

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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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.)	
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**BRIEF OF CASA DE PROYECTO LIBERTAD, THE COMMUNITY JUSTICE
PROJECT, LEGAL AID OF NORTHWEST TEXAS, AND THE NATIONAL
EMPLOYMENT LAW PROJECT AS *AMICI CURIAE***

STATEMENT OF INTEREST

Casa de Proyecto Libertad (“PL”) was founded in 1981 to provide legal defense and advocacy for detained Central American immigrants seeking asylum in the United States. Proyecto Libertad has evolved from a Central American legal services project into a community-based organization dedicated to supporting immigrant families living in the Rio Grande Valley. The mission of Casa de Proyecto Libertad is “to promote and defend the Human Rights of immigrant families in the Rio Grande Valley through legal defense and community organizing.” PL believes that all persons – clients, members, the greater public, and PL employees – deserve to be respected, live with dignity, and enjoy well-being.

The Community Justice Project (“CJP”) is a non-profit, statewide legal aid organization that is part of Pennsylvania’s Legal Aid Network. CJP specializes in litigation and advocacy that cannot be undertaken by other Pennsylvania Legal Aid organizations due to restrictions from

their funding sources. Among other legal representation, CJP regularly handles class action litigation against employers of immigrant workers. In the course of such representation, CJP has developed expertise in the settlement of claims for back wages owed to low income, immigrant workers, including income reporting requirements and the income tax and employment tax implications of such settlements.

For more than 60 years, Legal Aid of NorthWest Texas (“LANWT”) has provided free civil legal services to indigent persons in a 114-county area of North and West Texas. LANWT has special projects devoted to representing the poor in tax controversies and low-wage workers with employment problems.

The National Employment Law Project (“NELP”) is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, and that employers are not rewarded for skirting those basic rights. NELP’s area of expertise includes the workplace rights of contingent or nonstandard workers under federal employment and labor laws, with an emphasis on wage and hour rights. NELP collaborates closely with community-based worker centers, unions, and state policy groups and has litigated directly and participated as *amicus* in numerous cases addressing the rights of contingent workers under the Fair Labor Standards Act and the National Labor Relations Act and numerous state laws. We have represented janitors, home care, retail, and construction workers who have been treated as non-employees by their employers and underpaid on the job. NELP has submitted testimony to the U.S. Congress in 2010 and 2007 on the problems of wage theft and independent contractor misclassification, and works closely with state agencies and legislatures seeking to close loopholes exploited by

employers. This effort by the Board to make workers whole with tax reporting and payment remedies is important to NELP and its constituents because many low-wage and unorganized workers lack basic protections on the job and struggle to make ends meet in today's economy.

ARGUMENT

In its *Latino Express* decision, the Board invited interested parties to file briefing regarding two issues: (1) whether the Board should require employers to submit documentation to the Social Security Administration ("SSA") when backpay is paid to so that the backpay will be allocated to the particular employee's appropriate calendar quarters, and (2) whether the Board should require an employer to reimburse an employee for any excess federal and state income taxes the employee may owe as a result of receiving a lump-sum backpay award that covers more than one year of employment.

As organizations that represent the interests of low-wage workers, many of whom are not members of a union but who are discriminated against by employers for exercising their Section 7 rights to engage in collective, concerted activities to improve wages or working conditions, we write to express our support for the Board imposing both proposed requirements on employers who are in proceedings before the Board: the Board should require employers to properly report backpay awards to the SSA and to reimburse an employee for any excess taxes the employee must pay as a result of receiving a lump-sum payment. Adopting these requirements will not only ensure that employees who are victims of unfair labor practices are made whole, but will also reward law-abiding employers by ensuring that all employers play by the same rules.

- I. TO CARRY OUT ITS AUTHORITY AND RESPONSIBILITY TO MAKE EMPLOYEES WHOLE WHO ARE VICTIMIZED BY UNFAIR LABOR PRACTICES, THE BOARD IS JUSTIFIED IN REQUIRING EMPLOYERS TO PROPERLY REPORT BACKPAY AWARDS TO THE SSA.

Reporting backpay awards in the year when the employee should have received the pay originally serves two important purposes, particularly for low-wage workers. First, requiring such reporting ensures that low-wage workers receive the earnings credits with the SSA to which they are entitled. Second, requiring such reporting ensures that the employee's Social Security benefits level is accurately calculated and, more importantly, not too low. To facilitate a reporting requirement, the Board, in consultation with the Internal Revenue Service ("IRS") and the SSA, should create simple forms and template cover letters that the employer can use to report backpay awards to the SSA.

