

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), as *amicus curiae*, submits this brief addressing the questions raised by the Board in *Latino Express, Inc.*, 358 NLRB No. 94 (July 31, 2012). The Board seeks input regarding whether, in connection with an award of back pay, it should require a respondent to: (1) submit the appropriate documentation to the Social Security Administration (SSA) so that back pay is allocated to the appropriate calendar quarters; and (2) reimburse a discriminatee for any excess Federal and State income taxes the

discriminatee may owe as a result of receiving a lump sum back pay award covering more than one year.

The AFL-CIO urges the Board to adopt both changes. Because eligibility for Social Security benefits and the amount of such benefits depend on an employee receiving credit for hours worked and wages received, a discriminatee is not made whole for Social Security benefits purposes by a back pay award unless the employer informs the SSA of the correct allocation of the wages represented by the back pay award within the back pay period. Similarly, because a lump sum back pay award can lift a discriminatee into a higher tax bracket – requiring the discriminatee to pay more in total taxes than if she had not been discharged and had instead received her wages in the normal course of her employment – the net value of a back pay award may be insufficient to make a discriminatee whole unless the Board’s calculation of back pay takes into account any extra tax liability resulting from the lump sum payment.

1. The Board should require an employer who violates the NLRA to report the payment of a back pay award to the Social Security Administration so that the SSA can properly allocate the back pay to the discriminatee’s Social Security account.

The Supreme Court has held that “back pay . . . granted to an employee under the National Labor Relations Act[] shall be treated as ‘wages’ under the Social Security Act,” *Social Security Board v. Nierotko*, 327 U.S. 358, 359, 370 (1946), explaining:

“The purpose of the federal old age benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor. Eligibility for these benefits and their amount depends upon the total wages which the employee has received and the periods in which wages were paid. While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not ‘back pay’ under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives ‘back pay’ for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as ‘remuneration for employment’ and employment as ‘any service . . .

performed . . . by an employee for his employer.’” *Id.* at 364

(footnotes omitted).

On this basis, the Court also held that because “‘back pay’ is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual.” *Id.* at 370. *See also U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 211 (2001) (reaffirming *Nierotko*’s “allocation holding” that “‘back pay’ must be allocated as wages . . . to the ‘calendar quarters’ of the year in which the money would have been earned, if the employee had not been wrongfully discharged” (quoting *Nierotko*, 327 U.S. at 370)). As the Internal Revenue Service (IRS) subsequently explained, “inasmuch as Congress intended, under the National Labor Relations Act, that back pay could be ordered by the Board in order to make the victim whole, complete reparation would include the wage credits under the Social Security Act.” IRS Rev. Rul. 78-176, 1978-1 C.B. 303 (1978). *See also Cleveland Indians*, 532 U.S. at 216 n. 13 (“[F]or benefits eligibility and calculation purposes, the Social Security Administration [] by regulation continues to apply the *Nierotko* rule” that “backpay ‘is allocated to the periods of time in which it should have been paid if the employer had not violated the statute.’” (quoting 20 C.F.R. § 404.1242(b)).

In order to effectuate this “complete reparation” for victims of violations of the NLRA, the IRS and SSA have established an administrative procedure for employers to report the payment of back pay awards for violations of the NLRA and other statutes so that “the SSA can allocate the statutory back pay to the appropriate periods.” *See IRS, Reporting Back Pay and Special Wage Payments to the Social Security Administration, Pub. 957, p. 2 (May 2010).* This procedure requires employers to file a “special report” with the SSA that includes:

- “1. The employer’s name, address, and employer identification number (EIN).
2. A signed statement citing the federal or state statute under which the payment was made. [ ]
3. The name and telephone number of a person to contact. (The SSA may have additional questions concerning the back pay case or the individual employee’s information.)
4. A list of employees receiving the payment and the following information for each employee:
  - a. The tax year you paid and reported the back pay.
  - b. The employee’s social security number (SSN).

