

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

LATINO EXPRESS, INC.)	
)	
and)	
)	
CAROL GARCIA)	
)	Cases 13-CA-046528, 13-CA-046529,
and)	13-CA-046634
)	
PEDRO SALGADO)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 777)	
)	

**BRIEF OF THE SERVICE EMPLOYEES
INTERNATIONAL UNION AS *AMICUS CURIAE***

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The Service Employees International Union (“SEIU”) is a labor union representing more than two million workers, approximately half of whom are covered by the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. § 151 *et seq.* The SEIU submits this brief in response to the invitation of the National Labor Relations Board (“Board”) in *Latino Express, Inc.*, 358 N.L.R.B. 94 (2012). That opinion poses two questions for briefing by interested parties: “whether, in connection with an award of backpay, the Board should routinely require respondents to (1) submit the appropriate documentation to the Social Security Administration so 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.” *Id.* at 2-3.

The SEIU urges the Board to answer both questions affirmatively. Workers should not be forced to bear the burden of excess taxes or diminished Social Security benefits simply because they were subject to unlawful conduct. By requiring violators to reimburse employees for the excess income tax associated with lump sum awards of backpay, the Board would prevent victims from being forced to pay a second penalty after they have already lost pay due to the exercise of rights protected by the Act. The Board would thus take an important step towards realizing the purposes of the Act’s remedial regime: making employees whole and deterring violations. *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n.13 (1984). By requiring violators to provide appropriate documentation to the Social Security Administration, the Board would preserve workers’ Social Security benefits – an important factor in a true “make whole” remedy – at little cost to employers.

INTEREST OF THE *AMICUS CURIAE*

The SEIU is one of the largest labor unions in North America, representing more than two million service workers throughout the United States, Canada, and Puerto Rico, including nurses, nursing home workers, janitors, security guards, maintenance workers, public sector workers and others. The SEIU is committed to providing its members a voice on the job, building a fair economy, and ensuring that all working people can live with dignity. In fighting for those goals, members of the SEIU have frequently met unlawful resistance from their employers and, in many cases, have been awarded backpay under the NLRA.¹ The SEIU therefore has a strong interest in ensuring that the Board's remedial practices are fair and effective.

The SEIU's interest in this matter is particularly strong because the SEIU represents primarily low-wage workers – individuals who provide critical services in our communities but too often do not receive the pay or respect that they deserve. Members of the SEIU include workers in group homes for the developmentally disabled in Massachusetts who earn \$10.94 an hour, or only \$22,755 per year assuming regular work weeks of forty hours. The SEIU also represents, for example, hospital cafeteria cooks in West Virginia who earn \$13.49 an hour, or \$28,509 per year; janitors in Philadelphia who earn \$15.38 an hour, or \$31,990 per year; and

¹ See, e.g., *San Francisco Healthcare & Rehab, Inc.*, 2011 NLRB LEXIS 730, at *10-11 (N.L.R.B. Dec. 16, 2011); *Grane Healthcare Co.*, 2011 NLRB LEXIS 660, at *169 (N.L.R.B. Nov. 30, 2011); *Lee's Indus., Inc.*, 355 N.L.R.B. 1267, 1270 (2010); *Atlantis Health Care Grp. (P.R.) Inc.*, 2010 NLRB LEXIS 457, at *19-20 (N.L.R.B. Nov. 15, 2010); *Bronx Heights Neighborhood Cmty. Corp.*, 2009 NLRB LEXIS 212, at *4-5 (N.L.R.B. July 8, 2009); *Stafford Ambulance Ass'n*, 2007 NLRB LEXIS 511, at *6 (N.L.R.B. Dec. 21, 2007); *Sprain Brook Manor Nursing Home, LLC*, 351 N.L.R.B. 1190, 1192-93 (2007); *N. Hills Office Services, Inc.*, 346 N.L.R.B. 1099, 1116 (2006).

