Latino Express, Inc. *and* Carol Garcia *and* Pedro Salgado *and* International Brotherhood of Teamsters, Local 777.[1] Cases 13–CA–046528, 13–CA–046529, and 13–CA–046634

July 31, 2012

DECISION AND ORDER AND NOTICE AND INVITATION TO FILE BRIEFS

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On July 12, 2011, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent, Latino Express, Inc., filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[5]

We agree with the judge that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by: prohibiting employees from discussing their terms and conditions of employment with one another, creating the impression that employees' union activities were under surveillance, promising improved benefits to employees during a union organizing campaign, soliciting grievances and promising to remedy them during a union organizing campaign, coercively interrogating an employee about his union activities, and threatening to discharge employees and to close and move the facility if they selected the International Brotherhood of Teamsters, Local 777 (the Union) as their collective-bargaining representative.[6] We also agree that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Carol Garcia and Pedro Salgado because they supported the Union and engaged in other protected concerted activities.

The Acting General Counsel excepts to the judge's failure to find that, as alleged in the complaint, the Respondent violated Section 8(a)(1) by granting employees a wage increase during the organizing drive. We find merit in that exception. It is undisputed that the Respondent, shortly after learning of the organizing drive, told employees at a January 6, 2011 meeting that they would be receiving a 50-cent-an-hour wage increase. It is further undisputed that the wage increase became effective in the pay period following the January 6 meeting.

It is well established that "[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." *ManorCare Health Services–Easton*, 356 NLRB No. 39, slip op. at 21 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted). The Respondent has not made the requisite showing in this case. The Respondent contends that it granted the wage increase in early January because it needed to set its wage rates before reibidding on its 3-year contract with the Chicago Public Schools. It offered no evidence, however, of when the new rates had to be in place and

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties addressed in this decision.

[3] The Acting General Counsel has excepted to the judge's denial of his motion to amend the complaint to allege that the Respondent unlawfully issued subpoenas to employees seeking union-related pamphlets, letters, emails, and other documents in their possession. We find that the judge did not abuse his discretion in denying the motion. Member Block finds merit in the Acting General Counsel's exception and would sever and remand this allegation to the judge for further proceedings.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] We have amended the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified. We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[6] We reverse the judge's further finding that the Respondent unlawfully threatened employees that it would be futile to select the Union as their bargaining representative. The judge relied, in part, on Vice President Henry Garduñio's alleged statement to Carol Garcia that he, Garduñio, would never allow a union to represent the Respondent's employees. The judge, however, discredited Garcia on this point. To the extent the judge also relied on Maintenance Director Victor Gabino's threat to close and move the facility, which we agree was unlawful on its own terms, it is unnecessary to find that Gabino's statement was also unlawful as a threat of futility.

failed to explain why it could not have based its bid on projected wage rates. There also is no evidence that the Respondent was considering a wage increase until after it became aware of the union organizing campaign. Finally, the Respondent made no attempt to communicate to employees that the increase was independent of the ongoing union organizing campaign. For these reasons, we find that the Respondent's grant of the wage increase violated Section 8(a)(1) of the Act.

AMENDED REMEDY

The Acting General Counsel excepts to the judge's failure to recommend a broad order directing the Respondent to cease and desist violating the Act "in any other manner." A broad cease-and-desist order is warranted when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). On the facts of this case, we do not find that the Respondent has a demonstrated proclivity to violate the Act. In addition, although the Respondent discriminatorily discharged two employees and violated Section 8(a)(1) in a variety of ways, a broad remedial order is not justified merely by a substantial number of violations. See *Blankenship & Associates*, 306 NLRB 994, 994–995 (1992), enfd. 999 F.2d 248 (7th Cir. 1993). Accordingly, we find that a broad cease-and-desist order is not warranted in this case.

For similar reasons, we are not persuaded by the Acting General Counsel's exception to the judge's failure to recommend that the notice be read aloud to employees by the Respondent or a Board agent. The Acting General Counsel has not demonstrated that this measure, in addition to the Board's traditional remedies, is needed to remedy the effects of the Respondent's unfair labor practices. See *Chinese Daily News*, 346 NLRB 906, 909 (2006), enfd. mem. 224 Fed.Appx. 6 (D.C. Cir. 2007). Notably, despite the Respondent's misconduct, the Union won the election and has been certified as the employees' representative. See *Latino Express, Inc.*, Case 13–RC–022005 (April 15, 2011).

The Acting General Counsel has requested two additional remedies in connection with the issuance of a backpay award to remedy the 8(a)(3) discharges of discriminatees Garcia and Salgado. The first remedy involves the judge's ordering the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters.[7] Backpay awarded under a statute is creditable to the year(s) in which it should have been paid.[8] But, unless the employer or the employee notifies the Social Security Administration in a separate, special report, the employee's backpay will be posted to the employee's social security earnings record in the year received.[9] Wages not credited to the proper year may result in lower Social Security benefits or failure to meet the requirements for benefits.[10] The Acting General Counsel therefore sought an order requiring the Respondent to make the necessary report to the Social Security Administration, and the judge granted it.

The second requested remedy is raised by the Acting General Counsel's exception to the judge's failure to order the Respondent to reimburse the discriminatees for any excess Federal and State income taxes they might owe if they receive a lump-sum backpay award covering more than 1 calendar year. Backpay is taxable income in the year in which it is paid.[11] Receipt of a lump sum backpay award covering more than 1 calendar year can lift an employee into a higher tax bracket for the year in which it is received, with the result that the employee bears a greater tax burden than if she had received that same pay in the normal course. *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 441 (3d Cir. 2009). The Acting General Counsel seeks an order requiring the Respondent to make an additional payment compensating the discriminatees for any such increased tax burden.

Because adoption of these remedies in backpay cases would mark a change in Board practice, the Board has determined that it is desirable to ascertain the positions of interested parties and to solicit information from them. Accordingly, the Board has decided to sever these two remedial issues and retain them for further consideration, to permit the issuance of this decision regarding the remaining issues in the case. The Board will issue a supplemental decision regarding the Social Security reporting requirement and tax compensation remedy at a later date.

The Board invites all interested parties to file briefs in this case regarding the questions of whether, in connection with an award of backpay, the Board should routinely require a respondent to: (1) submit the appropriate documentation to the Social Security Administration so

[7] Although no party has excepted to this aspect of the judge's remedy, the Board has the authority to consider remedial issues sua sponte. See, e.g., *J. Picini Flooring,* 356 NLRB No. 9, slip op. at 2 fn. 5 (2010); *Indian Hills Care Center*, 321 NLRB 144, 145 fn. 3 (1996) (citations omitted).

[8] Internal Revenue Service, Reporting Back Pay and Special Wage Payments to the Social Security Administration 2, Pub. 957 (May 2010).

[9] Id.

[10] Id.

[11] Rev. Rul. 78-336, 1978-2 C.B. 255.

that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse a discriminatee for any excess Federal and State income taxes the discriminatee may owe in receiving a lump-sum backpay award covering more than 1 year.

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C. on or before October 1, 2012. No extensions will be granted. The parties to the matter may file responsive briefs on or before October 15, 2012, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at https://mynlrb.nlrb.gov/efile. If assistance is needed in filing through https://mynlrb.nlrb.gov/efile, please contact Lester A. Heltzer, Executive Secretary, National Labor Relations Board.