A. Requiring Reporting of Backpay Awards Ensures That Employees Receive the Earnings Credits to Which They Are Entitled

To qualify for Social Security retirement and disability benefits, an employee generally must have earned sufficient wages to accumulate 40 "credits." 20 C.F.R. § 404.110(b)(1). An employee receives one credit for each \$250 of wage earnings in 1978 dollars, adjusted for inflation, for up to four credits during a calendar year.¹ *Id.* § 404.143(a). For example, in 2012, an employee received a credit for each \$1,130 of wage earnings, up to a maximum of four credits in the year. Quarter of Coverage, <http://www.ssa.gov/oact/cola/QC.html> (last visited Sept. 26, 2012).

It has long been common for low-wage workers to spend years laboring as contingent employees in the informal economy, where employers routinely flout their obligation to report wages to the IRS and the SSA. *See, e.g., Murillo v. Texas A&M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. Jan. 18, 1996) (explaining allegations that several hundred farmworkers were misclassified by the defendant as independent contractors, leading to, *inter alia*, the defendant's failure to pay applicable Social Security taxes); AFL-CIO, THE MISCLASSIFICATION OF

¹ For wage earnings prior to 1978, the credits were earned based on calendar quarters, so an employee could earn up to four quarter-based credits per year. *See* 20 C.F.R. §§ 404.140(b), 404.141.

EMPLOYEES AS INDEPENDENT CONTRACTORS 3 (July 2012), *available at* <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-as-IC-2012.pdf> (noting that low-wage immigrant workers are frequent victims of misclassification and stating, “[t]he largest incentive for misclassifying workers is that employers are not required to pay Social Security and unemployment insurance (UI) taxes for independent contractors”); NAT’L EMPLOYMENT LAW PROJECT, 1099’D: MISCLASSIFICATION OF EMPLOYEES AS “INDEPENDENT CONTRACTORS” (Apr. 13, 2010), *available at* <http://www.nelp.org/page/-/Justice/1099edFactSheet2010.pdf?nocdn=1>; Donna St. George, *They’ve Little to Show for Years in the Fields*, PHILA. INQUIRER, March 8, 1992, at A1.

Low-wage workers in particular may otherwise lack earnings credits for the years in which the back wages should have been paid, and thus would be especially likely to be impacted by improper allocation of earnings credits. Consequently, for these vulnerable workers, it is crucial that they accumulate the 40 credits needed to qualify for Social Security benefits. Crediting wage payments received in Board proceedings to the year in which the wages should have been paid may increase the number of earnings credits in the wronged employee’s Social Security earnings account, thereby making it more likely that the employee will qualify for old age and disability benefits.

B. Requiring Reporting of Backpay Awards Ensures That the Employee’s Social Security Benefits Level Is Accurately Calculated and Is Not Too Low

The size of an employee’s Social Security retirement benefit is based on a formula that is derived from his or her Primary Insurance Amount (“PIA”). Social Security Benefit Amounts, <http://www.ssa.gov/oact/cola/Benefits.html> (last visited Sept. 26, 2012). For years in which the employee has no earnings, zeros are used until the worker has 35 years of earnings such that the employee’s PIA can be calculated. *See* 20 C.F.R. § 404.211(d)(3). In addition, for the purposes

of computing an employee's PIA, an employee's annual earnings are subject to an effective cap known as the contribution and benefit base, and any wages above that cap will not be considered as a part of the PIA calculation. Contribution and Benefit Base, <http://www.ssa.gov/oact/cola/cbb.html> (last visited Sept. 26, 2012). In 2012, for example, the contribution and benefit base was \$110,100. *Id.*

The formula for calculating an employee's Social Security benefits level is complex, but, for present purposes, the point is that, because an employee's Social Security benefits are directly tied to his or her reported wages, failure to properly credit backpay to the year(s) in which the wages should have been paid can have significant consequences on the employee's benefits level and, therefore, on the employee. Such consequences can be illustrated in the example of an employee who has only 29 years of wage earnings and who receives a \$150,000 backpay award in a Board proceeding, which represents six years of owed wages: \$25,000 for 2012, and \$25,000 each for the previous five calendar years (2007-2011), five years in which the employee otherwise has no wage earnings. If the employer does not report backpay to the SSA for the previous five years, it will be credited only to 2012. As a result, only \$110,100 of the backpay award will be used to calculate the employee's PIA and benefits level for 2012, and six of the employee's highest 35 years of earnings will continue to have zero wage earnings.

