

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 17**

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

**Cases 17-CA-085735**

**17-CA-085736**

**17-CA-085737**

**and**

**HEARTLAND WORKERS CENTER**

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**GREATER OMAHA PACKING CO., INC.'S  
ANSWERING BRIEF TO COUNSEL FOR ACTING GENERAL COUNSEL'S  
EXCEPTIONS TO PARTS OF THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Respondent, Greater Omaha Packing Co., Inc. (hereinafter “Company” or “Greater Omaha”), for its Answering Brief to Counsel for Acting General Counsel’s Exceptions to Parts of the Decision of the Administrative Law Judge (hereinafter “ALJ”), in the above-captioned matter states as follows:

## **I. INTRODUCTION**

Counsel for Acting General Counsel (hereinafter the “AGC”) filed exceptions to parts of the ALJ’s decision on February 7, 2013. The AGC excepted to the ALJ’s conclusion that the AGC did not prove illegal interrogations or the creation of the impression of surveillance. The AGC additionally excepted to the ALJ’s failure to order a notice-reading remedy and failure to order that backpay be computed with reimbursement of excess income taxes paid and that Greater Omaha report the proper backpay allocation to the Social Security Administration (hereinafter “SSA”).

The ALJ was correct in concluding that Greater Omaha did not violate the National Labor Relations Act (hereinafter the “Act”), relating to the AGC’s allegations of illegal interrogations and the creation of the impression of surveillance. The record evidence does not support the AGC’s arguments as it shows no evidence of illegal interrogations or the creation of the impression of surveillance and the AGC relies upon inapplicable law. Furthermore, the ALJ was correct in not ordering a notice-reading remedy and in not ordering reimbursement of any excess income taxes or reporting to the SSA. As a result, the AGC’s exceptions to the ALJ’s decision should be rejected.

## II. ARGUMENT

### A. The ALJ Was Correct in Concluding the AGC Did Not Prove Illegal Interrogations.

The AGC claims that a single question posed by Jose Samuel Correa, the Plant Manager, to Carlos Zamora, one of the alleged discriminatees, constituted unlawful interrogation.<sup>1</sup> However, the record evidence does not support such a conclusion, as was correctly found by the ALJ. The AGC argues that Correa's alleged single question to Zamora was "clearly a reference to the protected concerted activity." (AGC Brief in Support of Exceptions, p. 6). However, the alleged single question posed to Zamora was what more *he* wanted from the Company. Specifically, Zamora's testimony provided the following:

Q: What did Mr. Correa say?

A: He wanted to know what it is that I wanted, that I have a good job, that I have good insurance, that I have good overtime, what else did I want?

Q: Did you respond?

A: I told him that all I wanted was an increase.

(Tr. 160). There was no reference to other employees. No reference to a walk out. No reference to the speed of the line. Moreover, Zamora's individual request for higher wages for himself is not a protected concerted activity. An individual complaint regarding salary is not concerted activity. *Ryder Tank Lines, Inc.*, 135 NLRB 936, 938 (1962). *See also Meyers Industries (Myers II)*, 281 NLRB 882 (1986), *affd.* Sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.") (citations omitted).

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<sup>1/</sup> In the AGC's exceptions and supporting brief, it is only argued that a single question during Zamora's counseling constituted unlawful coercive interrogation. There is no argument of any unlawful coercive interrogation relating to either Jorge Degante or Susana Salgado.

The AGC relies upon *Benesight, Inc.*, 337 NLRB 282 (2001), for the proposition that Correa's alleged question constituted interrogation and is a separate violation from the discharge that should be remedied.<sup>2</sup> However, that case is inapplicable here as applied by the AGC. In *Benesight*, the only question found unlawful as interrogation was the question as to who "the instigators of the strike were," followed by the Respondent's agent's statement that, "she felt that it was insubordination on [the employee's] part and [the employee] should have known better! That it would affect [the employee's] employment." 337 NLRB at 284.<sup>3</sup> However, the ALJ in that case found several questions posed by management to employees to not constitute coercive interrogation, and the Board agreed. *Id.* The following questions were not found to be unlawful interrogation: "what are your gripes"; were the employees "really going to do this"; and the question to employees as to "what we considered we were doing, what were we doing". *Id.* at 287. Here, the only question allegedly posed by Correa was what more Zamora wanted from the Company. Surely this question does not constitute coercive interrogation, especially in light of those similar questions found to not be coercive interrogation in *Benesight*.