AMENDED CONCLUSIONS OF LAW

Replace the judge's Conclusion of Law 3 with the following paragraph.

"3. By prohibiting employees from discussing terms and conditions of employment with one another, creating an impression that employees' union organizing activities were under surveillance, promising improved benefits to employees during a union organizing campaign, soliciting grievances from employees during a union organizing campaign, granting a wage increase to employees during a union organizing campaign, interrogating an employee by asking him whether he supported the Union, threatening to discharge employees if they unionized, and threatening to close the facility and move the Company to a different location in the event the employees unionized, the Company violated Section 8(a)(1)."

ORDER

The National Labor Relations Board orders that the Respondent, Latino Express, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected union or concerted activities, including supporting the International Brotherhood of Teamsters, Local 777 or any other labor organization.

(b) Coercively interrogating employees about their union membership, activities, sympathies, or support.

(c) Prohibiting employees from discussing their terms and conditions of employment.

(d) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(e) Soliciting grievances from employees and promising to remedy them in order to discourage employees from selecting union representation.

(f) Promising improved benefits to employees in order to discourage employees from selecting union representation.

(g) Granting wage increases to employees in order to discourage employees from selecting union representation.

(h) Threatening employees with discharge if they select the Union or any other labor organization as their bargaining representative.

(i) Threatening employees with closure of their work facility if they select the Union or any other labor organization as their bargaining representative.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Carol Garcia and Pedro Salgado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Carol Garcia and Pedro Salgado whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."[12] Copies of the notice in English

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

and Spanish, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 20, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Social Security reporting requirement and tax compensation remedy discussed in the "Amended Remedy" section of this decision are severed from this case, and that the Board shall retain jurisdiction over those matters for further consideration. The Board will issue a supplemental decision regarding those remedies at a later date.

Dated, Washington, D.C. July 31, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected union or concerted activities, including supporting International Brotherhood of Teamsters, Local 777 or any other labor organization.

WE WILL NOT coercively question you about your union membership, activities, sympathies, and/or support.

WE WILL NOT prohibit you from discussing your terms and conditions of employment.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT solicit grievances from you and promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT promise you improved benefits in order to discourage you from selecting union representation.

WE WILL NOT give you wage increases in order to discourage you from selecting union representation.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT threaten you with closure of your work facility if you select the Union or any other labor organization as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Carol Garcia and Pedro Salgado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Carol Garcia and Pedro Salgado whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Carol Garcia and Pedro Salgado, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

LATINO EXPRESS, INC.

Jeanette Schrand, Esq., for the General Counsel.
Zane Smith, Esq. (Zane D. Smith & Associates, Ltd.), of Chicago, Illinois, and *Sheila Genson, Esq. (The Law Office of Sheila A. Genson, Ltd.),* of Schaumburg, Illinois, for the Respondent.
Gregory Glimco, of Brookfield, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 25–27, 2011. The charges in Cases 13–CA–46528 and 13–CA–46529 were filed on January 18, 2011,[1] and the charge in Case 13–CA–46634 was filed on March 9. The complaint issued April 6. The consolidated complaint (complaint) alleges that: Latino Express, Inc. (the Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Carol Garcia and Pedro Salgado on December 10, 2010, and January 12, 2011, respectively, for engaging in protected concerted activities.

The Company is also charged with a myriad of violations of Section 8(a)(1) of the Act: preventing employees from discussing terms and conditions of employment with one another; creating an impression that employees' union organizing activities were under surveillance; promising improved benefits to, and soliciting grievances from, employees during a union organizing campaign; interrogating an employee by asking him whether he supported the Union; threatening to discharge employees if they unionized; threatening to close the facility and move the Company to a different location in the event the employees unionized; and 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.[2]

The Company denied the material allegations of the complaint and asserts that Garcia was discharged for threatening her supervisor, while Salgado was discharged for stealing company money for charter services.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, with an office and place of business in Chicago, Illinois, has been engaged in the business of providing bus transportation services for students as well as charter bus services to the general public. In conducting its transportation services, the Company annually derives gross revenues in excess of $250,000, and purchases and receives at its Chicago facility goods and materials valued in excess of $5000 from points directly outside the State of Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

1. General operations

The Company provides bus transportation services within the Chicago metropolitan area. Its primary work arises from a contract with the Chicago Public Schools (CPS) system for the 2010–2011 school year. At all material times the following individuals were employed in supervisory capacities within the meaning of Section 2(11) or as agents within the meaning of Section 2(13) of the Act: Michael A. Rosas Sr.—president;[3] Henry Garduñio—vice president; Joseph Garduñio Sr.—owner; Victor Gabino—maintenance director; Sarah Martinez—dispatcher/manager;[4] and Raymundo Del Toro, Jr.—charter director.[5]

The Company is owned in equal one-third shares by Michael A. Rosas Sr., Henry Garduñio, and Joseph Garduñio. Henry

[1] All dates are from September 2010 to February 2011 unless otherwise indicated.

[2] At the end of the second day of trial, the General Counsel moved to amend par. V(5)(e) of the complaint to allege additional Sec. 8(a)(1) violations based on subpoenas duces tecum served on three employees on April 18, 2011; the subpoenas sought production of union-related pamphlets, letters, emails, notices or electronic communications. (Tr. 497–499.) After legal argument at the outset of the third and last day of trial, I found plausible merit to the proposed motion to amend. See *Guess ?, Inc.*, 339 NLRB 432, 434 (2003); *Wright Electric, Inc.*, 327 NLRB 1194 (1999); *National Telephone Directory Corp.*, 319 NLRB 420 (1995). However, relying on *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006), I denied the application on the ground that it was inexcusably late and prejudicial to the Company. (Tr. 566–575.)

[3] During a pretrial conference on April 7, the Company's trial counsel noted the similarity in names between me and the Company's President, Michael A. Rosas, Sr. I informed counsel for the parties that I was unaware of any extended family relationship between me and Mr. Rosas. The Company's counsel responded that he was unaware of any information to the contrary.

[4] The Company admits supervisory and agent status on the part of these individuals. (GC Exh. 1(k).)

[5] Del Toro was not listed in the complaint as a statutory supervisor or agent. Essentially seeking to conform the pleadings to the proof, the General Counsel, citing *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), established that Del Toro was a company supervisor and agent based on testimony that he exercised independent judgment to assign charter work. (Tr. 323.)

Garduñio oversees the Company's daily operations.[6] Sylvia Torres is an administrative assistant with a myriad of responsibilities, including payroll, bill payments, scheduling of meetings, and implementing employee discharges.[7]

Carol Garcia was employed as a bus driver by the Company during the 1990's before returning to their employ in September 2008. Pedro Salgado had been employed by the Company on and off since July 2006 as a standby driver to fill in for regularly scheduled drivers.