- c. The employee's name (as shown on his or her social security card).
- d. The amount of the back pay award excluding any amounts specifically designated otherwise, for example, damages for personal injury, interest, penalties, and legal fees.
- e. The period(s) the back pay award covers (beginning and ending dates – month and year).
- f. The other wages paid subject to social security and/or Medicare taxes and reported in the same year as the back pay award (if none, show zero). [ ]
- g. The amount to allocate to each reporting period. This includes any amount you want allocated (if applicable) to the tax year of the award payment. If you do not give the SSA specific amounts to allocate, the SSA does the allocation by dividing the back pay award by the number of months or years covered by the award.” *Id.*, pp. 2-3 (footnote omitted).

In addition, the IRS and the SSA require the employer to include a cover letter stating “[t]he name and address of the employer, [ ] [t]he statute under which you paid the back pay, [ ] [t]he name and telephone number of

the employer contact, and [] [t]he signature of the reporting official.” *Id.*, p. 3.

A Board requirement that an employer file the requisite “special report” with the SSA upon the payment of a back pay award would constitute a traditional make whole remedy pursuant to the Act. In the ordinary course of employment, an employer is required to report employees’ wages to the SSA on Form W-2, Wage and Tax Statement, thus ensuring that wages are credited to the employee’s individual earnings record for the year they are earned. *Id.*, p. 2. When an employer discharges an employee in violation of the Act and then pays back pay in a subsequent year, however, the employee is deprived of the benefit of the employer’s annual reporting of her wages to the SSA. For Social Security purposes, the proper remedy to “make whole [an] employee[] who ha[s] been discharged in violation of the Act,” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940), therefore, is to require the employer to file a special report with the SSA to ensure that the “‘back pay’ [is] allocated as wages . . . to the ‘calendar quarters’ of the year in which the money would have been earned, if the employee had not been wrongfully discharged,” *Cleveland Indians*, 532 U.S. at 211 (quoting *Nierotko*, 327 U.S. at 370).

Such an order lies well within the Board’s remedial authority, and requires an action similar to other non-economic “affirmative action[s] . . . [to] effectuate the policies of th[e] [Act],” 29 U.S.C. § 160(c), that the Board routinely orders in order to place the discriminatee as nearly as possible in the position she would have occupied but for the employer’s unlawful action. For example, the Board regularly requires employers, as it did in this case, to “remove from [their] files any reference to [] unlawful discharges, and . . . [to] notify the employees in writing that this has been done and that the discharges will not be used against them in any way.” *Latino Express*, 358 NLRB No. 94, slip op. 3. In cases where the Board finds that an employer’s workplace policies violate the Act, the Board typically orders the employer to “[r]escind the Work Rules . . . and advise the employees in writing that the rules are no longer being maintained.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 657 (2004).

The Board should thus require employers to file the requisite special report with the SSA any time a back pay award is paid to a discriminatee in a calendar quarter subsequent to the quarter in which the back pay period began.

2. In order to “make whole employees who have been discharged in violation of the Act,” *Republic Steel Corp.*, 311 U.S. at 12, the Board should

also, in calculating make whole remedies, take into account any extra Federal and State income taxes owed by the discriminatee as a result of receiving a lump sum back pay award instead of regular wages.

The IRS considers a back pay award under the National Labor Relations Act taxable income earned in the year the award is paid without regard to when the income would have been paid but for the employer's unlawful conduct. *See* IRS Rev. Rul. 89-335, 1989-1 C.B. 280 (1989); IRS Rev. Rul. 78-336, 1978-2 C.B. 255 (1978). Because of the progressive structure of the Federal tax code and some State tax codes, "receipt of a lump sum back pay award could lift an employee into a higher tax bracket for that year, meaning the employee would have a greater tax burden than if she were to have received that same pay in the normal course." *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 441 (3d Cir. 2009).

