

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

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LATINO EXPRESS, INC.,	:
	:
and	: 13-CA-46528
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CAROL GARCIA, AN INDIVIDUAL,	:
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and	: 13-CA-46529
	:
PEDRO SALGADO, AN INDIVIDUAL,	:
	:
and	: 13-CA-46634
	:The Honorable Michael A. Rosas
TEAMSTERS, LOCAL UNION NO. 777,	:Administrative Law Judge
AFFILIATED WITH THE INTERNATIONAL	:NLRB Regional Office
BROTHERHOOD OF TEAMSTERS, AFL-CIO	:209 S. LaSalle Street
	:Chicago, IL 60604
	:
	: <u>ORAL ARGUMENT REQUESTED</u>
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LATINO EXPRESS, INC.,’S ANSWERING BRIEF TO GENERAL COUNSEL’S CROSS
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

Respectfully submitted by:

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Attorneys for LATINO EXPRESS, INC.

LATINO EXPRESS, INC., by and through its attorneys, and for its Answer to General Counsel's Cross Exceptions to Decision of Administrative Law Judge Michael A. Rosas issued on July 12, 2011, states as follows:

I. The ALJ's decision finding that there was no unlawfully granted wage increase was not contrary to the evidence and therefore General Counsel's suggested remedy was properly rejected.

In this case, the ALJ did not find that the wage increase was unlawful. As such, any remedy entered granting General Counsel's request for a remedy should be rejected and denied.

Wage increases are permissible during a union organizing campaign "where the raise under consideration was one which was regularly or periodically granted or one which the employees normally expected to receive." *Standard Coil Products, Inc.*, 99 N.L.R.B. 899, 903, 30 L.R.R.M. (BNA) 1154 (1952). *See also Reeves Brothers, Inc.*, 277 N.L.R.B. 1568, 121 L.R.R.M. (BNA) 1201 (1986); *Wilma M. Moran, R.L. Mason & Stewart Mason*, 103 N.L.R.B. 81, 31 L.R.R.M. (BNA) 1503 (1953); *May Department Stores Co.*, 59 N.L.R.B. 976, 15 L.R.R.M. (BNA) 173 (1944). *See also Daily News of Los Angeles, Division of Cook Media Group, Inc.*, 315 N.L.R.B. 1236, 148 L.R.R.M. (BNA) 1137 (1994), in which the NLRB held that the employer violated the NLRA by withholding annual merit increases during negotiations with the union, even when the amounts of the increases were discretionary. The courts often have been critical of the NLRB's attempts to distinguish between improvements that are lawful because they are made pursuant to preexisting practice and those that are new and unusual and therefore constitute interference. *See, e.g., Acme Die Casting v. NLRB*, 93 F.3d 854 (D.C.Cir. 1996).

It is well established that an employer faced with a union organizing drive is required to proceed with an expected wage or benefit adjustment as if the union were not present; however, an employer may postpone such a wage or benefit adjustment. *See, e.g., Pleasant Travel Services*, 317 N.L.R.B. 996, 150 L.R.R.M. (BNA) 1003 (1995). There are no "magic words" in which the employer must couch the message. *Sam's Club, Division of Wal-Mart Stores, Inc.*, 349 N.L.R.B. 1007, 1013, 182 L.R.R.M. (BNA) 1173 (2007). In *Sam's Club*, the NLRB found that the respondent's suspension of merit wage increases was not unlawful because the store manager made it clear that merit increases were only being "put on

hold” in order to avoid appearing to attempt to influence employees’ votes and that “merit increases will be reinstated after the vote.” *Id.* “In these circumstances, the only plausible reading of [the store manager’s] statement is that the employees would receive their merit increases after the election regardless of the outcome.” *Id.*

Under some circumstances, even during the pendency of a representation petition, the employer can inform employees of or implement previously unannounced and unexpected benefits. Such actions are lawful as long as the benefits would have been granted regardless of the advent of the union campaign. *Flatbush Medical Center*, 270 N.L.R.B. 962, 116 L.R.R.M. (BNA) 1185 (1984); *Huttig Sash & Door Co.*, 300 N.L.R.B. 93, 135 L.R.R.M. (BNA) 1257 (1990).