2. Charter services

In addition to providing bus transportation to the CPS, the Company provides charter bus transportation to other organizations. Those organizations pay for the charters by cash, check, money order or purchase order. Raymundo Del Toro was the charter director until he was terminated in December. He was required to compensate charter drivers by check for one-third of the amount charged the customer. There was no written policy relating to charter assignments and Del Toro had complete discretion as to whom they were assigned. Unbeknownst to management, however, Del Toro paid several drivers by cash for their charters. These employees included Pedro Salgado, Sosino, Salvador, Juvencia, Pedro Garcia, Alfonzo Avila, Telmo Hernandez, Nicolas Paredes, and David Guerraro.[8]

Salgado was assigned a charter during the fall of 2010, but his subsequent paycheck did not reflect compensation for that service in accordance with Company procedure. He approached Del Toro, who instructed him to return later and refrain from speaking to anyone about the matter. Salgado returned later and Del Toro handed him $100 in cash.[9]

At some point after employees went on vacation status during the December 2010–January 2011 school holiday recess, Garduñio learned from a clerical assistant who reviewed invoices that Del Toro was misappropriating charter money.[10] Del Toro would deposit checks into his checking account and, after they cleared, would pay the charter drivers in cash.[11]

3. Policies

Several Company policies or procedures are at issue. Three of them appear typical to the normal operation of a business. The first involves employee raises. Based on the Company's typical 3-year contracts with the CPS, the Company typically determines the amount of employee salaries prior to the beginning of the contract term.[12] A second policy prohibits stealing. An example of stealing is where an employee fails to turn into the Company money received from a customer for a charter.[13] The third policy is a vague and inconsistent prohibition against threats to other employees; prior to 2010, Garduñio terminated one employee for threatening him, but took no action against another employee for the same conduct. More recently, in February 2011, Garduñio issued a verbal warning to an employee for intimidating two other employees.[14]

The last policy at issue relates to the Company's penchant for avoiding insurance coverage for property damage claims. Whenever an employee, while in the scope of his/her employment, causes property damage to a Company or other vehicle, the Company requires the employee to reimburse the Company for 25 percent of the damages. In return for such compliance, the Company does not document the incident in the employee's driving record.[15]

B. The Union Organizing Campaign

The union organizing campaign began in November 2010. After being contacted by employee Frank Hernandez, Union Organizer Elizabeth Gonzalez provided authorization cards and scheduled meetings with employees to discuss the prospects for the formation of a bargaining unit. Several weeks later, in late November 2010, Hernandez met with Elizabeth Gonzalez and they agreed to initiate an organizing campaign with company employees. Within days, Hernandez succeeded in having several employees, including Carol Garcia and Pedro Salgado sign union authorization cards. He was also able to enlist them to solicit signatures from other employees.[16]

[6] Unless otherwise stated, all references to Garduñio are to Henry Garduñio. (Tr. 582–583.)

[7] Although not pled in the complaint, Garduñio testified that she was part of his management team and was given the responsibility of notifying former Charter Director Del Toro that he was terminated. (Tr. 626–628, 649-650.)

[8] Although not disputed that there was a Company procedure requiring Del Toro to pay charter drivers by check, there was no evidence that drivers were actually prohibited from receiving their charter compensation in cash. (Tr. 322–326, 351, 382–386.)

[9] I found Salgado credible on this point, even though he conceded that receiving compensation in cash seemed inappropriate. The Company, even though it called Del Toro, did not challenge Salgado's assertion that he did, in fact, perform the charter at issue and received only $100 in cash for his services. (Tr. 387–389, 403–404, 420-423.)

[10] Although Melissa Morales did not testify, it is not disputed as to how Garduñio learned that Del Toro was stealing money from the Company. (Tr. 639–641.)

[11] Notwithstanding Del Toro's concession that he was stealing money from the Company (R. Exhs. 12–14.), there was no testimony to indicate that charter drivers whom he paid in cash failed to provide charter services or received more than one-third of the charter amount paid by customers for their services. (Tr. 325–327; R. Exhs. 5A–B, 6A–B, 7D(5), 7D(22)–23, 7D(25)–(26).)

[12] Although not disputed that salaries needed to be determined before submitting a bid to the CPS, it is unclear as to when bids were due for the next bus services contract. (Tr. 644-646.)

[13] Garduñio was evasive as to whether a charter driver was at fault for accepting cash from the charter director for services performed. On cross-examination, he sidestepped the role of the charter director and maintained that an employee stole money from the Company if he/she received cash for a charter and "if we don't know about this cash." (Tr. 612–614.)

[14] In spite of counsel's leading questions, Garduñio conceded that there is no written policy prohibiting employee threats. He eventually caught on and testified that there was an unwritten policy against threats. (Tr. 688–689.) That policy is, at best, inconsistent. On February 11, driver Kennith Mitchel received a verbal warning for intimidating two other employees. (R. Exhs. 7D–18.) In another instance, Garduñio immediately terminated Miguel Saballo for threatening him. (Tr. 607–608.) In yet another instance, however, he took no action against an employee who threatened him 2 years earlier and recently assaulted him. (Tr. 687–688.)

[15] The Company's practice of charging their employees for the cost of automobile damage was not disputed. (Tr. 215–217, 363, 684–686.)

[16] Although undisputed that Garcia and Salgado solicited coworkers and/or obtained signatures for union authorization cards, there is no

On December 9, Gonzalez and two other union representatives met with the first group of employees at Mariscos El Abuelo y Yo, a local seafood restaurant (the seafood restaurant), for about 1-1/2 hours. Located at the corner of 38th Street and Kedzie Avenue, the seafood restaurant was about a city block away from the Company's facility. The employees in attendance included Hernandez, Carol Garcia, Pedro Salgado, Major Rose, Edwardo Farerra, and Pedro Garcia. Gonzalez received 27 union cards and gave the employees more to distribute to other employees.[17]

When the meeting ended, the employees and union representatives exited the restaurant at about 6 p.m. and congregated briefly on the corner. Gonzalez and the other two union representatives wore jackets and hats emblazoned with Teamsters insignias. Their location was well lit by street lights. At that point, Sara Martinez, the Company's dispatcher/manager, was in a company vehicle a short distance away in the adjacent intersection. As she waited for the traffic light to turn green, Martinez looked directly at the employees.[18] Upon returning to the facility, Martinez reported her observations to Garduñio.[19]

C. December 10

On December 10, the day following the meeting at the seafood restaurant, Del Toro informed Pedro Garcia over the company radio that Maintenance Director Victor Gabino wanted to speak with him. Pedro Garcia complied and immediately reported to Gabino. Gabino proceeded to inform Garcia that he learned of the Union's organizing efforts and that many of the drivers were upset with that activity. Pedro Garcia acknowledged the union activity and proclaimed his support for the Union.[20]

Later that same day, Pedro Garcia, along with coworkers Ramiro and Tina, were summoned to a meeting in a conference room with several managers and supervisors, including Michael Rosas Sr., Michael Rosas Jr., and Sara Martinez.[21] Michael Rosas Sr. directed his son, Michael Rosas Jr., to address the employees. Michael Rosas Jr. proceeded to inform the employees that company management was aware of the union organizing campaign.[22] Ramiro promptly expressed his opposition to the formation of a union. Rosas Jr. followed with a promise to improve employee benefits, which led to a heated exchange between Pedro Garcia and Ramiro about unionized bus companies in the Chicago area. Martinez then challenged Pedro Garcia to name a unionized bus company in Chicago. The discussion moved to the issue of standby drivers. Pedro Garcia argued in favor of higher wages for standby drivers, while Michael Rosas Sr. responded that the Company would consider giving the employees 2 weeks of paid vacation. He added that the Company would schedule a meeting to propose those benefits to the drivers after the holidays.[23]