As the Board has explained, prior to the Tax Reform Act of 1986, "the Internal Revenue Code allow[ed] a taxpayer having unusual fluctuations in income to use an averaging device to ease the tax liability in peak income years," a procedure known as "income averaging." *Laborers Local 282 (The Austin Co.)*, 271 NLRB 878, 878 (1984) (citing former Sections 1301 through 1305 of the Internal Revenue Code). The Board's Casehandling Manual at the time required Board agents to inform discriminatees "that if

the backpay renders the total annual income for the year substantially in excess of normal income and thereby places [the] discriminatee in a higher tax bracket, the individual may be entitled to a reduced formula for computing income for that year and to consult the local Internal Revenue Service Office for information concerning the computation of taxes for the year.” *Ibid.* (quoting former Casehandling Manual (Part Three – Compliance Proceedings) Section 10648.9). On the basis of “the availability of income averaging,” the Board at the time refused to take into account a discriminatee’s extra tax liability in calculating make whole awards. *Ibid.* See also *Hendrickson Bros., Inc.*, 272 NLRB 438, 440 (1985), *enfd.* 762 F.2d 990 (2d Cir. 1985).

As former Member Liebman has explained, however, because income averaging is no longer available to discriminatees under the tax code, “the Board’s previous rationale for denying tax compensation no longer exists.” *Hotel Employees & Restaurant Employees Int’l Union, Local 26*, 344 NLRB 567, 568 (2005) (Liebman, M., dissenting in part). The Board should, for this reason, “align its remedies with the realities of existing tax law and . . . vindicate the Act’s policy in favor of true make-whole relief for discriminatees.” *Id.* at 567 (Liebman, M., dissenting in part).

Notably, two federal courts of appeals have already approved this step in the context of enforcing federal employment discrimination statutes, holding that “a district court may . . . award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create.” *Eshelman*, 554 F.3d at 441-42. *See also Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451 (10th Cir. 1984) (same). Although the D.C. Circuit has refused to follow its sister circuits on this issue, *see Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007); *Dashnaw v. Pena*, 12 F.3d 1112 (D.C. Cir. 1994) (per curiam), neither of the Court’s decisions provide any reasoning on the substance of the matter. Further, both D.C. Circuit cases involved review of district court damage awards; the Board’s exercise of its “broad discretionary” remedial authority, in contrast, is “subject to limited judicial review.” *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (citation and quotation marks omitted).

The purpose of the Board’s exercise of its remedial authority is to “make whole employees who have been discharged in violation of the Act.” *Republic Steel Corp.*, 311 U.S. at 12. In this regard, the Act requires the Board to order employers “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of th[e] [Act].” 29 U.S.C. § 160(c). The Board’s remedial goal is

“restoring the economic status quo that would have obtained but for the company’s wrongful [conduct].” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263). And, in pursuing that goal through “back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

“[R]estoring the economic status quo,” requires the Board to “comput[e] net backpay,” *Golden State Bottling*, 414 U.S. at 188 (emphasis added), *i.e.*, the amount of net income the discriminatee would have realized but for the employer’s violation of the Act. Thus, Board law has long been that the remedial purposes of the Act require the Board, in fashioning a make whole award, to account for any additional costs incurred by the discriminatee that flow from the employer’s unfair labor practice and effectively decrease the net value of the back pay award. For example, the Board includes a discriminatee’s job search expenses in the calculation of a make whole remedy, “allowance being made for the expense of getting new employment which, but for the discrimination, would not have been necessary.” *Phelps Dodge*, 313 U.S. at 199 n.7 (citing *Crossett Lumber Co.*, 8 NLRB 440 (1938), *enfd.* 102 F.2d 1003 (8th Cir. 1938)). *See also Rikal*

*West, Inc.*, 274 NLRB 1136, 1139 (1985) (citing cases applying the *Crossett Lumber* rule).

