
4. The ALJ's failure to grant the Acting General Counsel's request for a broad cease and desist order.
5. The ALJ's failure to grant the Acting General Counsel's request for a public notice reading.

### **III. The Acting General Counsel's Argument in Support of His Exceptions**

#### **A. Exception 1 – Grant of Benefits Allegation**

Complaint paragraph V(c)(iv) alleges that in about January 2011 Respondent granted employees a wage increase in response to the Union's organizing campaign, in violation of Section 8(a)(1).

In his decision, the ALJ concluded, as the undisputed evidence showed, that Respondent granted a wage increase to its employees. (ALJD p. 8, lines 1-10, 34) In his analysis section, however, the ALJ failed to note the General Counsel's separate allegation regarding the unlawful grant of a wage increase.

Respondent's Vice President, Henry Gardunio, readily admitted that the purpose of the January 6, 2011, meeting was to announce an immediate 50 cent wage increase for all the employees. (Tr. 599, 648) Gardunio told the assembled employees that the Company's contract with CPS would end in three or four months and that was why the Company had not given raises earlier. (Tr. 362)

As argued to the ALJ by the Acting General Counsel and as noted by the ALJ, under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964) granting benefits to employees in response to a union organizing campaign is unlawful if it's done "for the purpose of inducing employees to vote against the union," because it interferes with their protected right to organize. Under

settled Board precedent, "[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Yale New Haven Hosp.*, 309 NLRB 363, 366 (1992); see also *Kanawha Stone Co.*, 334 NLRB 235, 235 at footnote 2 (2001). Here, improper motive is properly inferred given the timing, i.e., right on the heels of Respondent learning of the employees union activities, and the complete lack of any logical business justification for the increase at that time.

Gardunio admitted that the decision to grant the wage increase was made over the winter holiday. (Tr. 600) Thus, given the undisputed evidence, coupled with the ALJ's specific credibility conclusions regarding Employer knowledge of the employees' union activity (ALJD p. 8, lines 35-39), the timing of the wage increase is clearly suspect.

Respondent attempted to explain away the timing of the wage increase by claiming that it granted the 50 cent wage increase in January 2011 so it would know its labor costs in order to "figure out how to bid for upcoming bus routes." (Tr. 646) However, this bald assertion simply doesn't make sense and it has been long held that the Board is not required to accept self-serving declarations of a respondent's witnesses. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 469 (9<sup>th</sup> Cir. 1966). At the time Respondent granted the wage increase, the old contract between Respondent and the Chicago Public Schools (CPS) was still in place and the funds needed for the immediate implementation of the wage increase necessarily had to come from revenue from the old contract. Therefore, the timing of the increase isn't explained away by Respondent's convenient claim regarding the upcoming bid. Instead, Respondent would always be free to estimate its labor costs and calculate a bid based on them, without having to suddenly grant a wage increase during an existing contract and

while armed with the knowledge that its employees were engaging in union organizing activity.

Therefore, as it stands, the evidence shows only a bare claim by Gardunio that the wage increase was unrelated to the employees' known union efforts and a proffered justification that is severely undercut by logic and that is totally unsupported by even a shred of other evidence. In sum, there was no reason to suddenly grant the wage increase, mid-contract, if not to attempt to coerce the employees to forego union organizing, an activity that Respondent admitted it opposed. Accordingly, the evidence strongly supports finding that the wage increase violated the Act, as alleged in the Complaint and the Acting General Counsel excepts to the ALJ's failure to find this violation.

**B. Exception 2 – Denial of the Acting General Counsel's Motion to Amend the Complaint at the Hearing**

The Acting General Counsel also excepts to the ALJ's denial of its motion at the hearing to amend the Complaint to add the following allegation to paragraph V: e) About April 18, 2011, Respondent interfered with employees' Section 7 rights by seeking any and all pamphlets, letters, emails, notices, or electronic communications received by you from any Union representative or employees of Latino Express in favor of the union in its subpoena duces tecum issued to employees. (ALJD p. 2, lines 39-47; Tr. 563; Rejected Exhibits GC X-11A-C) As noted at the hearing, courtesy copies of the subpoenas were provided to Counsel for the Acting General Counsel via an email at 12:30 pm on April 20, 2011. (Tr. 565-67) Contrary to the ALJ's reasoning, the Acting General Counsel respectfully submits that four business days is not an unreasonable time for the Region to consider whether this conduct violated the Act. (ALJD. p. 2 lines 45-47) In addition, there could be no undue surprise to Respondent that would prejudice Respondent since Respondent's

counsel was obviously aware of its own conduct, well before the motion was made. Also, unlike situations where attempts to amend the complaint have been denied as untimely, here, the motion to amend was made before the close of the General Counsel's case and did not greatly expand on the scope of Respondent's anticipated defenses. Cf. *Stagehands Referral Service*, 347 NLRB 1167 (2006).