D. Carol Garcia

On June 5, 2010, Carol Garcia was involved in a motor vehicle accident while operating a Company bus.[24] The other vehicle sustained approximately $4000 worth of property damage.[25] Sometime in September, in accordance with Company practice, Melissa Morales, a clerical assistant, presented Garcia with a bill for $800, or approximately 25 percent, of the total cost of the accident paid out by the Company. Garcia did not dispute her culpability for the accident, but insisted on speaking with Garduñio first before signing the reimbursement agreement.[26]

Garduñio spoke to Garcia on September 20. He informed her that employees were required to pay for 25 percent of the Company's costs for any damages caused by an employee's operation of a company vehicle. Garcia protested having to take responsibility for the damages and suggested that the practice was attributable to the Company's lack of insurance coverage during the summer months. She also mentioned that she discussed this issue with coworkers and that they were not happy about this and other aspects of their work. Garduñio denied Garcia's contention that the Company lacked insurance and instructed her to refrain from speaking about such issues with coworkers. Garcia challenged Garduñio to produce proof of insurance coverage. Reacting to Garcia's relentless resistance to the reimbursement issue, Garduñio told her to wait while he went to his office to check her driving record. He returned a few minutes later, told Garcia that he would reduce

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direct proof that Company managers or supervisors knew about their activity. (Tr. 56–60, 251–252, 254–255, 259–261, 354–357, 361; GC Exhs. 5, 7.)

[17] Similarly, it is not disputed that this activity occurred and that Carol Garcia and Salgado were present. (GC Exh. 2; Tr. 58–60, 64–69, 90–92, 260–264, 358, 471-472.)

[18] Witness estimates as to Martinez's distance from the group ranged from 20 to 50 feet. Nevertheless, the credible and fairly consistent testimony of meeting participants as to the lighting conditions, as well as Martinez' nearby position as she observed the group, went unrebutted. (Tr. 72–75, 91–92, 120–122, 264–266, 304–313, 358–360, 409–413, 438–439, 445–449, 469–477.)

[19] Without Sara Martinez' testimony to shed a different light, I found it suspicious that she would simply tell Garduñio that she observed a group of employees leaving a restaurant and nothing else. (Tr. 612, 692–694.)

[20] Gabino was not called as a witness to refute Pedro Garcia's credible testimony regarding this meeting. (Tr. 92–98, 122–124.)

[21] There was insufficient evidence to establish that another participant, Sylvia Torres, was a statutory supervisor. Pedro Garcia believed that she was "in charge of the office that's upstairs." (Tr. 99.) Such a vague description of Torres' duties is insufficient to establish supervisory status.

[22] Given the credible and undisputed evidence as to what Michael Rosas Jr. and Gabino told employees on December 10, I do not credit Garduñio's assertion that he only learned about the union activity after he received a letter from the Union in mid to late January 2011. (Tr. 637.)

[23] I base this finding on Pedro Garcia's credible and unrebutted testimony. (Tr. 98–104, 129–130, 135–137.) Given that none of the company witnesses testified, I find Garduñio's reference to the Company's prior announcement that it was considering a 401(k) benefits plan to relate to the December 10 meeting. (Tr. 643.)

[24] All references in this section to Garcia are to Carol Garcia.

[25] Carol Garcia conceded that she was at fault in the accident, which resulted in approximately $4000 worth of damages, with $3189 of that amount paid by the Company. (Tr. 215–217, 231–233, 684–686.)

[26] I base this finding on Garcia's credible and unrebutted testimony. (Tr. 217–219, 226–227; GC Exh. 3.) Subsequent testimony revealed that "Melissa" was Melissa Morales, a clerical assistant. (Tr. 628.) She did not testify.

her responsibility for the accident costs by half to $400, but directed her not to divulge the agreement to anyone and to stop "riling" up other workers. Garcia reluctantly agreed to sign the agreement.[27] As the encounter wound up, however, she approached Garduño and, from a few feet away, pointed a finger at him and warned that he "would pay for this." Garcia added that "[w]hen somebody plays with my money, I get them back." Garduño, clearly satisfied by the fact that Garcia signed the agreement, ignored her remarks and went about his business.[28]

Still seething from her September 20 encounter with Garduño, Garcia raised the issue with several people, including several coworkers. Subsequently, Garcia, Pedro Salgado, Frank Hernandez, and several other employees met at a local Chinese restaurant to discuss several work-related issues, including wages, work assignments, and the accident reimbursement policy. The meeting concluded with the participants deciding that Hernandez would explore the possibility of employee representation by a labor organization.[29]

On December 10, Garcia returned to the drivers' room after completing her bus route when Garduño called her into a meeting in the dispatcher's office. This was the day after she attended the meeting in the seafood restaurant and the same day that several supervisors informed employees that they knew about and opposed the union organizing effort. With Melissa Morales present, he handed Garcia a violation notice terminating her employment. After some discussion as to whether Garcia could read Spanish, Garduño read the portion reflecting her alleged threat: "You're going to pay me back for this. When a person does something to me, I will do something to get back at this person. They're not going to play with my money." Garcia asked for the particulars as to when and where she made that statement. Garduño said that the incident related to the earlier discussion in his office about reimbursement for her accident. Garcia did not dispute making the statement, but noted that the discussion took place outside Garduño's office. Garduño responded that he felt threatened by her remarks and consulted an attorney, who advised that he could discharge her.[30]

E. The January 6 Meeting

Following up on management's remarks to employees on December 10, the Company convened a meeting when the drivers returned to work after the holidays on January 6. At this meeting, Garduño announced two major developments: a 50-cent hourly wage increase for drivers, effective the following week;[31] and a change in the charter assignment process from one that generally favored office staff and mechanics to one deferring to the drivers based on seniority. Garduño also told the employees during this meeting that they should form a drivers' committee with whom he would meet to discuss issues of concern.[32]

At the January 6 meeting, Garduño also announced that Del Toro was no longer the charter director. Salgado asked Garduño why drivers were being paid in cash. After asking Michael Rosas Sr. if he knew anything about it, Garduño denied that such a practice existed and asked Salgado for more details. Realizing that his remark caused a stir among the drivers, Salgado declined to say anything else.[33]

F. January 7

The day after the January 6 meeting, Salgado and Hernandez had a conversation with Supervisor Victor Gabino. Gabino warned that the Union would charge the employees a lot of dues, asked why they needed a union, and suggested they form a committee to pursue their issues with management. Hernandez responded that "we already had our committee, that we had

[27] GC Exh. 4.

[28] My findings as to the September 20 incident are based on portions of testimony by Garduño and Garcia. Garduño's testimony, contradicted by several pretrial statements, was not entirely credible. Nevertheless, I credited much of his version regarding Garcia's outburst. I also credit his testimony that Garcia did not mention, at that point, any employee interest in a union, as the weight of the credible evidence indicates that employee interest in a union began in November. (Tr. 608–609, 679–687, 710–713, 722.) I was not impressed by his irrelevant contention, however, that Garcia, stipulated to weigh much more than Garduño, placed him in fear for his physical well-being. (Tr. 683–684.) Nevertheless, coupled with my observation of her earlier testimony containing specific details of the encounter, Garcia's tentative response on rebuttal, when asked whether she warned Garduño that he was going to pay her back or that she would get back at him in some way—"No, that I recall, no"—was unconvincing. On the other hand, Garduño did not deny Garcia's contentions regarding the lack of insurance coverage, his prohibition against "riling" up coworkers and the fact that he consulted an attorney before deciding to terminate her. (Tr. 230–242, 270–272, 779–780.)