security officers in Chicago who earn \$18.80 an hour, or \$39,104 per year. Low-wage workers such as these SEIU members are disproportionately affected by the heightened tax burden associated with lump sum awards of backpay covering more than one year. Those workers typically pay marginal tax rates of 15% but can be pushed into a higher bracket, to 25% or even 28%, when receiving backpay in a lump sum. Thus, a backpay award can dramatically increase the workers' tax liability.² Moreover, low-wage workers often struggle to make ends meet even without the burden of heightened tax liability. Each dollar of income can be critical. By forcing workers to surrender more of those precious dollars to taxes – just because they were subject to unlawful employer conduct – the current system can do real damage to financial wellbeing. Similarly, low-wage workers often depend heavily on Social Security benefits in their retirement. To continue allowing employers to jeopardize those benefits would be to harm the most vulnerable of Social Security recipients.

ARGUMENT

I. TO FULFILL THE PURPOSES OF THE ACT'S REMEDIAL REGIME, THE BOARD SHOULD REQUIRE VIOLATORS OF THE ACT TO REIMBURSE EXCESS INCOME TAX ASSOCIATED WITH LUMP SUM AWARDS OF BACKPAY

In response to the second question posed in *Latino Express*, the SEIU urges the Board to adopt the following rule: where an employer is found liable for backpay covering more than one year, that employer should be ordered to reimburse employees for any excess tax burden associated with the lump sum backpay award. (This brief refers to such awards as “excess tax

² The tax system has long had this general structure, with a significant gap between the marginal rate paid by low-wage workers and the marginal rate paid by those of higher income. See Tax Foundation, *U.S. Federal Individual Income Tax Rates History, 1913-2011*, Sept. 9, 2011 (showing historical tax brackets).

reimbursement.”) Excess tax reimbursement should be calculated by taking the difference between (1) the aggregate tax liability that the worker would have incurred on her wages if not subject to unlawful employer behavior and (2) the tax liability that the worker is expected to incur on her lump sum award. The Board has the authority to announce this rule through a decision in *Latino Express* or in a subsequent case. See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294-95 (1974) (holding that the Board may use “adjudicated cases” to “serve as vehicles for the formulation of agency policies, which are applied and announced therein” and “provide a guide to action that the agency may be expected to take in future cases”).

As discussed in Part A below, by recognizing that workers are entitled to excess tax reimbursement, the Board would take an important step in realizing the purposes of the Act’s remedial regime. Part B shows that many courts have ruled that excess tax reimbursement is available in similar situations. Part C rebuts likely employer objections to the rule. Finally, Part D discusses the critical issue of how evidentiary burdens should be allocated when workers seek excess tax reimbursement.

A. Excess Tax Reimbursement Would Ensure that Victims of Unlawful Discrimination are Made Whole While Strengthening Deterrence of Violations

The most important reason to require excess tax reimbursement is also the simplest: such awards are needed to restore workers to the position they would have occupied absent unlawful employer behavior. When a home health aide is fired after telling her supervisor that she plans to consult a union about changes in the workplace,³ that worker should not suffer both an unlawful termination and, in addition, a heightened tax burden when she eventually receives

³ See *Lee’s Indus.*, 355 N.L.R.B. at 1269.

backpay. But under the current system, workers are often forced to pay that second penalty for doing nothing more than exercising their statutory rights.

A more detailed example illustrates the point.⁴ Suppose that the hospital cafeteria cooks represented by the SEIU in West Virginia engage in a lawful strike for better working conditions and are permanently replaced in violation of the Act.⁵ The cooks earn approximately \$28,000 per year. *See supra* at 2. As actual case law indicates, as much as a decade might pass before the cooks receive backpay.⁶ For the sake of example, suppose that it takes eight years. If a cook has been unable to mitigate her damages by finding substitute work, the backpay award would be approximately \$224,000, subject to income tax of close to \$56,000 under 2011 tax rates, an effective tax rate of about 25%.⁷ That tax rate is significantly higher than the rate the cook would have paid absent the employer's unlawful dismissal. At \$28,000 per year, the cook would

⁴ The calculations described in this paragraph assume 2011 tax tables, according to which single individuals paid 10% on taxable income between \$0 and \$8,500; 15% on additional taxable income up to \$34,500; 25% on additional taxable income up to \$83,600; 28% on additional taxable income up to \$174,400; 33% on additional taxable income up to \$379,150, and 35% above that point. Under the 2011 tax laws, moreover, taxpayers could make more than \$9,000 of their income non-taxable through the standard deduction and personal exemption.