A violation based on the theory that the employer unlawfully granted or promised benefits requires evidence of the employer’s knowledge of the protected activity at the time it decided to grant or promise benefits. *Field Family Associates, LLC*, 348 N.L.R.B. 16, 181 L.R.R.M. 1034 (2006) (employer did not violate NLRA by promising new benefits in anticipation of union organizing campaign when there was no evidence employer knew that organizing efforts had begun). If it is shown that wages were increased or a benefit was granted during the critical period, the employer may show that the timing was governed by factors other than the pendency of the election. The employer is the only party that can explain why it chose to grant the benefit or wage increase when it did. *ARA Food Services*, 285 N.L.R.B. 221, 125 L.R.R.M. (BNA) 1305 (1987).

In the present matter, there is no evidence that any wage increase was anything other than the result of the Company’s raises in conjunction with the letting of bid for the Chicago Public School busing contract. The CPS contracts were offered into evidence, and the General Counsel stipulated to the three year contract. (Tr. 755, lines 12-15.) The CPS contract ends at the end of the 2011 school year. (Tr. 635:15-20.) Logically then, as there are 28 other bus companies bidding for the Chicago Public Schools bus routes, before bidding on the contract, the Company needed to know how much it was going to have to pay drivers. The raises are given every 2 ½ to 3 years based on the Chicago Public School systems three year contract for the bus service. (Tr. 644:16; 646:3.) Pedro Garcia stated that his last raise was

three years ago. (Tr. 133:8-13.) The ALJ Decision recognized that "there is no direct proof that Company managers or supervisors knew" about Garcia's and Salgado's solicitation of coworkers or obtaining signatures for union cards. (Tr. 56-60, 251-252, 254-255, 259-261, 354-357, 361; GC Exhs. 5,7.)

General Counsel relies on *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964). In that case, the Supreme Court has interpreted Section 8(a)(1) to prohibit "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964). However, not all agree with the *Exchange Parts* premise that employees receiving benefits from an employer in response to a union campaign are "intimidated by the figurative 'fist inside the velvet glove.'" *NLRB v. Curwood, Inc.*, 397 F.3d 548 (2005) relying on *Skyline Distribs. v. N.L.R.B.*, 99 F.3d 403, 408-10 (D.C.Cir.1996) (discussing criticism of *Exchange Parts* ruling). That is, not all announcements or promises of benefit are unlawful. Such promises or grants are unlawful only when done in order to discourage employee support of a union. *NLRB v. Curwood, Inc.*, 397 F.3d 548, 555 (2005).

Therefore, an employer does not commit an unfair labor practice when it is merely following an established practice of pay raises predating a union campaign, or when it has some other "union-neutral justification" for the increase. *NLRB v. Curwood, Inc.* 397 F.3d 548 (2005) relying on *N.L.R.B. v. Don's Olney Foods, Inc.*, 870 F.2d 1279, 1285 (7th Cir.1989). The test for determining whether an employer violates Section 8(a)(1) asks whether the employer's conduct had a reasonable tendency to interfere with or coerce employees in the exercise of their Section 7 rights. *NLRB v. Curwood, Inc.* 397 F.3d 548 (2005) relying on *Multi-Ad Servs., Inc. v. N.L.R.B.*, 255 F.3d 363, 372 (7th Cir.2001); *N.L.R.B. v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir.1998).

The employer's right to protected free speech pursuant to 29 U.S.C. § 158(c)(1) must be considered also.

In conclusion, the wage increase was based on the regular business of the Company, there was no evidence that such was given in January for a vote that did not occur until April, there was no evidence

that the wage increase was tied to any unionization efforts, and there is absolutely no testimony from any witness who stated that he or she was promised any benefit or wage increase based on their union vote. Therefore, General Counsel's request must be rejected.

II. The denial of General Counsel's request to amend the Complaint was proper.

The three subpoenas at issue were not challenged in any manner, the subpoenas requested relevant discoverable evidence, and they were issued by the NLRB. As such, as Acting General Counsel's request to amend was untimely, unsupported, prejudicial to Latino Express, Inc., and was merely submitted for harassment purposes. As such, Acting General Counsel's motion to amend was properly denied.

The National Labor Relations Board is granted the power to subpoena documents that "relate[] to any matter under investigation or in question." 29 U.S.C. § 161(1). Generally, this power is limited to documents and evidence that are relevant to the inquiry at hand. *N.L.R.B. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 08-CV-1361, 2011 WL 817547 (C.D. Ill. Mar. 1, 2011) relying on *N.L.R.B. v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007-1008 (9th Cir.1996); *N.L.R. B. v. Caroline Food Processors, Inc.*, 81 F.3d 507, 511 (4th Cir.1996).