[29] There is no dispute that this protected concerted activity took place. (Tr. 86–89, 245–251, 352–355, 486–489.)

[30] Garcia challenged Garduño's recollection as to whether the statement was made in his office or outside the office. She did not, however, deny making the statement. (Tr. 266–273; GC Exh. 6.) On the other hand, Garduño did not refute her testimony that he consulted an attorney before terminating her. (Tr. 271.) That seemed more plausible than his assertion that he wondered what to do about the incident for 2 months before being inspired by a police officer in a community patrol group ("CAPS") who suggested that "[y]ou cannot be nice with these people." (Tr. 687–688.)

[31] The wage increase became effective the following pay period. (Tr. 109, 601–602.)

[32] Garduño's announcement of these changes at the meeting is not disputed. (Tr. 104–109, 362–364, 414–418, 481–482, 599–604, 648–652.) Notwithstanding Garduño's subsequent denial, his shifting and contradictory testimony, his statements in a Board affidavit, as well as the Company's position statement, establish that he knew about employee union activity prior to January 6. (Tr. 631–635; GC Exh. 12.) Moreover, given Garduño's lack of credibility on this issue, it is also clear that any statements by him to unidentified employees refusing to meet with a group, if true, would have occurred after January 6. (Tr. 605–606, 668–671.)

[33] The differences in testimony as to what Salgado blurted out to Garduño were insignificant. Pedro Garcia, Frank Hernandez and Salgado testified that Salgado raised the issue of cash payments for charters, while Garduño testified that Salgado complained that he was owed money. (Tr. 107–109, 365–366, 416–419, 449–451, 479–481, 638–640, 653.) Although I find it more credible that Salgado raised the issue of cash payments and was not claiming to be owed anything, either version established that Garduño had reason to believe that Salgado actually performed the charter services that he was referring to.

65% of the drivers signed up."[34]

On the same day, Garduñio approached Salgado, Frank Hernandez, and another driver, Telmo Hernandez, as they sat in the lunchroom. He asked Salgado how he heard about the charter drivers being paid cash. Salgado responded that he heard rumors to that effect and suggested he check with the charter director. After Telmo Hernandez remarked that such a practice was attributable to Company's desire to avoid Federal income taxes, Frank Hernandez turned the conversation to Carol Garcia's discharge.[35]

G. Pedro Salgado

After Salgado's remarks at the January 6 meeting, Garduñio sought to determine which drivers received payments in cash from Del Toro for their charter services. He eventually determined that about 12 drivers received cash payments from Del Toro. Of those 12 drivers, only Salgado was terminated. On January 12, Garduñio terminated him on the ground that he stole from the Company. Unlike Salgado, however, other drivers were afforded the opportunity to return the money they received from Del Toro. Some were placed on probation; others have never been disciplined.[36]

H. Additional Interrogation

Sometime in late January or early February 2011, the Company convened a meeting of the drivers to listen to a speaker on the subject of union membership and its disadvantages. At some point during the meeting, Garduñio learned that an employee was filming the presentation. He went down to the meeting and stopped the filming.[37] After the meeting, Garduñio approached several drivers in the drivers' room. After asking one of them his position on union affiliation, Garduñio asked Hernandez why he was wearing a union shirt at work and noted that the shirt bothered some of the drivers. After Hernandez rejected his comment, Garduñio said that the CPS did not like to do business with union companies. He added that union affiliation would cause the Company to bid higher on future CPS contracts, reduce its driver work force, and possibly lose CPS contracts. He concluded the discussion by commenting that they did not need a third party involved, adding that "we could talk about this."[38]

Around the same time, Gabino followed up on Garduñio's statements with a warning to Hernandez that the Company might close the facility and re-open elsewhere in order to avoid the Union.[39]

III. LEGAL ANALYSIS

A. 8(a)(1) Violations

The amended complaint alleges that the Company violated Section 8(a)(1) by: preventing employees from discussing terms and conditions of employment with one another; creating an impression that employees' union organizing activities were under surveillance; promising improved benefits to, and soliciting grievances from, employees during a union organizing campaign; interrogating an employee by asking him whether he supported the Union; threatening to discharge employees if they unionized; threatening to close the facility and move the Company to a different location in the event the employees unionized; and 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. The Company denied the allegations in its answer, but did not offer evidence to the contrary as to some of them.

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1). Section 7 confers upon employees the right to self-organization, to form, join, or assist labor organizations, and to engage in other concerted activities for the purpose of mutual aid and protection. 29 U.S.C. 157. Employees may be said to be exercising their Section 7 rights where they discuss organizing amongst themselves. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972). Similarly, employees are engaged in Section 7 activity where they are seeking to improve terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Where an individual employee seeks to improve terms and conditions of employment his actions are protected under the Act if he intends to induce group activity or acts as a representative of at

[34] I base this finding on the credible and unrebutted testimony of Salgado and Hernandez. Hernandez said that the conversation took place between December and January, while Salgado pinpointed the date as January 7. (Tr. 369–371, 457–459.)

[35] I base this finding on the credible and unrebutted testimony of Salgado and Hernandez. (Tr. 367–368, 451–452.). Garduñio's testimony that he was invited into the meeting is not credible, given that he wanted to talk to Salgado about the charter situation. (Tr. 672–673.)

[36] There is no dispute that Del Toro stole the Company's share of charter fees. However, Garduñio also insisted on classifying the act of employees being paid cash for services as theft when they actually performed the charter services. That contention was not credible, especially when applied as a justification for Salgado's discharge, while issuing lesser discipline to others. It was evident that he had already determined to discharge Salgado when he met with him on January 12. Nor did he testify that he offered Salgado, unlike the other employees, an opportunity to pay back the cash he received for services rendered. Based on the foregoing, Garduñio's contention that he is *still* investigating some of other drivers is simply incredible. (GC Exhs. 8–10; Tr. 372–375, 377–389, 426–427, 613–626, 654–655.)

[37] I initially sustained the Company's objection as to testimony about the guest speaker coming in to address the drivers on the ground that such an event was outside the scope of the complaint and the General Counsel's excuse that the General Counsel *might* seek to amend the complaint at that late juncture was inadequate. (Tr. 452–455.) However, the Company later developed testimony about the guest speaker on cross-examination (Tr. 490–491), the General Counsel pursued that line on further examination (Tr. 629–630) and the Company followed up with yet more testimony about that meeting. (Tr. 673–678.) The General Counsel did not, however, follow up with an application to amend the complaint.

[38] I found the testimony of Hernandez and Pedro Garcia more credible than that of Garduñio as to whether the latter was invited by the drivers into a meeting or thrust himself upon them. Garduñio's contention that he was invited was significantly contradicted by his pretrial affidavit and was, therefore, not credible. Moreover, he did not refute their testimony as to his statements at the meeting. (Tr. 111–112, 456–457, 588–591, 598–599, 704–706.)

[39] I base these findings on Hernandez's credible and unrebutted testimony. (Tr. 457–458.)

least one other employee. *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). Additionally, where an employee raises a common concern in a group meeting the Board has found that action to be concerted activity. E.g. *Grimmway Farms*, 315 NLRB 1276, 1279 (1995).