⁵ The example is inspired by *Church Homes, Inc.*, 350 N.L.R.B. 21 (June 29, 2007), *aff'd*, *Church Homes, Inc. v. NLRB*, 303 F. App'x 998, 1001 (2d Cir. 2008), *cert. denied*, 130 S. Ct. 393 (2009), in which SEIU members were victims of such conduct.

⁶ The workers in *Church Homes* did not receive backpay until a decade after their unlawful dismissal, when the Supreme Court denied certiorari. *See* 130 S. Ct. 393 (2009). *See also* Mara Lee, *Payday at Last for Avery Heights Union Workers*, Hartford Courant, May 11, 2010.

⁷ Assuming the 2011 standard deduction of \$5,800 and personal exemption of \$3,700, making the worker's taxable income \$214,500, the worker would have paid 10% tax on the first \$8,500 of taxable income, 15% tax on income up to \$34,500, 25% tax on income up to \$83,600, 28% tax on income up to \$174,400, and 33% on income up to \$214,500. That totals \$55,682 in income tax, an effective rate of 24.9%.

have been in the 15% marginal bracket, paying \$2,350 in income tax under 2011 rates, an effective rate of slightly over 8%.⁸ Thus, the unlawful dismissal would have led to a tripling in the worker's effective tax rate, a tax penalty of more than \$37,000 – a figure that approximates a year and a half of the worker's post-tax income.

Excess tax reimbursement is therefore required to make victims whole, the primary goal of the Board's remedial powers. *See J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 263 (noting that the Board awards backpay "to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice"). To make whole means to "restor[e] the economic status quo that would have obtained but for the company's wrongful refusal to reinstate them" or otherwise pay them lawfully. *Id.* Because it ignores the tax consequences of awards, the current system fails to achieve that goal, denying workers full compensation for harms suffered in fighting for fair treatment in the workplace. *See, e.g.,* Eirik Cheverud, *Increased Tax Liability Awards After Eshelman: A Call for Expanded Acceptance Beyond the Realm of Anti-Discrimination Statutes*, 56 N.Y.L. Sch. L. Rev. 711, 746 (2011) (concluding that excess tax reimbursement should be available under the NLRA and other statutes in order to "ensure that the plaintiff is placed in a position equal to where she would have been absent the illegal conduct").

Aside from making victims whole, Congress also aimed to deter unlawful conduct. *See Sure-Tan*, 467 U.S. at 904 n.13 (noting that the backpay under the Act is intended to serve the goals of "more certain deterrence against unfair labor practices and more meaningful relief for

⁸ Assuming 2011 rates for simplicity, as well as the standard deduction and personal exemption, the worker would have paid 10% on taxable income up to \$8,500 and 15% on taxable income up to \$18,500. That totals \$2,350 in income tax, an effective rate of 8.4%.

the illegally discharged employees”). A well-functioning deterrent is needed to enable workers to exercise their rights to concerted action, collective bargaining, and other activities protected by the Act. By requiring employers to reimburse excess tax, the Board would strengthen deterrence in two ways. First, workers would have a heightened incentive to pursue their rights because they would be fully compensated for resulting economic loss. Second, each worker’s successful legal action would have a larger and more appropriate financial impact on employers.

