

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

**GREATER OMAHA PACKING CO., INC.**

**and**

**HEARTLAND WORKERS CENTER**

**Cases 17-CA-085735  
17-CA-085736  
17-CA-085737**

**COUNSEL FOR ACTING GENERAL COUNSEL'S  
BRIEF IN SUPPORT OF EXCEPTIONS TO PARTS  
OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. Introduction**

The Administrative Law Judge found that Jorge Degante Enriquez (herein referred to as Degante), Susana Salgado Martinez (herein referred to as Salgado) and Carlos Zamora (herein referred to as Zamora) were discharged for planning to refuse to work in violation of Section 8(a)(1). (ALJD p. 7 lines 43-48). All three were discharged on May 14, 2012<sup>1</sup> and all three were pulled separately into a conversation with management in which Zamora was asked what he wanted, why he was planning a walk out, and in which Degante and Salgado were accused of being leaders in planning a walk out. Although the Administrative Law Judge credited the accounts of the discriminatees regarding their protected concerted activities and regarding these conversations, and discredited the accounts of the managers, he found that General

---

<sup>1</sup> All events described herein took place in 2012 unless otherwise noted.

Counsel did not prove illegal interrogations and the creation of the impression of surveillance as alleged in paragraph 4 of the complaint and he concluded that the alleged violative statements would be duplicative of the discharges. (ALJD p. 12 fn 14).

In the Complaint, General Counsel sought a notice reading remedy. This remedy should be ordered in this case because of the nature of the violations and because through these violations, Respondent put an immediate end to employee efforts to engage in concerted efforts to improve wages and working conditions. In addition, since December 18, 2012 when *Latino Express* was decided, the Order here should include a provision for the reimbursement of excess income taxes that would otherwise be paid by the discriminatees and a provision that Respondent report proper backpay allocation to the Social Security Administration. *Latino Express, Inc.*, 359 NLRB No. 44 (December 18, 2012).

**II. Respondent violated Section 8(a)(1) by interrogation and creating the impression of surveillance.**

**A. Protected Concerted Activity**

Respondent operates a beef slaughter and processing plant in Omaha, Nebraska. The events in this case concern the fabrication employees who, in May numbered about 440 employees. (ALJD p. 1 lines 5-6 and 14-15; T. 22, 214). On April 3, the United States Department of Homeland Security sent Respondent a letter stating that it was unable to verify the identity and employment eligibility of 179 of Respondent's employees, whose names it listed. Within a few weeks of Respondent's receipt of this letter, agents of the Immigration and Customs Enforcement Bureau of the Department

(ICE) entered Respondent's plant and arrested 15 employees. Many other employees quit their employment voluntarily. (ALJD p. 2 lines 12-18; T. 27-28, 58-59; G.C. ex 2). Respondent attempted to replace these employees but because so many employees left and were replaced by less experienced employees, a number of the remaining employees felt that they were forced to work harder and faster to cover for the new employees in the face of unabated line speed, and complained to Respondent about the speed of the conveyor belts on which the meat came to them for processing. (ALJD p. 2 lines 20-23; T. 58, 85-86, 119, 131, 150). Experienced employees complained that since they were forced to work harder and faster, that their increased effort would be compensated by a wage increase. (T. 86).

As noted by the Judge, Zamora, Degante, and Salgado were long time employees of Respondent: Degante with 12 years, Salgado with 4 years, and Zamora with 3 uninterrupted years (but several previous periods of employment in addition). (ALJD p. 1). Degante was one of the few employees at the plant moved from area to area to cover various jobs. Salgado had a previously unblemished record.

It was undisputed, and the Judge found, that in mid-April, 2012, Zamora walked off his job with other employees to protest the speed of the line, and Plant Manager Correa was aware of this protected activity. Later that day, Zamora and others complained about their compensation. (ALJD p. 8, lines 34-38; T. 28-30, 149-151, 210).

According to Fabrication Manager Eliseo Garcia, about a week prior to May 14 (possibly around May 7), Zamora spoke to Garcia at Zamora's work station and

complained about the speed of the line. (ALJD p. 8 lines 40-43; T. 149-150, 210). This was a concern that was raised previously the day that Zamora and others walked off the job to protest the speed of the line and to seek a raise. (ALJD p. 8 line 40-43; T. 150-151).

Degante told Supervisor Roberto Silva that the line speed was way too fast and it was impossible to do a good job. Degante also said that since he moved from job to job, he should get an extra dollar an hour. Silva said he would talk to Correa. (T. 85; ALJD p. 9 lines 7-10).

On about Friday, May 11, Degante talked to employees in the strips and tenders area, and to employees who worked on rounds, about line speed and short staffing and that they should do something about it. (T. 86-87).