An 8(a)(1) violation exists where an employer interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1). Determinative in finding such a violation is whether the employer engaged in conduct that may reasonably tend to interfere with the free exercise of employee rights under the act. *Munro Enterprises, Inc*., 210 NLRB 403, 403 (1974). Inherent in this test is that to prove a Section 8(a)(1) violation the General Counsel need not prove either intent on the part of the employer, nor that the conduct actually had the effect of coercion on the part of the employee. *Hanes Hosiery, Inc*., 219 NLRB 338, 338 (1975).

1. Impression of surveillance

The General Counsel contends that the Company unlawfully created an impression of surveillance through comments made by both Victor Gabino and Henry Garduñio to various employees concerning their involvement in the union organizing campaign. The Company denied the allegation, but did not address these particular alleged violations in its brief. The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the employer's statements that he had been placed under surveillance. *Register Guard Publishing Co*., 344 NLRB 1142, 1144 (2005). The Board does not require evidence that the employer actually learned of the employee's activity, nor does it require evidence that the employee intended his union activity to be covert. *Flexsteel Industries,* 311 NLRB 257, 257 (1993). Rather an employer violates Section 8(a)(1) by indicating that it is closely monitoring the degree of an employee's union involvement. Id.; see *Emerson Electric Co.*, 287 NLRB 1065, 1065 (1988) (finding an 8(a)(1) violation where the employer told the employee that he knew he was involved in the union activity, but also that he was neither a "pusher" for or against the effort); *Homer D. Bronson Co.*, 349 NLRB 512, 512 (2007) (holding that an 8(a)(1) violation existed where the employer told the employee that he was aware the employee spoke to other employees about a union).

Here, Victor Gabino's conversation with Pedro Garcia, in which Gabino indicated that he was aware that Garcia was among the employees who wanted to unionize, constitutes an impression of surveillance. Although Gabino did not make any direct threats with regard to this knowledge, an impression of surveillance was created by simply informing Garcia that he was aware of his union activity. Under the Board's test, Garcia would reasonably assume that he had been placed under surveillance, thus violating the Act.

Similarly, Garduñio's statement to Garcia and some other drivers that he knew something was going on, and would kick those drivers out once he found out, also created an impression of surveillance. As stated in *Flexsteel*, the Board does not require that the employer actually find out what Section 7 activity the employees are engaged in. 311 NLRB at 257. Rather, his statements clearly gave the impression that the employees were being placed under surveillance. Accordingly, this constitutes an 8(a)(1) violation.

2. Promising improved benefits

The General Counsel contends that the Company unlawfully sought to give its employees improved benefits during their union organizing campaign in the form of a promise to increase vacation time or increase wages. The Company contends that the actions were lawful because they were not accompanied by any comments that the benefits would be granted to employees contingent on them rejecting the Union.

An 8(a)(1) violation exists where an employer announces, promises, or grants benefits in order to discourage union support. *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003). As stated by the Supreme Court, the danger inherent in well-timed increases in benefits is the implication that employees must disavow support for a union in order to continue to receive these benefits. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). It is sufficient that these benefits are conferred during an organizing campaign in order to constitute interference with employees' Section 7 rights. *Hampton Inn NY–JFK Airport*, 348 NLRB 16, 17 (2006). The employer must, however, have knowledge of the union activity in order for a grant of benefits to be considered unlawful. *Norfolk Livestock Sales Co.*, 158 NLRB 1595, 1595 (1966). Where the employer is offering increased benefits simply in an attempt to decrease the future appeal of unionizing, rather than an attempt to decrease the appeal of a current campaign, that does not constitute an 8(a)(1) violation. *Hampton Inn*, 348 NLRB at 17.

Here, the promise to increase benefits, either in the form of a 2-week paid vacation, or in the form of a wage increase in the January 6 meeting (depending on what the employees would rather have had), constituted interference with the employee's Section 7 rights. At this point, the Company clearly knew of the union activity, and was intent on defeating the organizing campaign, as evidenced by Michael Rosas Jr.'s proposal to increase vacation time during his prior conversation with Pedro Garcia. Previous comments, such as those made by Gabino and Garduñio, also demonstrated the Company's desire to deter the employees from unionizing. Accordingly, this increase in benefits cannot be said to have been aimed at decreasing the general appeal of unionizing, but rather, was aimed at defeating the organizing campaign.

The Company incorrectly argues that the benefits were not unlawful because there were no statements directly linking them to the employees' support of the Union. The Board, however, has made clear that it does not need such explicit and direct evidence to find an employer's granting of increased benefits to be unlawful. See *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992) (stating that absent 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). The employer failed to offer any evidence supporting that the proposed increase in vacation time and promised increase in wages were a result of a valid business justification. Rather, the timing of the benefits, coupled with the December 10th meeting between Rosas and Garcia, clearly indicate an attempt to use these benefits to defeat the organizing campaign,

thus constituting an 8(a)(1) violation.

3. Solicitation of grievances

The General Counsel contends that the Company unlawfully sought to solicit grievances from its employees, in the form of a committee, in an attempt to defeat the union organizing campaign. The Company contends that Garduñio sought to solicit grievances prior to his actual knowledge of the union organizing campaign and, in fact, refused to solicit further upon learning of the employees' efforts.

An employer interferes with Section 7 rights where he solicits employee grievances during an organizational campaign and promises, either expressly or implied, that those grievances will be remedied. *Briarwood Hilton*, 222 NLRB 986, 989 (1976); see *Capital EMI Music,* 311 NLRB 997, 1007 (1993) (holding that soliciting grievances during union organizing inherently constitutes an implied promise to remedy them). Implicit in that promise is that unionizing is unnecessary because the employees' grievances will be righted absent a union. *House of Mosaics, Inc.*, 215 NLRB 704, 704 (1974). Where an employer solicits grievances in accordance with past practices, prior to any union activity, however, he may not have violated the Act. *Yale New Haven Hospital*, supra at 365.

Here, the Company directly solicited employee grievances by virtue of Garduñio's suggestion that they form a committee to address their problems at the January 6th meeting. There is no proof that the Company ever solicited employee grievances before then. Occurring during an organizing campaign, which management was well aware of, Garduñio's statement evidences Company interference with employees' Section 7 rights in violation of Section 8(a)(1).

4. Employee interrogation

The General Counsel contends that the Company unlawfully interrogated an employee by asking him whether he supported the Union. The Company denies the allegation and insists that he made the statement after being invited into a meeting with the drivers.

Employee interrogations that tend to coerce or interfere with Section 7 rights are unlawful. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In determining whether an interrogation is unlawful, the Board considers all of the relevant circumstances. Id. Factors include the scope of the questioning, the interrogator's position in the company, and the particularized nature of the information sought. *Cumberland Farms*, 307 NLRB 1479, 1479 (1992). Where the interrogation occurs in an atmosphere of animosity toward the union, and is directed at discovering the identity of union organizers, it may be coercive. *M.F.A. Oil Co.*, 162 NLRB 1071, 1074 (1967).