B. Courts Have Held that Excess Tax Reimbursement Is Available Under Analogous Anti-Discrimination Laws

By requiring excess tax reimbursement, the Board would be adopting an approach that has already been embraced by courts applying other anti-discrimination laws. The Third and Tenth Circuits have both held that excess tax reimbursement is available to prevent plaintiffs from paying the tax penalty associated with lump sum backpay awards. *See Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009) (approving excess tax reimbursement under the Americans with Disabilities Act); *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (approving excess tax reimbursement under Title VII of the Civil Rights Act of 1964). Those courts determined that excess tax reimbursement was required by the “make whole remedial purpose” of federal anti-discrimination law. *Eshelman*, 554 F.3d at 442. *Accord Sears*, 749 F.2d at 1456 (noting that reimbursement was needed to compensate workers for the cost of being vaulted into the highest tax bracket).

The Eighth Circuit has also suggested that excess tax reimbursement is available, declining to award it only on the grounds of sovereign immunity or because of insufficient documentation presented by the plaintiff. *See, e.g., Arneson v. Callahan*, 128 F.3d 1243, 1247 (8th Cir. 1997) (declining to approve an excess tax award under the Rehabilitation Act on the

grounds of sovereign immunity while suggesting that such an award would grant employees “a full measure of backpay”). At least one district court within the Eighth Circuit has therefore ruled that excess tax reimbursement can be ordered as a remedy where sovereign immunity does not apply. *See Powell v. N. Ark. College*, 2009 U.S. Dist. LEXIS 59826 (W.D. Ark. July 1, 2009) (applying *Arneson* to permit excess tax reimbursement and following the reasoning of the Third Circuit decision in *Eshelman* in deeming such awards appropriate under the Family and Medical Leave Act).⁹

Finally, at least one state Supreme Court has approved excess tax reimbursement in connection with violation of a state anti-discrimination law that employs the Title VII remedial regime. *See Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, Dist. No. 160, 87 P.3d 757 (Wash. 2004) (affirming an award of excess tax reimbursement in connection with a backpay award for gender discrimination “[b]ecause [the Washington Law Against Discrimination] incorporates remedies authorized by the federal civil rights act and that statute has been interpreted to provide the equitable remedy of offsetting additional federal income tax consequences of damage awards”).

Cases under these federal and state anti-discrimination laws are directly applicable to the question before the Board. Indeed, “the backpay remedy provided by Title VII is modeled on the

⁹ One federal appellate court – and only one – has held that excess tax reimbursement should not be available as a general matter under federal anti-discrimination laws. *See Dashnaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994). Of course, *Danshaw* is not binding on the Board. *See Arvin Auto.*, 285 N.L.R.B. 753, 757 (1987) (holding that the Board “operate[s] under a statute that simply does not contemplate that the law of a single circuit would exclusively apply in any given case”). *Danshaw* is also not persuasive. The court’s only rationale – the lack of precedent for excess tax reimbursement – has been eroded by time and, in any case, sidesteps the key question of whether reimbursement is needed to make victims whole. Unsurprisingly, *Danshaw* has been the subject of serious academic criticism. *See, e.g., Cheverud, supra*, at 727.

remedial provisions of the NLRA.” *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 444 (1975) (Rehnquist, C.J., concurring). From the standpoint of ensuring effective backpay awards, there is no difference between a nursing home aide discriminatorily fired for distributing flyers supporting representation by an SEIU local, a violation of the NLRA,¹⁰ and a manager discriminatorily fired after experiencing side effects of chemotherapy, a violation of the Americans with Disabilities Act.¹¹ Neither form of discrimination should force employees to shoulder the burden of excess taxation.

C. Employers’ Likely Objections to Excess Tax Reimbursement Fly in the Face of Established Precedent and Fundamental Principles of Equity

Employers’ likely objections to excess tax reimbursement can be anticipated based on prior cases on tax reimbursement in other contexts. As evidenced by those cases, employers are unlikely to argue that workers are generally unharmed by the excess tax liability associated with lump sum backpay awards. Instead, employers may seek to characterize excess tax reimbursement as speculative, unfair, or unsupported by precedent. But each objection collapses under scrutiny.