About Saturday, May 12, about 5 to 10 employees waited outside the plant to talk to Degante after work, and asked if they were going to strike, and what the signal would be. Degante replied that they should strike, and that there would not be a signal, that they should just walk out at 10:00 am the next Monday, May 14. (T. 87-89).

On Monday, May 14, during or at the end of the morning break, Degante, Zamora, and Salgado all discussed the plans for the 10:00 walk out with other employees. (T. 90, 120-121, 159, 170).

#### **B. May 14 interrogation and discharge of Zamora**

Zamora testified that on May 14, right after morning break ( about 9:15 or 9:30), he was called into the supervisor's office. Plant Manager Correa began the

conversation demanding to know what Zamora wanted, that he had a good job, good insurance, good overtime, and asking what else he wanted. Zamora replied, I want an increase. Correa said, you are fired. (T. 161).

Although the Judge stated that the interrogation was not proven (ALJD p. 12 fn 14), he found Respondent's witnesses' description of events incredible and inherently unlikely. (ALJD pp 8-10). In particular, the Judge found Plant Manager Correa's testimony about the May 14 meetings implausible. (ALJD p. 10, line 33). The Judge credited Zamora that on May 14, he was fired without any attempt to counsel him. (ALJD p. 9 lines 1-5). The Judge found that Zamora was discharged because he engaged in protected concerted activity. (ALJD p. 10 lines 24-46 and p. 11 lines 1-16).

Paragraph 4 (a) of the Complaint alleges that on about May 14, 2012, Respondent, acting through plant manager and admitted agent and supervisor Jose Samuel Correa, interrogated employees regarding their protected concerted activities.

In *Rossmore House*, The Board held that the test for determining whether an employee interrogation violates Section 8(a)(1) is whether, under all the circumstances, the interrogation reasonably tended to restrain or interfere with the exercise of employee rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* Sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). The Board considers such factors as the nature of the information sought, whether the interrogation served a lawful purpose, the place and method of the interrogation, whether the employer provided proper assurances regarding the questioning. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002).

On May 14 after break, right before the planned walk out, Zamora was called into the office, and the top manager immediately began questioning him about why he was discontent. This was a clearly coercive situation. The Plant Manager's question to Zamora was clearly a reference to the protected concerted activity of Zamora and other employees—to the concerted complaints of Zamora the week before the month before, to his complaints with other employees in the previous month, and why they were planning a walk out. The questioning served no lawful purpose. Not only did the Employer offer no proper assurances regarding the questioning, but Zamora was then terminated. Under *Rossmore House analysis*, the May 14 interrogation of Zamora was clearly coercive and in violation of Section 8(a)(1).

The interrogation is a separate violation from the discharge and should be remedied. A supervisor's statement linking a discharge to protected concerted activity is coercive and independently violates Section 8(a)(1). *Benesight, Inc.*, 337 NLRB 282, 283 (2001); *Sands Hotel & Casino*, 306 NLRB 172, 184 (1992), enf'd. 993 F.2d 913 (D.C. Cir. 1993). The statement in *Benesight* sent a message to employees that if they engaged in protected concerted activity (there, a walk out), they could be discharged. Here too, the same message was clear, and here too, the interrogation is a separate violation and warrants separate mention in the Notice to Employees.

Correa violated Section 8(a)(1) by interrogating Zamora regarding protected concerted activity.

## **B May 14 – Fabrication Manager Eliseo Garcia Creates of the Impression of Surveillance**

On May 14, Degante was called to the office in the presence of two top managers. Degante asked why he was summoned. Fabrication Manager Eliseo Garcia said, no, you tell me, what are you doing? Degante said that he was not doing anything. Garcia said, you are the one who is provoking the people. Garcia said Degante was “alboratando la gente” (agitating the people). Degante replied no, what are you talking about? Garcia said, tell me, what are you doing? Degante said, I am not doing anything. Garcia asked, you are not happy with your salary? Degante said no, I told Roberto (Silva) several times. You move me from table to table, I never say no. I am always willing to do my work. Garcia said, are you sure you are not agitating the people? Degante said, no. Garcia said, just leave your stuff in here and you can go. You are fired. (T. 91-94). The Judge found that Degante was fired because he engaged in protected concerted activity and planned to refuse to work. (ALJD p. 10 lines 24-44 and p. 11 lines 1-16).

The Judge noted that Degante’s account of his complaints to Silva is uncontradicted – that Degante complained about the speed of the production line and his compensation, and that Silva promised to discuss these things with Plant Manager Correa. (ALJD p. 9 lines 7-10). The Judge credited Degante’s testimony about his conversation with Correa and Garcia on May 14 and concluded that Correa and Garcia knew about the planned strike and knew or suspected that Degante was behind it. (ALJD p. 9 lines 10-12).