Garduñio approached a group of drivers in February 2011 and asked one of them what his position on the Union was. Contrary to the General Counsel's contention, the fact that Garduñio's actions caused other employees to cover their union insignia is irrelevant. As with all 8(a)(1) violations, the Board does not look to the actual effect that the conduct had, but rather looks at the conduct from an objective standpoint. *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975). Analyzed objectively, however, the circumstances reveal a coercive encounter. Garduñio, the Company's part owner and top operating official, made the inquiry of an employee coupled with a statement to Frank Hernandez that they needed to talk about the union situation. The totality of the circumstances establishes Garduñio unlawfully interrogated an employee in violation of Section 8(a)(1).

5. Threat of discharge

The General Counsel contends that Garduñio unlawfully threatened to discharge employees if they unionized. The Company denied the allegation.

The expressing of any views does not constitute an unfair labor practice if they contain no threat of reprisal, force or promise or benefit. 29 U.S.C. 158(c); see *Southern Frozen Foods, Inc.*, 202 NLRB 753, 755 (1973) (finding no violation where employer's remarks were ambiguous in that they did not clearly imply a threat that a union victory would automatically be followed by a loss of employment). An employer may make a prediction as to the precise effects he believes unionization will have on his company without violating Section 8(a)(1). See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (holding that a prediction carefully phrased on objective fact that conveys an employer's belief as to demonstrably probable consequences is not unlawful). Where the employer's basis for such predictions is not objective fact, however, predictions may violate the Act. See *Patsy Bee, Inc*., 249 NLRB 976, 977 (1980) (finding violation where employer had no indication from union that it would make demands which would cause economic hardship, let alone plant closure; nor did he have evidence that his customers might even pull their contracts).

Here, Garduñio's statements to the effect that, if the employees unionized the Company would be forced to lay off drivers, represented threats not made on the basis of objective fact. As was the case in *Patsy Bee*, Garduñio had no indication that the Union would necessarily drive up labor costs or that the CPS would not contract with the Company. Accordingly, his predictions, made on the basis of subjective beliefs, cannot be construed as anything other than threats that employees would be discharged if they unionized. Such threats constituted an 8(a)(1) violation.

6. Prohibiting employees from speaking about the accident reimbursement policy

The General Counsel contends that the Company unlawfully prevented employees from discussing terms and conditions of employment with one another when Garduñio told Carol Garcia not to discuss their agreement concerning her liability for her accident with anyone else. The Company did not address this alleged violation in its brief.

An employer may not restrict its employees' right to discuss self-organizing with other employees unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Similarly, absent such a business justification, an employer may not restrict employees in their discussions concerning other concerted protected activity. See *Lafayette Park Hotel*, 326 NLRB 824, 825–826 (1998) (rule was not unlawful where there was a legitimate business justification for the rule and it did not prohibit Sec. 7 activity). The Board must, therefore, balance the proposed business reasons against

employees' Section 7 rights. See *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (employer's business reasons did not outweigh employees' Sec. 7 rights where the employer offered no evidence that its proffered reasons were of valid concern).

The reason offered by the Company was, essentially, that it did not want other employees to find out about the concessions it was making because it might make them jealous. As Counsel for the General Counsel notes in her brief, a similar business justification was rejected by the Third Circuit in enforcing the Board's decision finding a rule prohibiting employee discussion of wages. *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). Moreover, the Company offered no evidence that this was even a valid concern. If anything, employees concerned about the accident reimbursement policy would have, in all likelihood, been interested to learn such information for their own benefit. The accident reimbursement policy was clearly a term or condition of employment. Under the circumstances, the Company's attempt to restrain Garcia in exercising her Section 7 rights lacks legal justification and, thus, constitutes an 8(a)(1) violation.

7. Threat to close facility

The General Counsel contends that the Company violated Section 8(a)(1) through Gabino's statement to Frank Hernandez threatening to close the facility and move the Company to a different location in the event the employees unionized. The Company denied this allegation.

Unsupported employer predictions that a plant shutdown will follow a union victory are unlawfully coercive. *Federated Logistics & Operations.*, 340 NLRB 255, 256 (2003). As the Company correctly pointed out in its brief, a prediction of plant closure may be lawful if the employer can show that it is the probable consequence of unionization for reasons beyond the employer's control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Here, however, no evidence was presented to show that Gabino's statement constituted a prediction based on probable consequences beyond the Company's control. Rather, this statement was an unsupported prediction aimed at intimidating Hernandez and other employees in the exercise of their Section 7 rights, and thus constitutes an 8(a)(1) violation.

8. Statements of futility

The General Counsel asserts that the Company violated Section 8(a)(1) through Garduñio's statement to Carol Garcia that the Company would never agree to allow a labor organization to represent its employees. The Company denied this allegation but did not address it in its brief.

A statement to the effect that the Company will never agree to union representation restrains employees and violates their Section 7 rights because it conveys a message that it would be futile for them to join or support a union. *Rood Industries Inc*., 278 NLRB 160, 164 (1986); see *Maxi City Deli*, 282 NLRB 742, 745 (1987) (finding employer's statement that there would never be a union in his restaurant to be unlawful); *Loby's Cafeteria*, 187 NLRB 420, 420 (1970) (finding employer's statement that he was not going to have a union to be unlawful because it indicated that support for a union is futile). Here, the credible testimony established that statements by Garduñio to Carol Garcia and by Gabino to Hernandez conveyed the Company's position that it would never agree to let the Union represent its employees. Under the circumstances, their statements of futility violated Section 8(a)(1) by restraining Garcia and Hernandez in the exercise of their Section 7 rights.

B. Section 8(a)(3)

The amended complaint also alleges that the Company violated Section 8(a)(3) by discharging Garcia and Salgado because they engaged in protected concerted activity. Garcia was allegedly discharged because she was engaged in union organizing and complained about the Company forcing her to reimburse it for the costs of property damage resulting from a vehicular accident during her employment; Salgado was allegedly discharged for also engaging in union organizing and raising the issue of compensation for performing charter services. The Company denies the material allegations and contends that Garcia was discharged for insubordination after she threatened Henry Garduñio, while Salgado was discharged for theft of company property.

Charges alleging Section 8(a)(3) violations are analyzed under the *Wright Line* framework, which requires the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. 251 NLRB 1083, 1089 (1980). To meet this burden, the General Counsel must establish that the employee engaged in protected activity, the employer had knowledge of the protected activity, and that the employer took adverse action against the employee as a result of this protected activity. *American Gardens Management Co*., 338 NLRB 644, 645 (2002). Once the General Counsel has proven these elements, the burden shifts to the employer to demonstrate that he would have taken the same action even in the absence of protected conduct. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discharge are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003).

1. Carol Garcia

Carol Garcia engaged in protected concerted activity. She was involved in the union organizing campaign and engaged in other concerted activity by voicing her concerns amongst fellow employees about the Company's accident reimbursement policy. Moreover, Garduñio was aware of that activity. First, Garcia told him in September that employees were not happy about certain workplace issues. Second, she was among the employees leaving the union meeting on December 9 when Sara Martinez saw them and reported that to Garduñio.