Additionally, in circumstances where an employer questions employees in an investigation of alleged employee misconduct, the Board has concluded no unlawful interrogation occurs where the employer has a legitimate basis for investigating an employee's misconduct. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 529-30 (2007). Here, Correa and Eliseo Garcia, the Fabrication Manager, were counseling Zamora for leaving his

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<sup>2</sup>/ The other case cited by the AGC, *Sands Hotel & Casino*, 306 NLRB 172, 184 (1992), enf'd. 993 F.2d 913 (D.C. Cir. 1993), does not address unlawful coercive interrogation and thus is inapplicable to the question of unlawful interrogation.

<sup>3</sup>/ In *Benesight*, the other independent violation of Section 8(a)(1) found by the Board was a statement by a manager to the employee that she was terminated based on her participation in the work stoppage. The Board did not find this was an unlawful interrogation. *Benesight*, 337 NLRB at 283. Such an allegation that an independent statement was a violation of Section 8(a)(1) was neither pled by the AGC nor found by the ALJ in the present case before the Board.

workstation. It is clear from the testimony that Zamora had a history of trouble leaving his workstation without permission. (Tr. 169, 223-224). In fact, he had previously been fired for that very reason. (Tr. 169). As a result, it is clear Correa and Garcia had a legitimate basis for investigating Zamora's misconduct under a valid policy. Thus, there is no evidence that Correa unlawfully interrogated Zamora.

Furthermore, the record evidence shows that there was no coercion or interference in Correa's question to Zamora. The leading case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985). In *Rossmore*, the Board noted that "[i]t is well established that interrogation of employees is not illegal per se." 269 NLRB at 1177. *Rossmore* directs the Board to consider whether, in light of all of the circumstances, the questioning would have reasonably tended to coerce the employee in the exercise of rights protected by Section 7 of the Act. *Id.* Relevant factors include (1) whether the employer had previously shown hostility to protected conduct; (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the employee's reply. *Id.* at 1178 n. 20. While these factors should be considered, they "are not to be mechanically applied in each case." *Id.*

It has been further held that "[m]ere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8[a](1)." *Sax v. NLRB*, 171 F.2d 769 (7th Cir. 1948). There is no evidence of coercion in this matter.

Notwithstanding that Correa was a high-level supervisor, and the conversation occurred in the supervisors' office, the relevant factors, considered in their entirety, are insufficient to establish unlawful interrogation. Under the first factor, the record establishes that Greater Omaha has not shown any hostility to protected conduct. Indeed, to the contrary. After around 400 workers walked away from the production line in 2008, three individuals, including the Owner, talked with the employees, were able to come to an agreement, and the employees went back to work. (Tr. 216-217). No employees were disciplined or discharged as a result of this protected activity. (Tr. 217). The record also shows that more recently, Correa had a conversation with ten or twelve employees, which included Zamora, who had left their production line during working time, mentioning that the line was going too fast. (Tr. 29, 165-166). Later that same day, Correa had a conversation with these same employees, where Zamora stated that he thought he should receive an increase in wages. (Tr. 29-30). No employees, including Zamora, were disciplined or discharged for leaving their production line or talking to management. (Tr. 151, 167, 215). This shows that Greater Omaha did not show any hostility to protected conduct but rather knew how to lawfully treat protected activity.

The second factor, the nature of the information sought, also does not show coercion. If Zamora's version of the meeting is relied upon, the only question Correa asked was what more Zamora wanted from the Company. There is no evidence that Correa asked this question seeking information to take action against Zamora as he had previously not disciplined Zamora for asking for higher wages. As indicated above, the third and fourth factors show that Correa was the Plant Manager and the meeting took place in the supervisors' office. Notably, however, employees were routinely called into the supervisors' office—being called to the office was not a rare event, lessening any coercive nature of the location. (Tr. 101, 132).

Finally, as to the truthfulness of the reply, Zamora truthfully responded to the question at issue. Clearly Zamora was not intimidated by this question and it was not coercive as he responded truthfully. Thus, there is “no evidence that the interrogation actually inspired fear.” *Bourne v. NLRB*, 332 F.2d 47 (1964). There is simply no evidence of an element of coercion or interference in Correa’s question to Zamora.