1. **In Multiple Contexts, the Supreme Court and other Courts have Held that Future Tax Rates are Not Too Speculative to Consider in Awarding Remedial Compensation**

One objection to excess tax reimbursement is that it is inherently speculative because at the time of the award, the tax to be paid on the lump sum is uncertain. For example, in a case under Title VII, a court denied a request for excess tax reimbursement as “requir[ing] a

¹⁰ *Sprain Brook Manor Nursing Home, LLC*, 351 N.L.R.B. at 1202-03 (awarding backpay to two such workers who were “discriminatorily discharged” in violation of the Act).

¹¹ *Eshelman*, 554 F.3d at 432 (awarding backpay to such a worker who was subject to discrimination on the basis of disability).

significant degree of speculation,” even though the plaintiff had offered calculations from a financial expert. *EEOC v. Fed. Express Corp.*, 537 F. Supp. 2d 700, 720 (M.D. Pa. 2005). In characterizing excess tax reimbursement as speculative, employers have pointed to the possibility of changes to the tax rate or unexpected use of deductions or credits by workers. *See Argue v. David Davis Enters.*, 2009 U.S. Dist. LEXIS 32585 (E.D. Pa. Mar. 20, 2009) (characterizing an excess tax award as overly speculative because “the question of federal income tax rates is in its own state of flux and speculation”).

In an analogous context, however, the United States Supreme Court has held that courts *must* consider forecasts of future taxation in awarding remedial compensation, even though those forecasts are not absolutely certain.¹² Under the Federal Employers’ Liability Act (“FELA”), a railroad carrier must compensate the family of a worker who died on the job due to the employer’s negligence. 45 U.S.C. § 51. That compensation typically comes in the form of a lump sum award of damages intended to replace the income that the deceased worker would have earned over his or her lifetime. Employers argued that, because an award under FELA is not taxable, courts should reduce the award by the amount that the decedent would have paid in taxes on his or her pay – that is, the future taxes that would be owed on each year of income during the decedent’s expected lifespan. Plaintiffs argued in response that such reduction would

¹² It is important to note that for the purposes of the question before the Board, any source of uncertainty – particularly, a change to the tax rate or unanticipated deduction or credit – only enters the picture if it occurs between the date of the backpay award and December 31st of that year, an unusual circumstance. To the extent deductions are a source of confusion, only thirty percent of all taxpayers itemize deductions, with that population disproportionately upper-income. *See Benjamin H. Harris & Daniel Baneman, Who Itemizes Deductions?*, Tax Policy Center (Jan. 17, 2011), *available at* <http://www.urban.org/uploadedpdf/1001486-Who-Itemizes-Deductions.pdf>.

be speculative because future taxation is unknown. *See, e.g., Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236-37 (5th Cir. 1975) (accepting the latter argument under the related Jones Act).

The Supreme Court provided a decisive answer on the question, holding that courts must forecast the taxes that would be owed in future years when calculating awards under FELA. *See Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 495-96 (1980). The Court specifically rejected the notion that such forecasts were too speculative for inclusion in damage calculations:

[T]here are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available We . . . reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.

Id. Indeed, the calculation of after-tax income was “the only realistic measure” of the amount required to make families whole for their loss. *Id.* at 493. For recipients of backpay under the NLRA, future taxation is no more speculative. To the contrary, while a FELA award requires tax forecasts for many years into the future, excess tax reimbursement in this context requires only a forecast for the year in which the lump sum is paid, a much more certain calculation.

Several courts have reached the same conclusion in wrongful death suits under state law. For example, the Iowa Supreme Court required the consideration of evidence regarding future taxes, finding it “self-evident that future probable taxes are no more speculative than any other element a trier of facts is permitted, if not required, to consider in the determination of wrongful death damages.” *Adams v. Deur*, 173 N.W.2d 100, 105 (Iowa 1969). *Accord Mosley v. United States*, 538 F.2d 555, 558-59 (4th Cir. 1976) (applying North Carolina law); *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 185 (1st Cir. 1974) (applying Rhode Island law).

