

**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**

**REPLY BRIEF IN SUPPORT OF THE ACTING GENERAL
COUNSEL'S CROSS EXCEPTIONS**

NOW COMES Jeanette Schrand, Counsel for the Acting General Counsel, who submits this Reply Brief in Support of the Acting General Counsel's Cross Exceptions.

I. The Evidence Shows that Respondent's Wage Increase Violated the Act as Alleged in the Complaint

In Respondent's Answering Brief to General Counsel's Cross Exceptions (hereafter "Brief"), Respondent claims that there is no evidence that the wage increase was anything other than the result of "raises in conjunction with the letting of bid for the Chicago Public School busing contract." (Brief p. 3). Similarly, Respondent asserts that there was no evidence that the wage increase was "tied to any unionization efforts." (Brief p. 4-5) However, both claims conveniently ignore the ALJ's finding that the timing of the proposed increase and the related 8(a)(1) violations (the promise of improved benefits by Rosas, Sr. and Respondent's other

8(a)(1) violations that made Respondent's anti-union stance clear) demonstrated that the benefits at issue were not the result of a legitimate business decision. (ALJD p. 12, lines 1-19) By clear implication, therefore, the ALJ rejected Gardunio's otherwise unsupported statement that the wage increase was somehow a normal part of Respondent's CPS bid process. This implicit finding is fully supported by the fact that the details of the bid process were never explained by Respondent, including even the most basic information, such when the bids were due, or, more fundamentally, why it needed to implement the wage increase when it did. Without more details it is not surprising that the ALJ would reject Respondent's supposed business justification for a wage increase that occurred immediately after Respondent learned of the Union organizing activity.

In addition, as explained in the Acting General Counsel's Cross Exceptions, it simply does not make sense that Respondent would be unable to fashion a bid without immediately granting a wage increase. Gardunio's utter failure to explain why the bidding process mandated an immediate raise, particularly in light of the fact that the increase occurred during the old contract, rather than at the start of any new agreement with CPS, leaves a gaping hole in the evidence which Respondent failed to address in its Brief or elsewhere.

Finally, Respondent seems to suggest that there is no evidence of its knowledge of the employees' union activity prior to the wage increase by noting the lack of evidence of its knowledge regarding certain specific union activity by Garcia and Salgado. (Brief p. 4) However, Respondent's lack of knowledge of certain discrete activities in no way detracts from the ALJ's other detailed findings as to employer knowledge, including, for example, supervisor Martinez witnessing a group of employees leaving a meeting with union representatives who were clad in clothes with large union insignias and thereafter reporting this information to

Gardunio. (ALJD p. 5 lines 15-21) Thus, there is clear evidence that Respondent was aware of the employees' unionization efforts prior to the wage increase that was undisputedly granted by Respondent in nearly January 2011.

Accordingly, for the reasons explained in the Cross Exceptions, the Board should clarify the ALJ's finding as to the grant of benefits and find the violation, as alleged in the Complaint by the Acting General Counsel (hereafter "AGC"), and provide for an appropriate remedy.

II. The Proposed Amendment Related to Respondent's Subpoenas

As it did at the hearing, Respondent once again demonstrates its failure to understand the basic issues pertaining to the motion to amend the complaint. (Tr. 563-569; ALJ Exhibit 1; Brief p. 2-5) First, Respondent misses the procedural aspect, namely, whether the request to amend should have been granted based on the factors discussed in cases such as *Stagehands Referral Service*, 347 NLRB 1167 (2006). Second, Respondent fails to grasp the issue as to the merits of the amendment, specifically, whether the subpoenas violated the Act by impermissibly seeking certain documents from employees.

As the ALJ noted at the hearing, providing Respondent with blank subpoenas upon request is basically a clerical function and the Region lacks discretion as to whether to provide them. (Tr. 569) Thus, providing the requested subpoenas to Respondent was not somehow an endorsement of the purpose for which they are ultimately used. Thus, the vast majority of the argument in Respondent's Brief, which is almost entirely verbatim from its response brief filed during the hearing (ALJ Exhibit 1) is irrelevant.

Regarding the procedural aspect of the amendment issue, Respondent merely parrots its earlier claim that the proposed amendment was prejudicial to it. (Brief p. 5) However, Respondent fails to explain how the timing of the proposed amendment would affect its ability to

defend itself. Indeed, Respondent made no claim at the hearing, and makes none in its Brief, to the effect that it needed to investigate the facts of the alleged violation in order to prepare a response to it. Likewise, Respondent has not even so much as hinted at what it would have done differently during the initial two days of the hearing had it known about the substance of the proposed amendment, nor what it might have needed to do in terms of calling additional witnesses or offering additional documents during its case-in-chief in order to respond to the additional allegation. In short, Respondent has failed to identify how it was prejudiced based on the lateness of the proposed amendment.