**B. The ALJ Was Correct in Concluding the AGC Failed to Prove Unlawful Surveillance.**

The AGC additionally argues that Garcia created the impression of surveillance during his meetings with Jorge Degante and Susana Salgado.<sup>4</sup> However the evidence does not show that Greater Omaha created the impression of surveillance. “An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided.” *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). Even if the Board accepts the ALJ’s crediting of the alleged discriminatees’ testimony, there is no evidence of unlawful surveillance.

“The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*.” *North Hills Office Services*, 346 NLRB 1099, 1104 (2006) (emphasis in original). “Thus, merely informing employees that their coworkers have volunteered information about ongoing union activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information.” *Bridgestone Firestone*, 350 NLRB at 527. Degante testified during the trial that “[Garcia] told him that someone had told him that I was the leader of the strike that we were planning to do.” (Tr. 93). This testimony clearly shows that there is no evidence of the impression of surveillance.

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<sup>4</sup>/ In the AGC’s exceptions and supporting brief, it is only argued that the meetings of Degante and Salgado created the impression of surveillance. There is no argument of any impression of surveillance relating to Zamora.

Additionally, Salgado's testimony does not show that Greater Omaha unlawfully created the impression of surveillance. In determining whether a statement created an unlawful impression of surveillance, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enfd.* Mem. 181 F. App'x 85 (2d Cir. 2006). There is inadequate evidence that any statement to Salgado would reasonably cause her to assume that any of her alleged protected activities were under surveillance by Greater Omaha. If Salgado's testimony is credited, which as explained below it should not, the mere statement that she was one of the organizers of the strike does not show the impression of surveillance. *See Frontier Telephone of Rochester, Inc.*, 344 NLRB at 1276 (finding a statement by an employer that an employee engaged in protected concerted activity did not unlawfully create the impression of surveillance of that activity).

In Salgado's NLRB Supplemental Affidavit, she stated "I was called in on May 14 *after* 10:00 a.m., but the work stoppage did not happen because they had already fired Jorge and Carlos, and because Jorge was starting everything, and as the leader, he was fired before 10:00 a.m., and that is why they didn't do nothing." (Tr. 139-140). She admitted, however, she had no knowledge that Zamora and Degante had been terminated until later that afternoon. (Tr. 142). Nor could she have known earlier, for both Zamora and Degante went directly from the supervisors' office to the employee exit without returning to the production floor or any area where they could be seen by or communicate with other employees. (Tr. 212). There is not one shred of evidence that any employees knew, prior to 10:00 am that *anyone* had been fired. Furthermore, Salgado testified in an unemployment insurance hearing, under oath, in response to

the question, “What time were you fired” she stated “I came – I came back at 9:30 and they called me to the office around 10:45 or 11:00. That is when I was terminated.” (Tr. 141-142).<sup>5</sup>

Additionally, Salgado testified at the hearing—contrary to Garcia and Correa—that she did not argue during her meeting that other employees were leaving their stations so she could do the same. (125:11-126:1). However, she argued this exact point during the trial:

- Q: Okay. But when you were on the bridge, you hadn’t asked permission to go to the bathroom?
- A: We do not ask permission to go to the bathroom, because between the five people that work on that table, we relieve – we give a break to the one that needs to go to the bathroom and we cover for them.
- Q: So all of the employees in your area don’t ask permission to use the restroom, do they?
- A: They don’t give you a break. Between like the five people at our table, we have to give ourselves a break.
- Q: You know that there is a work rule that you are supposed to ask your supervisor for permission to use the restroom, though, right?

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<sup>5</sup>/ Salgado’s testimony at trial was almost entirely incredible. She testified the following relating to the timing of being asked to the office when questioned by ALJ Amchan:

- Q: You said that you – if I remember, Mr. Varela told you to go to the office and you went to the cafeteria; is that correct?
- A: Yes.
- Q: Do you know, was that before ten o’clock? Do you know what time that was?
- A: Yes, it was before ten o’clock.
- Q: It was not ten o’clock, yet?
- A: We had to wait in the cafeteria because Samuel was busy upstairs, and he wouldn’t let us in. We had to wait until he would ask me to go in.
- Q: Who was “we?” You said “we.” Who was “we?”
- A: My supervisor and I.

(Tr. 127-128). However, prior to this questioning, during the hearing, Ms. Salgado testified that she had seen supervisors on the catwalk around ten o’clock. (Tr. 122). Additionally, as explained above, this testimony is completely inconsistent with prior sworn testimony provided by Salgado in her affidavit and during an unemployment insurance hearing before a judge.