Similarly, in calculating a make whole remedy, the Board accounts for uncompensated medical expenses that result from the discriminatee's loss of health insurance, since otherwise such medical expenses could work a net reduction in the discriminatee's back pay. *See ibid.*; *Prestige Bedding Co.*, 212 NLRB 690, 691 (1974); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1129-31 (1965), *enfd.* in relevant part 365 F.2d 888 (D.C. Cir. 1966); *Deena Artware, Inc.*, 112 NLRB 371, 375 (1955), *enfd.* 228 F.2d 871 (6th Cir.). As the D.C. Circuit explained, "[s]ince [the discriminatees] would have received the [medical and hospital] expenses except for the unfair labor practice, the loss is one which the Board validly included in the amounts required to make them whole, after deducting an amount equal to the premium the employee would have been required to pay." *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 893 (D.C. Cir. 1966).

Extra taxes that result from a lump sum back pay award – like job search expenses or uncompensated medical expenses resulting from the loss of employer-provided health insurance – are "expense[s] . . . which, but for the [respondent's] discrimination, would not have been necessary." *Phelps Dodge*, 313 U.S. at 199. The Board should thus treat extra taxes in the same

manner – as an additional cost to the discriminatee that results from the employer’s violation of the Act and effectively reduces net back pay and, for those reasons, is compensable as part of a make whole remedy.

Finally, at least one Board decision and a General Counsel memorandum suggest that the General Counsel must affirmatively seek compensation for extra tax liability as part of the General Counsel’s merits case. *See Webco Industries, Inc.*, 340 NLRB 10, 12 (2003) (stating, in a case in which the Board’s Order already had been enforced by the court of appeals, that “[t]o provide the requested [tax] remedy at this stage would require the Board to amend its Order and possibly to return to court to seek enforcement of the amended Order”); Memo. GC 11-08, Changes to the Methods Used to Calculate Backpay p. 3 & n. 8 (stating that *Webco* requires that tax liability “be fully litigated in the underlying unfair labor practice proceeding”). But because extra taxes that result from a lump sum back pay award are analogous to job search costs and the cost of uncompensated medical care – *i.e.*, costs to the discriminatee that are traceable to the employer’s violation of the Act and that effectively reduce the discriminatee’s net back pay award – there is no reason the General Counsel should be required to seek reimbursement for extra taxes as part of its merits case. Instead, any additional tax burden should be treated as a component of

the make whole remedy calculated in the compliance specification. As a practical matter, this approach is sensible; until the Board orders a make whole remedy, the General Counsel cannot determine whether the back pay award will cause the discriminatee to be liable for extra taxes or, if so, in what amount.

The Board should therefore take into account any extra Federal and State income taxes owed by a discriminatee as a result of receiving a lump sum back pay award in calculating a make whole remedy for an employer's violation of the Act.

Dated: October 1, 2012

Respectfully submitted,

/s/ Matthew J. Ginsburg  
Lynn K. Rhinehart  
James B. Coppess  
Matthew J. Ginsburg  
815 Sixteenth Street, NW  
Washington, DC 20006  
(202) 637-5397

## CERTIFICATE OF SERVICE

I hereby certify that, on October 1, 2012, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* by electronic mail on the following:

Gregory Glimco  
International Brotherhood of  
Teamsters, Local 777  
3438 Grand Blvd.  
Brookfield, IL 60513-1208  
greg@teamsters777.org

Zane D. Smith, Esq.  
Zane D. Smith & Associates, Ltd.  
415 North LaSalle Street  
Suite 501  
Chicago, IL 60654  
zane@zanesmith.com

Sheila A. Genson, Esq.  
Latino Express, Inc.  
1300 E. Woodfield Road  
Suite 400  
Schaumburg, IL 60173-5444  
lawofficeofgenson@ameritech.net

Regional Director Peter S. Ohr  
National Labor Relations Board – Region 13  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604  
peter.ohr@nrlrb.gov

/s/ Matthew J. Ginsburg  
Matthew J. Ginsburg