Here, whether Respondent's subpoenas violated the Act is a legal question that is based on an objective standard and therefore no additional testimony could possibly shed light on whether the conduct violated the Act. Thus, unlike the *Stagehands* case, no additional evidence would be required by Respondent to defend against this additional allegation. In short, it doesn't matter what effect the subpoenas had on the recipients, or whether they told others about Respondent's efforts to learn of their union activities—the violation was complete upon service of the subpoenas. There is, therefore, no prejudice to Respondent to permit the amendment. Accordingly, the amendment should have been permitted and the Acting General Counsel excepts to the ALJs denial of the motion to amend and therefore his failure to find a violation of Section 8(a)(1) based on the subpoenas.

As to the merits of the amended allegation, as the Board makes clear in several cases, attempts by employers to obtain certain information or documents from employees regarding their or their co-workers' protected activity violates the Act where the confidentiality interests of the employees outweighs the respondent's need for the information. *National Telephone Directory Corp.* 319 NLRB 420, 421 (1995)(subpoena to union organizer for authorization cards and the names of employees who attended certain union meetings quashed); *Guess, Inc.*, 339 NLRB 432, 434 (2003)(questioning during a deposition must seek relevant information, lack an illegal motive, and the need for the information sought must

outweigh the employees confidentiality interests to not run afoul of Section 8(a)(1)); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999).

Here, Respondent vaguely contended at the hearing that it needed the information sought in the subpoenas in order to determine whether the discriminatees named in the Complaint “were involved with any sort of union activity.” (Tr. 565) Respondent’s written response was similarly vague, stating only that the documents were relevant “to show whether there was union activity.” (ALJ Exhibit 1, at p. 6) However, Respondent made no effort to explain how all communications between the subpoenaed employees and “any Union Representative or employee in favor of the union” was relevant to its defense. (Rejected Exhibits – GC X-11A-11C) In addition, the scope of the subpoena necessarily includes communications from all pro-union employees, not just the named discriminatees. As such, the information sought is significantly broader than the one specific stated purpose offered by Respondent and clearly seeks to documents that it would not otherwise be lawfully permitted to request from its employees.

In addition, even assuming some relevance, Respondent has not demonstrated that its need for the information outweighs the confidentiality interests of the broad category of employees “in favor of the union”. The Acting General Counsel therefore requests that the ALJ’s denial of its motion to amend the Complaint be overruled and that the violation alleged in the amendment be found and remedied by the Board.

### **C. Exception 3 – Tax-Related Remedy**

As part of the remedy for the unfair labor practices alleged, the Acting General Counsel sought an order requiring reimbursement to Carol Garcia and Pedro Salgado of

amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed to had there been no discrimination.

This aspect of the remedy is certainly appropriate given the fact that the goal of the Act is to make discriminatees whole. In order for employees to be made whole, it is necessary to seek reimbursement for amounts equal to the difference in taxes discriminatees owe upon receipt of a lump-sum payment and the taxes they would have owed had they not been the subject of discrimination. Without this added amount, Carol Garcia and Pedro Salgado would unquestionably not be fully made whole.

#### **D. Exception 4 – A Broad Cease and Desist Order**

The ALJ also failed to address the Acting General Counsel's request that the remedy in this case include a broad cease and desist order. However, the serious and pervasive nature of the unfair labor practices by Respondent mandates a broad cease and desist order, requiring that Respondent refrain from *in any manner* interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act. *Autospa Express, Inc.*, 355 NLRB No. 205, slip op. at 5 (2010); *Five Star Mfg.*, 348 NLRB 1301, 1302 (2006). Under the totality of circumstances it is clear that Respondent's unlawful conduct manifests the requisite opposition to the purposes of the Act and a general disregard for the employees fundamental statutory rights such that it is appropriate to protect the rights of employees generally by enjoining reasonably anticipated future threat to any of those rights. *Id.*

### **E. Exception 5 – Public Notice Reading**

The ALJ also failed to note the Acting General Counsel’s request that the remedy include a public notice reading. Specifically, the Acting General Counsel sought an order requiring that during the time the Notices are posted, the Company must convene the unit employees during working time at the Company’s Chicago facility and have a responsible management official of the Company read the Notice in English and Spanish, or permit a Board Agent, in the presence of a responsible management official of the Company, to read the Notice to employees. The Acting General Counsel therefore exceptions to the lack of this remedial order.