It has long been recognized that the NLRA confers powers on the NLRB to issue such subpoenas. In *N. L. R. B. v. Lewis*, 310 F.2d 364, 365-66 (7th Cir. 1962), the court stated:

Section 11 of the National Labor Relations Act (Title U.S.C.A. § 161(1)), entitled 'Investigatory powers of Board,' so far as material provides:

'(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forth-with issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.'

The section authorizes the Board, upon the petition of a person thus required to produce evidence, to revoke the subpoena if in its opinion 'the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings.'

It is given the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any relevant evidence. Nothing in the second sentence, which relates to the Board's subpoena power, limits that power to persons being investigated or proceeded against. Congress having expressly limited the Board's power to examine and copy to persons being investigated or proceeded against and, in the very next sentence, omitting this limitation on the Board's subpoena power, it is plain that no such limitation was intended as to the latter.

N. L. R. B. v. Lewis, 310 F.2d 364, 366 (7th Cir. 1962).

Upon reviewing a challenge to a subpoena, the court has stated that the test for discoverability, absent a claim of privilege, is relevancy. Fed.R.Civ.P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...."). *United States v. Electro-Voice, Inc.*, 879 F. Supp. 919, 924 (N.D. Ind. 1995). Relevancy is construed broadly to include "any matter that bears on, any issue that is or may be in the case." *United States v. Electro-Voice, Inc.*, 879 F. Supp. 919, 924 (N.D. Ind. 1995) relying on *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978).

In *United States v. Electro-Voice, Inc.*, 879 F. Supp. 919, 924 (N.D. Ind. 1995), the Court stated that:

Federal district courts have ordered the NLRB to disclose certain non-privileged documents. *See, e.g., Kobell v. Reid Plastics, Inc.*, 136 F.R.D. 575, 579 (W.D.Pa.1991) (disclosure of witness affidavits within NLRB's possession or control); *Fusco v. Richard W. Kaase Baking Co.*, 205 F.Supp. 459, 464 (N.D.Ohio 1962) (disclosure of affidavits of witnesses scheduled to testify in 10(j) hearing). This court may limit discovery to avoid unnecessary delay in this action's resolution and to avoid creating evidentiary conflicts and credibility issues that this court should not resolve, (*see San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir.1969) (Section 10(l) action)); *Kobell v. Reid Plastics, Inc.*, 136 F.R.D. 575, 579 (W.D.Pa.1991) (Section 10(j) action) (citing cases), and may prohibit discovery of an investigator's reports, internal memorandum, files and notes, *see Madden v. International Hod Carriers', Bldg. and Common Laborers' Union of America, Local No. 41, AFL-CIO*, 277 F.2d 688, 693 (7th Cir.1960), *cert. denied*, 364 U.S. 863, 81 S.Ct. 105, 5 L.Ed.2d 86 (1960); *D'Amico v. Cox Creek Refining Co.*, 126 F.R.D. 501, 505-06 (D.Md.1989), as well as preclude deposition testimony of any agents of the Board relative to such information. *See Madden*, 277 F.2d at 693 (scope and adequacy of Board's investigation and testimony of Board's agents not relevant to Section (l) action).

Only documents and tangible things prepared in anticipation of litigation are protected. *United States v. Electro-Voice, Inc.*, 879 F. Supp. 919, 924 (N.D. Ind. 1995). The work-product privilege is not absolute, and yields upon a showing of substantial need and undue hardship by the party seeking discovery. *United States v. Electro-Voice, Inc.*, 879 F. Supp. 919, 924 (N.D. Ind. 1995) relying on *See Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir.1984).

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. *Perius v. Abbott Laboratories*, 07 C 1251, 2008 WL 3889942 (N.D. Ill. Aug. 20, 2008). Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *Perius v. Abbott Laboratories*, 07 C 1251, 2008 WL 3889942 (N.D. Ill. Aug. 20, 2008). All discovery is subject to the limitations imposed by Rule 26(b) (2) (C).

Fed.R.Civ.P. 26(b)(1) also provides that "for good cause," the court may order discovery of any matter "relevant to the subject matter involved in the action." *Perius v. Abbott Laboratories*, 07 C 1251, 2008 WL 3889942 (N.D. Ill. Aug. 20, 2008).

The test of what is relevant is best left to a common sense approach by the court. *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994*, 172 F.R.D. 295, 303-04 (N.D. Ill. 1997) relying on 8 Charles Alan Wright, Richard L. Marcus, *Federal Practices and Procedure: Civil 2d*, § 2008. Even information that is not admissible at trial may be sought as long as the information sought to be discovered "appears reasonably calculated to lead to the discovery of admissible evidence." *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994*, 172 F.R.D. 295 relying on *Amcast Industrial Corp. v. Detrex Corp.*, 138 F.R.D. 115, 118 (N.D.Ind.1991). The phrase, "relevant to the subject matter involved in the pending action" is broadly construed to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case, without limitation to the issues raised by the pleadings. *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994*, 172 F.R.D. 295, 303-04 (N.D. Ill. 1997).