In sum, the difference in the employee's Social Security benefits level due to an employer's failure to properly report a backpay award is significant. Accordingly, it is entirely appropriate for the Board to require, as part of its Section 10(c) authority to make whole the victims of unfair labor practices, that the employer properly report backpay to the SSA.

C. The Board Should Work with the IRS and the SSA to Develop Simple Forms for Employers to Report Backpay Awards to the SSA

The number of SSA credits an employee receives as a result of a backpay award depends on whether the backpay is awarded “under a statute” or not. Backpay awarded “under a statute” is a payment by an employer pursuant to an award, determination, or agreement approved or sanctioned by a court or government agency responsible for enforcing a federal or state statute that protects an employee’s right to employment or wages. 20 C.F.R. § 404.1242(b). Back wages awarded pursuant to the National Labor Relations Act (“Act”) qualify as backpay awarded “under a statute.” *Id.* § 404.1242(b)(1).

Whereas the SSA credits backpay awards not made “under a statute” only to the year the payment is made, it credits awards that are made “under a statute” to the year(s) in which the award *should have* been made initially.² *Id.* §§ 404.1242(b), (c). However, the employer must notify the SSA via a special report of backpay “under a statute” in order for the SSA to treat it as such and give the employee the appropriate number of credits, otherwise the backpay will be credited to the employee’s account only for the year in which it was actually received. Reporting Back Pay and Special Wage Payments to the Social Security Administration, I.R.S. Pub. 957, at 2 (May 11, 2010), *available at* <http://www.irs.gov/pub/irs-pdf/p957.pdf>. Because of the consequences this can have for an employee’s Social Security benefits, both in terms of qualifying for them and for the amount of the benefits themselves, proper reporting of the backpay award is essential.

Unfortunately, however, neither the IRS nor the SSA has developed a form for reporting backpay “under a statute” to the SSA. The IRS has issued Publication 957, which contains instructions on how to report backpay to the SSA. Specifically, Publication 957 notes that an employer must provide a cover letter with its name and address, the statute under which it paid

² The IRS treats all backpay award payments as wages in the year in which they are actually paid to the worker. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (holding that, “for FICA and FUTA tax purposes, back wages should be attributed to the year in which they are actually paid”).

the backpay, the name and telephone of an employer contact, and the signature of the reporting official. *Id.* at 3. In addition, Publication 957 states that the following information must be included with such a report:

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. (If the statute is not identified, the SSA will assume the payment was not under a statute and will not allocate to earlier period(s).)
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 that the employer 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.

Id. at 2-3.

To further streamline the reporting process, a best practice for the Board would be to provide unambiguous, easy-to-use guidance to employers by using standardized forms for reporting back wage payments to the SSA. Some employers, particularly of low-wage workers not represented by a union, lack counsel in Board proceedings, may not have adequate payroll records, and may not have access to competent tax counsel. In light of these circumstances, both employers and employees would benefit from guidance and simple instructions for how to report backpay awards to the SSA.

Accordingly, the Board should suggest that the IRS create a standardized form and cover letter that employers must use to report backpay to the SSA as part of the standard Board remedial order in applicable cases. In the event the IRS does not create such reporting documents, the Board should consult with the IRS and SSA and develop the documents itself. Moreover, the form and cover letter should be made widely available, including in electronic format. As is currently the case in Board proceedings at the Compliance Specification stage, the General Counsel should follow regular Board procedures used to gather any relevant employee information that is needed for the form, such as the employee's name as shown on his or her social security card, without requiring employees to provide unnecessary and irrelevant private or sensitive information to the Board, and potentially to the employer, if the employer appeals the Compliance Specification.

II. TO CARRY OUT ITS AUTHORITY AND RESPONSIBILITY TO MAKE EMPLOYEES WHOLE WHO ARE VICTIMIZED BY UNFAIR LABOR PRACTICES, THE BOARD IS SIMILARLY JUSTIFIED UNDER ITS MAKE-WHOLE POWER IN REQUIRING EMPLOYERS TO REIMBURSE AN EMPLOYEE FOR ANY EXCESS TAXES THE EMPLOYEE MUST PAY AS A RESULT OF A LUMP-SUM PAYMENT.

A. *An Employer's Lump-Sum Backpay Award Results in Increased Tax Liability for the Employee*

Because the IRS treats backpay award payments as wages during the year they were actually paid, *see supra* note 2, an employee who receives a backpay award one year will thus see a substantial increase in wages for that year. As a result of such an increase, the employee will likely face higher tax liability for the year in which he or she receives the award. This increased liability constitutes an additional form of damages because the employee would not have had to pay these excess taxes but for the employer's unfair labor practice—had the wages been paid when due, the employee's tax liability would be much less during those years. For a

simple illustration of the discrepancy in tax liability and the resulting tax damages a worker faces, see Tables 1 through 3 below, pertaining to a hypothetical case involving a \$100,000 backpay award representing \$50,000 in backpay for each of the previous two years.