Paragraph 4(b) alleges that on about May 14, Respondent, through Fabrication Manager Garcia, created the impression that it was monitoring employees' protected concerted activities.

On May 14 after break, right before the planned walk out, Degante was called into the office, and a top manager immediately accused him of agitating the people. This was a clearly coercive situation. The Fabrication Manager's statements to Degante were clear accusations that he was leading plans for a walk out and were clearly a reference to the protected concerted activity of the employees. The questioning served no lawful purpose. Not only did the Employer offer no proper assurances regarding the questioning, but Degante was then terminated. Under *Rossmore House* analysis, these May 14 statements to Degante created the impression that Respondent was monitoring employees' protected concerted activities and was clearly coercive and in violation of Section 8(a)(1). A statement that an employee engaged in protected concerted activity is known to an employer unlawfully creates the impression of surveillance of that activity. *Daikichi Sushi*, 335 NLRB 622, 623 (2001); *Syncor International Corp.*, 324 NLRB 8, 12 (1997).

Respondent created the impression that Respondent was monitoring employees' protected concerted activity in violation of Section 8(a)(1).

### **C May 14 – Fabrication Manager Eliseo Garcia Creates of the Impression of Surveillance**

Also on May 14, Salgado was called off the floor, made to wait 20 to 30 minutes in the cafeteria with her supervisor, and then taken into the supervisor's locker room

and confronted by the same top two managers and her supervisor and another supervisor. Plant Manager Correa said, you are here because you are one of the organizers of the strike. The Spanish word he used was “huelga” (striker). (T. 123-124). Salgado was then fired. The Judge found that her discharge was because she engaged in protected concerted activity and planned to refuse to work. (ALJD p. 10 lines 24-444 and p. 11 lines 1-16).

The Judge credited the testimony of Salgado and concluded, based on this testimony and upon the circumstances surrounding her discharge, that Respondent suspected her of playing a significant role in the plan for employees to walk off the job. (ALJD p. 9 lines 15-18). Paragraph 4(b) alleges that on about May 14, Respondent, through Plant Manager Correa, created the impression that it was monitoring employees’ protected concerted activities.

The analysis of *Rossmore House* leads to the conclusion that the May 14 statements to Salgado were coercive and violated Section 8(a)(1): Salgado was called off the production floor into a meeting with two top managers and two supervisors, was not given proper assurances, was accused of planning to participate in the walkout, and the statements served no lawful purpose. Further, a statement that an employee engaged in protected concerted activity is known to an employer unlawfully creates the impression of surveillance of that activity. *Daikichi Sushi*, 335 NLRB 622, 623 (2001); *Syncor International Corp.*, 324 NLRB 8, 12 (1997).

In these May 14 statements to Salado, Respondent clearly implied that Respondent had been monitoring the protected concerted activity and plans for a walk

out. These statements independently coerced employees in the exercise of their right to engage in protected concerted activity in independent violation of Section 8(a)(1) and should be remedied by a paragraph in the Notice to Employees.

## **II. Notice Reading Should Be Ordered**

The General Counsel requested a notice reading remedy in the complaint. (T. 10). This was not a part of the remedy ordered by the Judge. The customary remedies for discriminatory discharges (reinstatement and a make whole remedy) and for independent 8(a)(1) statements (posting of an appropriate notice) are important, but additional remedies should be ordered because these nip-in-the-bud unfair labor practices took place in a work force of employees highly susceptible to harassment and coercion. This is largely an immigrant population, many of whom do not speak English. All these employees earn a modest living and are extremely vulnerable during time out of work. Such employees are especially vulnerable to the impact of unlawful discharge and to chilling of their willingness to engage in protected concerted activities to improve wages and working conditions. Here, walkout planned for 10:00 on May 14 did not happen because in about the half hour before 10:00, Degante, Zamora, and Salgado, the suspected leaders of the strike, were taken off the floor and fired. The Respondent sought to discourage such activity, and succeeded. Their co-workers knew that these long time employees were out of work, facing the consequences of being without a job.

The remedy should include a provision requiring that a responsible management official read the notice to assembled employees or, at the Respondent's option, that a Board Agent read the notice in the presence of a responsible management official.

Public reading of a notice has been recognized as an “effective but moderate way to let in a warming wind of information and, more important, reassurance.” *United States Service Industries*, 319 NLRB 231, 232 (1995), enf’d 107 F.3d 923 (D.C. Cir. 1997). See also *Concrete Form Walls, Inc.*, 346 NLRB 831, 841 n.3 (2006). By imposing such a remedy, the Board can assure the respondent’s “minimal acknowledgment of the obligations that have been imposed by the law. ...The employees are entitled to at least that much assurance that their organizational rights will be respected in the future.” *Federated Logistics*, 340 NLRB 255, 256-57, enf’d 400 F.3d 920 (D.C. Cir. 2005). A notice reading will also ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the employer’s bulletin boards. A reading will also allow all employees to take in all of the notice, as opposed to hurriedly scanning the posting under the scrutiny of others. The Order should also provide that the notice be read to the widest possible audience. See e.g., *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 290 n. 4 (2010).