A: Yes, but when we need to go to the bathroom, the supervisor is not around. He is always busy. He is supervising other people.

(130:17-131:7). Clearly any testimony by Salgado must be discredited and there is no evidence of any impression of surveillance on the part of Greater Omaha.

**C. A Notice-Reading Remedy is Not Warranted.**

The AGC additionally argues that the ALJ erred in failing to order a notice-reading remedy. In this matter, a notice-reading remedy is not necessary. The extraordinary remedy of a notice reading goes beyond what is necessary to erase the effect of any misconduct of the Company. Because a notice-reading remedy is an extraordinary remedy, before it is granted, it must be demonstrated why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found. *See First Legal Support Services, LLC*, 342 NLRB 350, 350 n.6 (2004) (additional remedies, including a notice reading, not warranted, notwithstanding multiple violations, included repeated threats of discharge and plant closure as well as the actual discharge of two union supporters where there was no showing “that traditional remedies are so deficient here to warrant imposing the extraordinary remedies requested by the General Counsel.”).

The AGC argues that a notice-reading remedy is necessary because Greater Omaha’s work force is “largely an immigrant population, many of whom do not speak English.” (AGC Brief in Support of Exceptions to Parts of the Decision of the Administrative Law Judge, p. 10). That assertion is not supported, for the AGC offered no evidence to establish that fact. Like much of the rest of the AGC’s case, the claim is based on assumption, not established fact. Furthermore, there is no evidence to suggest that Greater Omaha has shown a proclivity to violate the Act.

Even if the underlying unfair labor practice charges are upheld, a notice reading remedy does not affect a reinstatement and make-whole remedy and appropriate notices may be posted in all languages spoken by employees. There is no basis for imposing a notice-reading remedy in this matter. The effect of any unfair labor practices that may be found on behalf of Greater Omaha would be sufficiently ameliorated by traditional remedies.

**D. The ALJ Correctly Refused to Order the Reimbursement of Any Excess Income Taxes or Reporting to the Social Security Administration.**

The AGC finally takes exception to the ALJ's failure to order the computation of backpay to include reimbursement of excess income taxes and the ALJ's failure to order Greater Omaha to report proper backpay allocation to the SSA. The AGC relies on *Latino Express, Inc.* 359 NLRB No. 44 (December 18, 2012), for the proposition that these remedies are required. However, pursuant to the D.C. Circuit's recent opinion in *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, \_\_\_ F.3d \_\_\_ (Jan. 25, 2013), the *Latino Express* decision is invalid. In *Noel Canning*, the D.C. Circuit held that President Obama's recess appointments of three members of the Board, Members Sharon Block, Terence F. Flynn, and Richard F. Griffin, were invalid and thus the Board could not lawfully act in that case as it did not have a quorum. *Noel Canning*, 2013 WL 276027, at \*23. Like *Noel Canning*, the *Latino Express* case was decided by a three-member panel of the Board, which included two members that have been found to be invalid appointments. Compare *Noel Canning*, 358 NLRB No. 4 (Feb. 8, 2012) (three-member panel consisting of Members Hayes, Flynn, and Block), with *Latino Express, Inc.*, 359 NLRB No. 44 (Dec. 18, 2012) (three-member panel consisting of Chairman Pearce and Members Griffin and Block). As a result, because the Board did not have a quorum to lawfully take action in *Latino Express*, that decision is invalid and the ALJ was correct in refusing to order the reimbursement of any excess income taxes or reporting to the SSA. See *New Process*

*Steel, L.P. v. NLRB*, \_\_\_ U.S. \_\_\_\_, 130 S. Ct. 2635 (2010) (holding that the Board cannot act without a quorum of three members).

### **III. CONCLUSION**

For the reasons discussed above, Greater Omaha respectfully submits that the decisions of the ALJ that the Acting General Counsel did not prove illegal interrogations and the creation of the impression of surveillance should be affirmed. Additionally, as described above, the extraordinary remedy of a notice reading is not warranted in this matter and the ALJ correctly refused to order the reimbursement of any excess income taxes or reporting to the Social Security Administration. Thus, the Acting General Counsel's exceptions to the ALJ's decision should be rejected.

Dated this 21st day of February, 2013.

GREATER OMAHA PACKING CO., INC.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21st day of February 2013, the above and foregoing was emailed to the following:

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