In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994, 172 F.R.D. 295, 303-04 (N.D. Ill. 1997).

Ultimately, a party who fails to challenge a subpoena, fails to challenge its relevancy and lacks factual support to allow an amendment to the charges but requests to amend due to litigation conduct on behalf of defense counsel that fails to rise above the level of strategic litigation conduct designed to “zealously” represent their clients should be denied its request to amend. *See, Lewis v. Sch. Dist. No. 70*, 05-CV-776-WDS, 2009 WL 928874 (S.D. Ill. Apr. 6, 2009).

Here, the Charges include allegations that:

- the maintenance director created the impression that employees’ union and/or protected concerted activities were under surveillance;
- the Company promised employees improved benefits in response to the Union’s organizing campaign;
- Henry Gardunio interfered with employees’ protected concerted activity, told employees that union representation was never going to happen, created impression that union activities were under surveillance and threatened them with discharge, granted employees a wage increase in response to union’s organizing campaign, promised improved benefits in response to Union’s organizing campaign, solicited grievance from employees response to the Unions organizing campaign, interrogated employees about their union activity and threatened them with discharge;
- discharged Carol Garcia because Garcia complained about working conditions and engaged in protected concerted activities;
- discharged Pedro Salgado after he was questioned about the cash payments for charter services work and engaged in protected concerted activities.

It is alleged that Latino Express, Inc. violated Section 8(a) (1) and (3) and Section 2 (6) and (7).

Due to the allegations, the National Labor Relations Board allowed subpoenas to be issued to the three individuals. The subpoenas requested that the three persons were to appear to give testimony and produce “Any and all pamphlets, letters, emails, notices or electronic communications received by you from any Union Representative or employee of Latino Express in favor to the Union.”

There was absolutely no support for Acting General Counsel’s request to amend. The subpoenas were properly issued by the NLRB, they were forwarded to Counsel five days prior to attempted service, and there was no challenge to the subpoenas by the persons who were served with them. Therefore, to allow any amendment at the late stage in the trial would have been prejudicial to Latino Express, Inc. in terms of time and resources in having to respond to an allegation for which there was clearly no support.

Furthermore, there was no evidence that the subpoena was forwarded for any other purpose than to obtain relevant evidence to defend the allegations brought against the Company.

In addition, the requests are relevant to the defense of the allegations. The Charges brought against Latino Express, Inc. allege that there was Union activity that Latino Express, Inc. knew about. There was little credible evidence of any Union activity, and there certainly was no evidence of illegal conduct by Latino Express, Inc. General Counsel's evidence was solely the testimony of witnesses, without any documents or support. Requesting supporting documents to defend the testimony required that the Company be able to challenge the testimony. The fact that no documents were produced and no persons responded to the subpoenas is very telling as to the lack of support of the testimony of the General Counsel's witnesses.

In conclusion, General Counsel's request to amend was properly denied and the request should be rejected.

III. General Counsel's calculation appears to result in those persons being unjustly enriched; there is no need to award additional monetary remedy to the former employees .

General Counsel's request appears to be based on a theory without support. As such, the ALJ's denial was proper.

According to the Board, backpay awards are determined by first estimating an employee's adjusted gross pay during the discharge period and then reducing that amount by any income that the employee may have earned during the same period through other endeavors (interim earnings). *Phil Smidt & Son, Inc. v. N.L.R.B.*, 810 F.2d 638, 640 (7th Cir. 1987). See also, *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900-01 (1984) ("[I]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices. ("[O]nly actual losses should be made good ..."). To this end, we have, for example, required that the Board give due consideration to the employee's responsibility to mitigate damages in fashioning an equitable backpay award.")

In the event that the ALJ's decision is affirmed, the calculation will be determined by the established, lawful, and proper method. General Counsel's desire to formulate a remedy based on some theory without basis and without explanation should be rejected.

IV. The failure to grant the request for a broad cease and desist order and a request for a public notice reading was proper, especially in light of the pending appeal.

Assuming, *arguendo*, that the General Counsel carried its burden, the remedy must fit the proved unfair labor practice violation. The ALJ recognized that the General Counsel's requested remedy did not do so here. As such, the General Counsel's request was properly denied.