In addition to ensuring that the notice’s content reaches all the employees, a personal reading places on the Board’s notice “the imprimatur of the person most responsible” and allows employees to see that the respondent and its officers are bound by the Act’s requirements. *Loray Corp*, 184 NLRB 557, 558 (1970). For example, where an employer discharged employees for union or protected concerted activity, hearing the Board’s cease-and-desist language read will better serve to allay the employees’ fear that such activity at work will be met with reprisal. Furthermore, where a high ranking manager personally committed some of the violations, hearing that manager read the notice, or seeing him present while it is read, will “dispel the

atmosphere of intimidation he created” and best assure employees that their rights will be respected. *Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993), enf’d mem 55 F.3d 684 (D.C. Cir. 1995). Finally, a notice-reading remedy is more effective at remedying violations because of its heightened psychological impact on employees: “[f]or an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve”. Teeter, *Fair Notice: Assuring Victims of Unfair Labor Practices that their Rights will be Respected*, 63 UMKC Law Review 1, 11 (Fall 1994).

For these reasons, it is appropriate here to order that the notice be read to employees in Spanish, English, and other languages spoken exclusively by Respondent’s employees

### **III. Appropriate Tax and Social Security Remedies**

The Board has held that both the tax and social security reporting remedies as sought in the complaint herein better serve the remedial policies of the National Labor Relations Act by ensuring that discriminatees are truly made whole for the discrimination they suffered. *Latino Express, Inc.*, 359 NLRB No 44, Advance sheet at p. 1. (December 18, 2012). In *Latino Express*, the Board held that it should routinely require a respondent 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 2) reimburse a discriminatee for any additional Federal and State income taxes the discriminatee may owe as a consequence of receiving a lump-sum award covering more than one calendar year. The Board adopted both remedies

and found that both should be applied retroactively. Both are made part of a general Board order. Respondent bears the burden of the Social Security reporting. In compliance, it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences that would result from a lump sum backpay award: the amount sought should be pled in the compliance specification. *Id.*

#### **IV. Conclusion**

Accordingly, General Counsel seeks findings and conclusions that on about May 14, 2012, Respondent interrogated employees regarding protected concerted activity, and made statements indicating it was monitoring employees planning of protected concerted activities in violation of Section 8(a)(1) of the Act along with an appropriate remedial order.

General Counsel seeks a remedy that requires a Notice Reading in order to remedy these nip-in-the-bud unfair labor practices took place in a work force of employees highly susceptible to harassment and coercion.

General Counsel also seeks that the Respondent be required 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 2) reimburse Zamora, Degante and Salgado for any additional Federal and State income taxes they may owe as a consequence of receiving a lump-sum award covering more than one calendar year.

Respectfully submitted,

Dated: February 7, 2013

Lyn R. Buckley\_\_\_\_\_

Lyn R. Buckley  
Counsel for Acting General Counsel  
National Labor Relations Board, Subregion 14  
8600 Farley, Suite 100  
Overland Park, KS 66212-4677  
Phone 913.967.3002  
lyn.buckley@nrlrb.gov

## STATEMENT OF SERVICE

I hereby certify I have this date served copies of the foregoing Counsel for Acting General Counsel's foregoing Brief to the Administrative Law Judge by e-mail on all parties listed below.

Dated: February 7, 2013

Lyn R. Buckley \_\_\_\_\_

Lyn R. Buckley  
Counsel for Acting General Counsel  
National Labor Relations Board, Region 17  
8600 Farley, Suite 100  
Overland Park, KS 66212-4677  
Phone 913.967.3002  
[lyn.buckley@nlrb.gov](mailto:lyn.buckley@nlrb.gov)

Ruth A. Horvatich, Attorney and  
Roger Miller, Attorney  
McGrath North  
First National Tower, Suite 3700  
1601 Dodge St.  
Omaha, NE 68102  
[rhorvatich@mcgrathnorth.com](mailto:rhorvatich@mcgrathnorth.com)

James Walter Crampton, Attorney  
Service Life Building  
1904 Farnam Street, Suite 200  
Omaha, NE 68102  
[jwcrampton@hotmail.com](mailto:jwcrampton@hotmail.com)

Abbie Kretz  
Heartland Workers Center  
4923 S. 24<sup>th</sup> Street, Suite 3A  
Omaha, NE 68107-2763  
[abbie.hwcomaha@gmail.com](mailto:abbie.hwcomaha@gmail.com)