The same result has been reached in a second line of cases, here where the defendant's conduct has deprived the plaintiff of income that would have been tax-free. Because damages awards are generally not tax-free, courts have required defendants to reimburse all expected taxes on these awards in order to make the plaintiff whole. *See, e.g., Home Sav. of Am. v. United States*, 399 F.3d 1341 (Fed. Cir. 2005) (“[A] tax gross-up is appropriate when a taxable award compensates a plaintiff for lost monies that would not have been taxable.”). In awarding such tax reimbursement, courts have rejected defendants' contention that calculations of future taxes are too speculative. *See id.; Oddi v. Ayco Corp.*, 947 F.2d 257, 262 (7th Cir. 1991) (holding that courts should resolve concerns about tax speculation by presuming that current tax rates will remain in effect).

2. Under Established Principles of Causation, Employers are Properly Held Responsible for Excess Taxation Arising from Lump-Sum Backpay Awards Because It is Fully Foreseeable

A second objection to excess tax reimbursement suggests that it is unfair to hold employers responsible for excess taxation because it flows from the vagaries of the federal tax system, which is out of employers' control. In fact, the opposite is true: when an office cleaner is fired for distributing union literature,¹³ it is most fair to place the cost of excess taxation not on the worker but on the employer who broke the law.

Indeed, under basic common law principles, employers are properly held responsible for any reasonably foreseeable consequence of their unlawful actions. *See W. Page Keeton et al., Prosser & Keeton on The Law of Torts* § 44, at 303 (5th ed. 1984) (“Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence.”). For example, someone who physically injures another is typically responsible for reasonably

¹³ *N. Hills Office Services*, 346 N.L.R.B. at 1100-01.

foreseeable further injuries incurred in the course of medical treatment, even when those further injuries are due to the incompetence of the doctor. *See, e.g., Sharkey v. Penn Cent. Transp. Co.*, 493 F.2d 685, 690-91 (2d Cir. 1974) (“[T]he original tortfeasor is held responsible if the injury caused by him is aggravated by the negligent acts of a physician who attempts to treat the victim for his injury.”). Because a backpay award is considered income, it is fully foreseeable that such income will be subject to tax and equally foreseeable that the size of the award will determine the tax rate to be applied. Thus, there is no unfairness in requiring employers to reimburse any excess tax.

3. The Board Should Not Limit Excess Tax Reimbursement to a Poorly Defined Set of “Protracted” Cases

Finally, although some cases in the anti-discrimination context can be interpreted to suggest that excess tax reimbursement should be available only in “protracted” litigation,¹⁴ the Board should not adopt that rule. Adoption of the limitation would force the Board to make case-by-case determinations regarding the “protractedness” of a case, a characteristic that cannot be precisely defined. Those determinations are particularly difficult because, at the stage when backpay is initially awarded, it will rarely be clear whether that award will be appealed and how long such an appeal may take. Moreover, there is simply no principled basis for depriving victims reimbursement for their excess tax burden just because their case extended over, say, three years rather than eight. The Board should instead adopt a rule that the remedy is available wherever the evidence indicates that receipt of a lump sum backpay award covering more than one year will cause a worker to suffer an excess tax burden.

¹⁴ *See Fogg v. Gonzales*, 407 F. Supp. 2d 79, 91 (D.D.C. 2005), *rev’d*, 492 F.3d 447, 456 (D.C. Cir. 2007).

D. In Assessing Excess Taxation, the Board Should Shift the Burden to Employers to Disprove Victims' Reasonable Calculations or Show that Current Tax Rates Will Change

Although it is not specifically addressed in *Latino Express*, a critical issue regarding excess tax reimbursement is how to allocate evidentiary burdens in assessing the appropriateness and amount of such an award. The SEIU urges the Board to employ a burden-shifting framework in which the Board first requires workers to put forward a prima facie case providing a reasonable calculation of their excess tax burden, then shifts the burden to employers to demonstrate that the calculation is inaccurate. Due to the imbalance in financial sophistication between workers and employers, a burden-shifting framework is critical to ensure that excess tax reimbursement exists not just on paper but also in practice.