The remedy must be tailored to fit the unfair labor practice it is intended to redress. *NLRB v. Curwood, Inc.*, 397 F.3d 548, 555 (2005) relying on *N.L.R.B. v. Aluminum Casting & Eng'g Co.*, 230 F.3d 286, 295 (7th Cir.2000) (citations omitted). ("[T]o cease and desist from such unfair labor practice...as will effectuate the policies of this subchapter." 29 U.S.C. §160(c).) Any cease and desist orders must be related to the violations found. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 85 L.Ed. 930, 61 S.Ct. 693 (1941). The NLRB has stated that narrow orders are usually more appropriate unless the union or employer has shown a proclivity to violate the NLRA or engage in "such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 101 L.R.R.M. (BNA) 1342 (1979). *See also Vanguard Tours, Inc.*, 300 N.L.R.B. 250, 136 L.R.R.M. (BNA) 1149 (1990), *enforcement granted in part, denied in part*, 981 F.2d 62 (2d Cir. 1992); *American Golf Corp.*, 294 N.L.R.B. 881, 132 L.R.R.M. (BNA) 1022 (1989), *enforcement granted in part, remanded*, 931 F.2d 896 (9th Cir. 1991).

General Counsel relies on *United States Service Industries*, 319 NLRB 231 (1995), which relied on *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533 for support that a public notice reading is required. However, in *J.P. Stevens & Co.*, the court began its opinion by stating that:

Only three things distinguish this case from the run-of-the-mill §§ 8(a) (1), 8 (a) (3) labor cases. The first is the tenacity with which the Employer persists in the exercise of deep seated anti-union convictions. The second is the succession of formal cases culminating in the present one bearing five service stripes in which, except for minor variations, the Board's findings of spectacular Employer violations of §§ 8 (a) (1), 8(a) (3) and 8(a) (5) of the Act have been upheld by three Courts of Appeals. The third is the Board's efforts

to devise some character of remedy which has at least some prospects of keeping the recalcitrant Employer's intransigence within the bounds of vigorous but lawful opposition to Union attempts to organize units in a multistate industrial complex.

That is, the employer in *J.P. Stevens & Co.* appears to have been unlawfully overzealous in its attempts to keep its company union-free. That is certainly not the issue in the case at issue.

The remedy requested by the General Counsel was denied. General Counsel cannot presume that such was overlooked by the ALJ just because it was not granted. Based on the evidence the General Counsel presented, however lacking in proving violations that the Company believes, the ALJ concluded that there was not enough evidence to warrant the remedy that General Counsel requested. Therefore, the General Counsel's request should be denied and rejected.

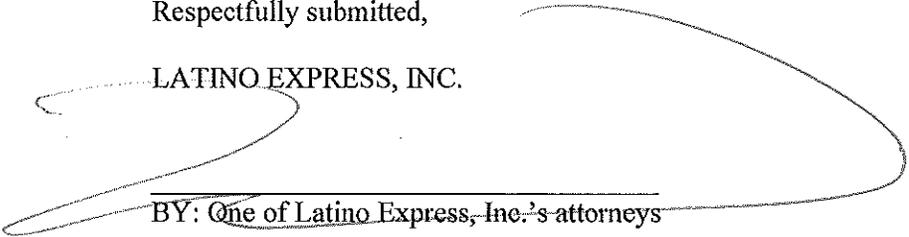
V. Conclusion

As such, Latino Express, Inc. respectfully requests that all of General Counsel's requests be wholly rejected and denied, and that there be a reversal of the ALJ's Conclusion, that this Board enter a finding wholly in favor of the Company, an Order be entered dismissing this matter in the Company's favor and against the Petitioners, and for any other relief deemed appropriate.

ORAL ARGUMENT REQUESTED.

Respectfully submitted,

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BY:  One of Latino Express, Inc.'s attorneys

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CERTIFICATE OF SERVICE

The undersigned, a nonattorney, hereby certifies that true and correct copies of the attached **LATINO EXPRESS, INC.,’S ANSWERING BRIEF TO GENERAL COUNSEL’S CROSS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION** have, been served on this 21st day of September 2011, upon the following in the manner indicated:

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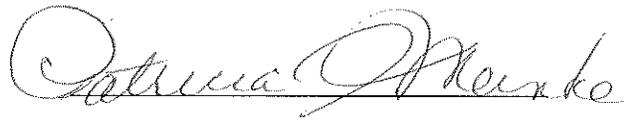
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