Respondent's claim of prejudice is also rendered completely nonsensical when one considers another misstatement in Respondent's Brief.¹ Specifically, Respondent incorrectly claims that the subpoenas "were not challenged in any manner." (Brief p. 5) In fact, an oral petition to revoke the document request aspect of the subpoenas was granted by the ALJ. (Tr. 576-580) However, according to Respondent, it needed the subpoenaed documents to "defend the testimony" of employees who they expected would testify about their own union activity and Respondent's knowledge of that activity. (Brief p. 9) If this were truly the case however, then the fact that the ALJ granted the AGC's petition to revoke the subpoenas would logically be itself highly prejudicial to Respondent. (Tr. 576-580) Yet inexplicably, Respondent has in no way challenged that ruling. Accordingly, Respondent's hollow claim of prejudice should be rejected since Respondent has offered absolutely nothing to support it.

As to the merits of the proposed amendment, Respondent merely offers the blanket claim that there was "absolutely no support" for it. (Response p. 8) However, after reviewing various case cites submitted to both the ALJ and Respondent during the hearing, the ALJ concluded that

¹ Respondent also incorrectly claims that there were no documents offered to support the employees testimony that they engaged in union activity. (Brief p. 9) In fact, AGC Exhibits 2, 5 and 7 clearly demonstrate the two discriminatees' union activity.

the amendment had “plausible merit”. (ALJD p. 2 lines 42-45) In addition, Respondent makes no effort in its Brief to address the cases provided to it and cited by the ALJ. Respondent has therefore failed to offer any explanation as to how its need for the documents outweighed the employees’ confidentiality interests. Thus, for the reasons explained in the Cross Exceptions, the AGC submits that the subpoenas violated the Act, as the proposed amendment alleges, and this violation should be found and appropriately remedied.²

III. Monetary Remedy to Cover Additional Tax Liability

In one of the cases cited by Respondent, *Sure Tan, Inc.* 467 U.S. 883, 897 (1984) the Supreme Court noted that Section 10(c) of the Act vested in the Board, “the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act.” As the Board recently noted, the Board’s “primary focus” in cases involving back pay is it to make employees whole. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 3 (2010). (awarding daily compounded interest on backpay and monetary awards and noting that full monetary remedies also deter the commission of unfair labor practices).

As explained in the Cross Exceptions, the AGC merely seeks to make the discriminatees whole, not to unjustly enrich them with speculative claims, as Respondent appears to claim. Thus, including in the remedy a requirement that, in the event that it is demonstrated that a discriminatee must pay additional taxes because of a lump-sum back-pay award, Respondent must pay this additional amount is appropriate since it will do nothing more than make the employees whole for the losses they suffered, thereby making them whole.

² In this section of its Brief, Respondent also inexplicably claims that it was alleged to have violated Sections 2(6) and (7) of the Act. (Brief p. 8) However, these are merely definitions, not substantive parts of the Act, and, for that matter, are definitions that Respondent admitted in its Answer that it satisfied. (GCX-1(k))

IV. Broad Cease and Desist Order and Public Notice Reading

Respondent asserts in its Brief that it has not been “unlawfully overzealous” in its attempts to remain union-free. (Brief p. 11) This, of course, is at odds with the ALJ’s entire decision, which found that Respondent committed numerous 8(a)(1) violations and terminated two employees on trumped up charges that the ALJ concluded were nothing more than pretext offered to hide Respondent’s anti-union motive. Unlawfully over zealous anti-unions actions by Respondent is precisely what the ALJ found, in abundance. Accordingly, Respondent’s reliance on *J.P. Stevens & Co. v. NLRB*, 417 NLRB F.2d 533 (5th Cir. 1969) for this argument is clearly misplaced.

In addition, to the extent Respondent’s Brief can be read to assert that as a first-time offender a broad cease and desist order and/or a public notice reading are unwarranted, such an argument must be rejected. See *Autospa Express, Inc.*, 355 NLRB No. 205 slip op. at 5 (2010) and cases cited therein. Here, the widespread and serious nature of the violations, coupled with the fact that the vast majority of them were committed by one of the highest ranking management officials at Respondent, Vice President Henry Gardunio, strongly support both additional remedies despite the fact that this is the first case against Respondent.

V. Conclusion

For the foregoing reasons, the ACG respectfully requests that Board reject Respondent’s arguments and grant the Cross Exceptions.

DATED in Chicago, Illinois, this 4th day of October, 2011.

Respectfully submitted,



Jeanette Schrand
Counsel for the Acting General Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Reply Brief in Support of the Acting General Counsel's Cross Exceptions have been served, this 4th day of October, 2011, in the manner indicated on the following parties of record:

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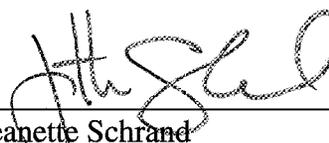
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