A public notice reading is required here given Respondent’s pervasive and serious violations. Such a reading has long been recognized as an “effective but moderate way to let in a warming wind of information and, more important, reassurance.” *United States Service Industries*, 319 NLRB 231, 232 (1995) enfd. 107 F.3d 923 (D.C. Cir. 1997), quoting *J.P. Stevens & Co., v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969). See also *Concrete Form Walls, Inc.*, 346 NLRB 831, 841 n.3 (2006) (Member Schaumber, dissenting in part)(notice reading remedy “gives teeth to other notice provisions” that the respondent must also announce).

By imposing such a remedy, it can be assured that Respondent’s “minimal acknowledgment of the obligations that have been imposed by the law. . . . The employees are entitled to at least that much assurance that their organizational rights will be respected in the future.” *Federated Logistics*, 340 NLRB 255, 258 n.11 (2003). See also *United States Service Industries*, 319 NLRB at 232 (reading allows employees to gain assurance from a high level employer representative that they view “as the personification of the Company” that an employer will respect their rights).

A notice reading will also ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the employer's bulletin boards. A reading will also allow all employees to take in all of the notice, as opposed to hurriedly scanning the posting, under the scrutiny of others. Thus, Respondent should be required to convene a meeting at a time reasonably calculated to ensure as many employees as possible will be present. See, e.g., *Vincent/Metro Trucking, LLC*, 355 NLRB No.50, slip op. at 2 (2010). In addition to ensuring that the notice's content reaches all the employees, a personal reading places on the Board's notice "the imprimatur of the person most responsible" and allows employees to see that the respondent and its officers are bound by the Act's requirements. *Loray Corp.*, 184 NLRB 557, 558 (1970).

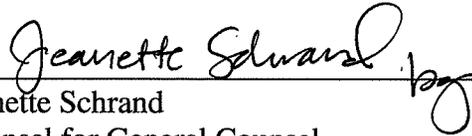
Here, since Respondent discharged two lead union supporters and committed numerous egregious independent 8(a)(1) violations, hearing the appropriate cease-and-desist language read aloud will better serve to allay the employees' fear that union activity at work will be met with reprisal. Furthermore, since it was one of Respondent's highest ranking officials, Vice President Henry Gardunio, who committed the vast majority of the violations hearing him read the notice, or seeing him present while it is read, will "dispel the atmosphere of intimidation he created" and best assure employees that their rights will be respected. *Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993), *enfd.* mem 55 F.3d 684 (D.C. Cir. 1995). Accordingly, the Acting General Counsel requests that the Board require a public notice reading by Respondent.

#### ***IV. CONCLUSION***

Counsel for the Acting General Counsel submits that Board law and supporting record evidence in this case thoroughly establishes that Respondent violated Sections 8(a)(1) of the Act by granting a wage increase to employees and issuing document subpoenas to certain employees. For this reason, and based upon the record as set forth by the ALJ and as discussed above, the Acting General Counsel requests that the Board grant its exceptions and find these additional violations. In addition, the Acting General Counsel requests that contrary to the ALJ, the Board modify the remedy to include an additional monetary remedy to the two terminated employees to cover any additional tax liability, and to include both a broad cease and desist order and a public notice reading. It is therefore requested that the Board grant these limited cross-exceptions, along with including the appropriate remedying language and modifying the Order and Notice contained in the Appendix to the ALJ's Decision. Specifically, an appropriate cease and desist order and Notice including the language "We will not grant a wage increase in order to discourage you from supporting the Union" and "We will not request copies of our employees' communications with representatives of the Union or their communications with their co-workers about the Union." By granting the General Counsel's limited cross exceptions in this case, such Board Order would constitute a full and complete remedy to the Complaint thereby vindicating the policies of the Act.

DATED in Chicago, Illinois, this 7<sup>th</sup> day of September 2011.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jeanette Schrand", written over a horizontal line. The signature is written in black ink and includes a large, stylized flourish at the end.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of General Counsel's Cross Exceptions to the Decision and Order of the Administrative Law Judge have been served, this 7th day of September, 2011, in the manner indicated on the following parties of record:

**By U.S. Mail:**

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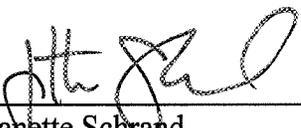
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