Table 1: Tax liability with lump-sum payment of \$100,000 backpay award

Lump-Sum Amount	\$100,000
Exemptions (5)	-\$18,500
Standard Deduction	-\$11,600
Taxed Amount	\$69,900
Total Tax Liability	\$9,731

Table 2: Tax liability had the backpay been paid when owed, \$50,000 for each of the previous two years

Payment – Year 1	\$50,000	Payment – Year 2	\$50,000
Exemptions (5)	-\$18,500	Exemptions (5)	-\$18,500
Standard Deduction	-\$11,600	Standard Deduction	-\$11,600
Taxed Amount	\$19,900	Taxed Amount	\$19,900
Tax Liability – Year 1	\$2,139	Tax Liability – Year 2	\$2,139

$$\text{Total Tax Liability} = \$2,139 + \$2,139 = \mathbf{\$4,278}$$

Table 3: Total tax damages – comparison of tax liability of lump-sum payment and tax liability of payments when owed

Tax Liability Under Lump Sum Payment	\$9,731
Tax Liability for Payments When Owed	\$4,278
Total Tax Damages (Additional Tax Liability with Lump Sum Payment)	\$5,453

B. To Compensate for Such Increased Tax Payments the Employee Must Make, the Board Should Require Employers to Include Tax Damages as a Part of the Backpay Award

Pursuant to its remedial authority in Section 10(c) of the Act³, we urge the Board to require employers to compensate employees for these tax damages so that a Board-ordered backpay award truly makes the employee whole—not only in terms of backpay, but also in terms of the increased tax payments the employee must make as a result of the employer’s one-time

³ The Board has the power to award backpay and other “affirmative action” that “will effectuate the policies of this Act.” 29 U.S.C. § 160(c).

lump sum payment. Such tax damages awards are not novel, and have been awarded by courts in a variety of employment lawsuits. *See, e.g., Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009) (holding that “a district court may, pursuant to its broad equitable powers granted by the [Americans with Disabilities Act], award a prevailing employee an additional sum of money to compensate for the increased tax burden a backpay award may create”); *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (upholding “a tax component in the back pay award to compensate class members for their additional tax liability as a result of receiving over seventeen years of back pay in one lump sum” under to the district court’s “discretion in fashioning remedies to make victims of discrimination whole” in a Title VII case); *see generally* Robert W. Wood, *To Tax Gross Up or Not to Tax Gross Up?*, 19 CAL. TAX LAW. 14, (Winter 2010), *available at* http://www.woodllp.com/Publications/Articles/pdf/To_Tax_Gross_Up_Or_Not_To_Tax_Gross_Up.pdf; Eirik Cheverud, Note, *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 (2011/2012), *available at* <http://www.nylslawreview.com/wordpress/wp-content/uploads/2011/11/Cheverud.Increased-Tax-Liability-Awards-After-Eshelman.pdf>.

We recognize that the calculation of the tax damages portion of an employee’s award can be complex. For example, to ensure the precise calculation of an employee’s tax liability, the backpay award would ideally be considered in conjunction with any other wages the employee earned during the year(s) to which the backpay award pertains, which would entail revisiting and recalculating the employee’s previously filed tax returns. Moreover, in order to properly determine the employee’s tax liability for the current year, the employee will have to wait until he or she prepares her tax filings in the following year. Taking such steps to calculate the tax

damages award with total precision will delay the employee's receipt of long-overdue pay and prolong the proceedings before the Board.

Accordingly, we propose a streamlined and administratively feasible method to calculate the employee's tax damages to be paid by the employer as a part of a backpay award. Put simply, the damages would be calculated using only information that is already in the record—any deductions and exemptions to which the employee is entitled and the years covered by the backpay award—and solely with reference to the award amount itself, without considering the employee's other wages earned during the relevant years. Thus, in the example illustrated by Tables 1 through 3, the worker's tax damages would total \$5,453, therefore bringing the worker's total backpay award to \$105,453. This final, tax damages-adjusted backpay award should be the amount reflected on any forms submitted to the SSA by the employer, as described above in section I.

Dated: October 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 1, 2012, I caused to be served a copy of the foregoing Brief of Casa de Proyecto Libertad, The Community Justice Project, Legal Aid of NorthWest Texas, and The National Employment Law Project as *Amici Curiae* by electronic mail on the following:

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