The General Counsel also met her burden in establishing that Garduñio terminated Carol Garcia because she engaged in protected activity. While there is no direct proof of discriminatory motivation, such motivation can be inferred from circumstantial evidence based on the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Factors supporting an inference of unlawful motivation include the timing of the termination and departures from past practices. Id. Here, the

timing is sufficiently suspicious to support the General Counsel's contention. Garcia allegedly threatened Garduño in late September. Yet, it was not until nearly 3 months later that Garduño actually fired her. Moreover, Garduño fired Garcia the day after Martinez saw Garcia leaving a restaurant with union officials. His proffered explanation for waiting to fire Garcia—that he did so after consultation in a CAPS meeting—is contradicted by previous instances in which he immediately discharged an employee for threatening him. Garduño's failure to discharge Garcia immediately after the threat seriously diminished his credibility. See *Soft Water Laundry, Inc*., 143 NLRB 1283, 1294 (1963) (finding employer's claim to not be credible because he failed to discharge employee immediately after alleged threat). Coupled with the antiunion animus expressed by Garduño, it is clear that Carol Garcia was fired because of her protected conduct.

Having established a prima facie case, the burden shifted to the Company to demonstrate that it would have discharged Garcia even in the absence of her protected conduct. It did not. Garduño's decision to terminate Garcia was not related to a legitimate concern for his safety or his past practice. His reliance on an incident 3 months earlier as a basis for Garcia's termination was clearly pretextual. As noted above, Garduño testified that he was influenced by external forces over the course of 3 months before deciding to terminate Garcia. Observing his testimonial demeanor and involvement at counsel's table throughout the trial, as well as his past record of dealing or not dealing with similar incidents, he did not strike me as one taken to deep deliberation regarding personnel decisions. All of these factors lead me to conclude that Garcia was discharged because she engaged in protected concerted activity in violation of Section 8(a)(3) and (1).

2. Pedro Salgado

The General Counsel contends that Pedro Salgado was discharged for his protected concerted activity concerning his union organizing efforts as well as his questioning of cash payments for charter service work. The Company contends that Salgado was not fired for his protected activity, but rather, because he stole money from the Company.

Applying a *Wright Line* analysis, the General Counsel has clearly demonstrated that Salgado engaged in protected activity, through both his unionizing efforts, as well as his clear questioning of company policy regarding charter compensation at a drivers' meeting. It is also clear that the Company knew of his protected activity. Gabino's conversation with Salgado concerning the effects of unionizing revealed company knowledge of Salgado's union-related activities.

The General Counsel has also met its burden of proving that Salgado's protected activity was a motivating factor in the Company's decision. As explained above, the Company's antiunion animus was evident from its efforts to restrain its employees in their union organizing campaign. See *Dandridge Textile Inc*., 279 NLRB 89, 98 (1986) (taking into account the Company's 8(a)(1) violations in establishing animus in an 8(a)(3) charge). Moreover, Salgado and only one other driver received the most severe form of discipline—termination—while the other 10 drivers who also received cash compensation for their charter services were simply required to reimburse the Company and placed on probation or received no discipline at all. I also find that Garduño failed to fully investigate the matter as it specifically applied to Salgado's involvement in receiving cash for charter services. He approached Salgado after the drivers meeting and asked him about the cash payments. Salgado told him to speak to the charter director. Garduño provided no explanation as to what his alleged investigation before or after that encounter revealed with respect to Salgado's question as to why drivers were being paid cash for providing charter services. See *Socied Espanola de Auxillio Mutuo Y Beneficencia de P. R.*, 342 NLRB 458, 459 (2004) (emphasizing that one factor to consider in an unlawful discharge claim is whether the employer conducted a full investigation into the conduct that allegedly brought about the discharge). This was a classic instance of disparate treatment attributable to Salgado's protected concerted activity. See *Embassy Vacation*, 340 NLRB, supra at 348 (holding that one factor to consider is the disparate treatment of employees with similar offenses). All of these factors demonstrate that Salgado's protected activity was a motivating factor in the Company's decision.

Having established a prima facie case, the Company failed to meet its burden of demonstrating that it would have discharged Salgado even in the absence of his protected conduct. It did not. The General Counsel proved that Garduño's reason offered for Salgado's termination—that he stole money from the Company—was pretextual. It is clear that Del Toro stole money from the Company. However, assuming arguendo that a driver receiving cash compensation from the Company's charter services director violated some unstated company policy or procedure, Garduño failed to explain how Salgado, or any other drivers for that matter, stole money. Indeed, Salgado raised the issue of cash compensation for charter services at the company meeting. The uncontroverted facts also revealed that Salgado was underpaid for his share of the charter at issue. Moreover, given the vastly disparate treatment afforded Salgado compared to the other drivers involved, it is quite evident that he would not have been discharged in the absence of his protected concerted conduct. Under the circumstances, Salgado's discharge violated Section 8(a)(3) and (1). *Wells, Inc.*, 68 NLRB 545, 547 (1946).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Carol Garcia and Pedro Salgado because they engaged in protected concerted activity by supporting the Union and complaining about terms and conditions of employment, the Company has been discriminating against employees in violation of Section 8(a)(3) and (1) of the Act.

3. By preventing employees from discussing terms and conditions of employment with one another, creating an impression that employees' union organizing activities were under surveillance, promising improved benefits to, and soliciting grievances from, employees during a union organizing campaign, interrogating an employee by asking him whether he supported the Union, threatening to discharge employees if they unionized, threatening to close the facility and move the Company to a

different location in the event the employees unionized, and 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, the Company violated Section 8(a)(1).

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Carol Garcia and Pedro Salgado, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed from date of discharge to date of proper offer of reinstatement in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, the Company shall be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters. The Company shall also be required to remove from its files any and all references to the unlawful discharges of Carol Garcia and Pedro Salgado. The Company shall notify them in writing that this has been done and that the unlawful references will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Company, Latino Express, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities, including supporting the Teamsters, Local Union No. 777, affiliated with the International Brotherhood Teamsters, AFL–CIO or any other labor organization.

(b) Coercively questioning employees about their union support or activities.

(c) Prohibiting employees from discussing issues relating to their terms and conditions of employment.

(d) Creating the impression that employees union organizing activities are under surveillance.

(e) Promising improved benefits to employees or soliciting grievances from them during a union organizing campaign.

(f) Interrogating employees by asking them whether they support the Union or another labor organization.

(g) Threatening to discharge employees or otherwise close the facility if they form a union.

(h) 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.

(i) Preventing employees from discussing terms and conditions of employment with each other.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Carol Garcia and Pedro Salgado reinstatement and make them whole for any loss of earnings and other benefits.

(b) Within 14 days from the date of this Order, the Company shall also be required to remove from its files any references to the unlawful discharges of Carol Garcia and Pedro Salgado. The Company will, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix"[41] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since September 20, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. July 12, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities relating to your terms and conditions of employment or supporting Teamsters, Local Union No. 777, affiliated with the International Brotherhood Teamsters, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT prohibit you from discussing with coworkers issues relating to your terms and conditions of employment.

WE WILL NOT create the impression that employees' union organizing activities are under surveillance.

WE WILL NOT promise improved benefits to employees or solicit grievances from them during a union organizing campaign.

WE WILL NOT interrogate employees by asking them whether they support the Union or another labor organization.

WE WILL NOT threaten to discharge employees or close the facility if they form a union.

WE WILL NOT warn employees that it would be futile to form a union because the Company would never agree to allow a labor organization to represent them.

WE WILL NOT prevent employees from discussing their terms and conditions of employment with each other.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Carol Garcia and Pedro Salgado reinstatement and make them whole for any loss of earnings and other benefits as a result of the unlawful discrimination against them.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful discharges of Carol Garcia, and Pedro Salgado and, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

LATINO EXPRESS, INC.