Burden-shifting frameworks are already well known in the calculation of backpay. For example, under long-established precedent followed by the Board, the burden lies on an employer to “establish any facts that would negate or mitigate its backpay liability.” *Aero Ambulance Serv., Inc.*, 349 N.L.R.B. 1314, 1318 (2007). *See also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (establishing a burden-shifting framework for damages and liability under the Fair Labor Standards Act). Here, the Board should adopt a burden-shifting framework for several reasons. Most importantly, employers are typically much more knowledgeable in matters of taxation than workers, especially low-wage workers. For example, employers are required by law to withhold taxes from their workers and to maintain careful records related to those workers' income and tax liability. *See* 26 U.S.C. § 3402 (requiring withholding by employers); 26 U.S.C. § 6051 (requiring employers to maintain records of income and taxes). Even when a worker is fired or otherwise deprived of pay in violation of the Act, the employer will almost always continue to withhold taxes and maintain records for other

similarly paid workers, while the victim will have no reason to maintain records of the wages she would have received or tax she would have paid absent the violation. Due to the imbalance in sophistication and recordkeeping, a burden-shifting framework is needed to ensure that workers who deserve excess tax reimbursement are not denied it simply because of their inability to prove the exact amount by a preponderance of the evidence.¹⁵

In analogous situations, both the Supreme Court and Congress have established similar burden-shifting frameworks. The Supreme Court adopted such a framework for determining workers' overtime hours under the Fair Labor Standards Act. *See Anderson*, 328 U.S. at 686-88. In *Anderson*, the Sixth Circuit had dismissed the plaintiffs' claims because they were unable to prove by a preponderance of the evidence the amount of unrecorded pre-shift and post-shift overtime hours they had worked. *Id.* at 684. The Supreme Court reversed, holding that plaintiffs needed only to offer a reasonable estimate of these hours in order to shift the burden to employers to disprove that approximation. *Id.* at 687-88. The Court reasoned that employers had a statutory duty to maintain time records and that it was not fair to penalize workers – and reward employers – when those records were inadequate. *Id.* at 687. Similarly, recognizing individuals' disadvantage in tax sophistication as compared to the government, Congress mandated that individuals can satisfy their burden in civil tax suits simply by providing “credible evidence” of their position, placing the burden on the government to rebut that evidence.¹⁶

¹⁵ In several cases, plaintiffs have been denied excess tax reimbursement because they were unable to prove with certainty the amount of reimbursement required. *See, e.g., Argue*, 2009 U.S. Dist. LEXIS 32585, at *78.

¹⁶ *See* 26 U.S.C. § 7491(a)(1) (establishing the burden shifting framework). Small businesses also receive the benefit of the framework. *See Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 198-99 (D. Conn. 2004). According to a House Committee Report, the statute was motivated by Congress' concern that “individual and small business taxpayers

As the Seventh Circuit has held, a presumption is especially appropriate with respect to a plaintiff's use of current tax rates to calculate a future tax burden. *See Oddi*, 947 F.2d at 262. Namely, if a worker submits a reasonable calculation assuming that current rates will continue, the employer should have the burden to disprove that assumption. In *Oddi*, the Seventh Circuit articulated several reasons to adopt such a rule. The presumption prevents defendants from escaping full accountability for their actions, while making litigation outcomes more predictable, since parties know the current tax rate before entering litigation. *Id.* Finally, “[o]rdinary legislative inertia ensures that any statutory status quo will continue for at least a few years.” *Id.* *See also* Cheverud, *supra*, at 728 (arguing that tax rates do not typically change suddenly and that the consequence of any uncertainty “should fall on the party that broke the law”).

Given the above, the SEIU respectfully submits that the Board should adopt the proposed evidentiary burden-shifting framework for awards of excess tax reimbursement.

II. THE BOARD SHOULD REQUIRE EMPLOYERS TO SUBMIT DOCUMENTATION TO THE SOCIAL SECURITY ADMINISTRATION SHOWING HOW BACKPAY SHOULD BE ALLOCATED AMONG CALENDAR QUARTERS

In response to the first question in *Latino Express*, the SEIU urges the Board to answer affirmatively, requiring employers to submit documentation showing how workers' pay would have been distributed over time if not for unlawful employer action. After demonstrating that such a policy is needed to ensure that employees are made whole, this Section demonstrates that the requirement will impose little, if any, burden on employers.

frequently are at a disadvantage when forced to litigate with the Internal Revenue Service.” H.R. Rep. No. 105-364(I) (1997).

A. Failure to Properly Allocate Income Can Lead to Loss of Workers' Social Security Benefits

There can be little doubt that failure to properly allocate income can harm workers by denying them part or all of their earned Social Security benefits. The Internal Revenue Service has said just that: “[W]ages not credited to the proper year may result in lower Social Security benefits or failure to meet the requirement for benefits.” IRS Publication No. 957 (Rev. May 2010). When a worker for an ambulance agency in Connecticut is terminated after engaging in union activity,¹⁷ and his Social Security benefit is diminished or eliminated as a result, he has not been made whole for his injury.

There are two ways in which workers can be harmed by an employer's failure to submit proper documentation. First, benefits can be diminished. The government calculates each employee's benefit based on the average annual income received by that employee over his or her working life. When calculating average annual income, the government applies a cap each year to the amount of income from that year creditable to the calculation. But a lump sum award for a multi-year period can push some of a worker's compensation over that cap in the year of the award, even when it would have fit under the cap if distributed over several years. For example, the SEIU represents security officers in Chicago who make approximately \$39,000 annually, and in 2011, the cap for social security earnings was \$106,800. Thus, if one of the security officers were unlawfully dismissed and recovered backpay in 2011 covering five years, that worker would lose credit for approximately half of the \$195,000 backpay award.

Second, an improper allocation can deprive workers of Social Security eligibility altogether. To qualify for Social Security benefits, an individual must have received income in

¹⁷ *Stafford Ambulance Ass'n*, 2007 NLRB LEXIS 511, at *6.

at least forty calendar quarters. *See* 42 U.S.C. § 414. Improper documentation can prevent a worker from meeting that requirement. For example, suppose the security officer in Chicago is unable to find work for five years between the date of his unlawful termination and the date that he is reinstated pursuant to a Board order. Absent the employer's unlawful behavior, the employee would have received income in twenty quarters, half of the eligibility requirement. But without proper documentation, the government will treat the employee as having received income in just one quarter, the quarter in which the lump sum was received. This situation threatens the subset of the population which is unemployed for long periods, and that subset is not of trivial size. In a time of high unemployment rates, nearly thirty percent of the unemployed have not had a job in over a year. *See* Tiffany Hsu, *Long-term Unemployment Affects Nearly 30% of Jobless Americans*, L.A. Times, May 3, 2012.

B. A Requirement to Provide Proper Documentation Would Impose Virtually No Additional Burden on Employers

While protecting workers' Social Security benefits, the proposed documentation rule would impose little burden on employers. Employers need only submit a one page table showing how income should have been distributed across years. *See* IRS Pub. 957, at 4. That is exactly the type of information that employers are already required to submit each year for each of their employees. *See* 26 U.S.C. § 6051.

CONCLUSION

Every day, workers like the nurses, janitors, home-health aides, and others represented by SEIU choose whether to engage in protected activity to pursue better pay, fair working conditions, and a voice on the job. That choice is inherently fraught with risk. But the Board should endeavor to avoid needlessly heightening that risk through the prospect of additional

taxes and loss of Social Security benefits. Therefore, and for all of the reasons described above, the SEIU urges the Board to answer affirmatively both questions posed in *Latino Express*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 1st day of October, 2012, the foregoing amicus brief was served, via the National Labor Relations Board's electronic filing system and the manner indicated, upon the following:

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