UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GARDA CL GREAT LAKES, INC., Respondent, and **UNITED FEDERATION OF SPECIAL POLICE AND SECURITY OFFICES, INC.,** Charging Party.	:	Case No. 9-CA-087203 9-RC-085968

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Garda CL Great Lakes, Inc. (hereinafter the "Company") files these Exceptions to the Decision ("Decision") of the Administrative Law Judge ("ALJ").

Exception 1: The ALJ erred in basing his Decision on violations of the Act allegedly committed by Vincent Modarelli, Ivelices Linares, and/or Lori Brown, individuals who were not named or otherwise identified in the Amended Complaint or Objections. (Decision, JD-15-13, pages 1-9).

Exception 2: The ALJ erred in concluding that the "motivation of Garda as a corporation" was at-issue in this matter, and that all alleged violations from *any and all* alleged "agents" of Garda were at issue, not just those otherwise identified in the Amended Complaint and Objections. (Decision, JD-15-13, pages 1-9).

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION

I. STATEMENT OF THE CASE

This case comes before the National Labor Relations Board pursuant to the Exceptions filed by Garda CL Great Lakes, Inc. (hereinafter "Garda") to Administrative Law Judge Arthur Amchan's Decision in the above referenced case. This Brief is filed pursuant to Sections 102.46, 102.62, and 102.69 of the Rules and Regulations of the Board.

The Complaint in the instant matter alleges violations of Sections 8(a)(1) and 8(a)(3) of the Act. Allegedly, on or about August 7, 2012, Garda's Director of Risk Management Christine Bouquin, and Garda's Health and Safety Director Webster Lubemba violated the Act by soliciting employee grievances, increasing benefits, and improving the terms and conditions of employment in exchange for employees refraining from union activity. (Amended Complaint ¶ 5). Ms. Bouquin and Mr. Lubemba are the only individuals identified by name in the Union's Amended Complaint and Objections. (Id.).

Very few relevant facts in this matter are in dispute. The parties agree that: 1) Garda launched a Heat Mitigation Pilot Program before the Union filed a petition in Columbus in July 2012; 2) the Columbus Branch was riddled with OSHA violations in advance of August 7, 2012; and 3) these violations were mitigated by Ms. Bouquin and Mr. Lubemba during their time in Columbus during the critical period.[1]

During the Hearing, the Company argued that the evidence in the case did not establish that Ms. Bouquin and Mr. Lubemba's conduct was motivated by a desire to dissuade employees from supporting the union. The Record establishes that Ms. Bouquin and Mr. Lubemba's remedial actions all corrected active OSHA violations, and these remedial actions were taken

[1] Ms. Bouquin and Mr. Lubemba are referred to as the "Risk Management Team" herein.

immediately after Ms. Bouquin and Mr. Lubemba discovered these violations. Respondent contends that no credible evidence was presented at the Hearing suggesting that the Risk Management Team had any alternative, impermissible motivation for its actions – they had nothing to gain by interfering with the union campaign; their jobs were not affected by the organizing drive and they have no involvement with Garda's union relations or labor relations matters. (Tr. 163-165).

The Respondent's first Exception contends that the ALJ's conclusions are legal error because the conduct of Garda's Senior Vice-President Vincent Modarelli, Garda's Director of Labor Relations Ivelices Linares, and Garda's Director of Human Resources Lori Brown, are not at issue in this case. None of these three individuals is named in the Amended Complaint in this matter or in the Objections to the election. To the contrary, the Amended Complaint and the General Counsel's case-in-chief allege violations of the Act by only two individuals, Christine Bouquin and Webster Lubemba. In his Decision, the ALJ credits allegations made against Mr. Modarelli, Ms. Brown, and Ms. Linares as a basis for his decision that the Company violated the Act, and explicitly states that the General Counsel's "focus on the activities of Christine Bouquin and Webster Lubemba in the complaint and in the parties briefs is misplaced." (Decision, JD-15-13, p. 8). The allegations concerning Mr. Modarelli, Ms. Linares, and Ms. Brown were not fully litigated in this matter, and thus may not be a foundation for the ALJ's Decision. The Judge's Decision to expand the scope of the Complaint beyond the General Counsel's intent and beyond those allegations of which the Respondent had notice and an opportunity to prepare a defense is a violation of Board law and the fundamental tenets of due process.

The Respondent's second Exception contends that the ALJ erroneously concluded that the Union's use of the term "employer" in its Objections meant that the conduct of any "agent"

of Garda was properly before the ALJ in this matter, regardless of whether that individual was named by the Union or whether the Company had any previous knowledge of allegations made against these alleged "agents." Well-settled Board law establishes that an Amended Complaint must include sufficient specificity, including the nature of the specific violations, the dates on which the violations occurred, the "names of the agents of the respondent who allegedly violated the Act," and the location of the alleged violations. It is not enough to include the catch-all phrase "employer" in an Amended Complaint or Objections and sweep in any allegations against any salaried employee into a Complaint. Ken Maddox Heating & Air Conditioning, Inc., 340 NLRB No. 7 (2003).

In sum, Respondent had no notice that the conduct of Mr. Modarelli, Ms. Brown, or Ms. Linares was the subject of alleged violations. Because these matters were not fully litigated before the ALJ, and because Respondent did not have the opportunity to present an adequate defense to any of the allegations made against Mr. Modarelli, Ms. Brown, and Ms. Linares, the ALJ's Decision is legal error and the Complaint should be dismissed in-full.

II. FACTUAL BACKGROUND

A. Background On Garda And Its Columbus, Ohio Branch

Garda is an armored transport and cash logistics operation that services clients in a broad range of industries. Garda maintains a branch in Whitehall, Ohio, a suburb of Columbus, and the Company maintains over 200 other, similar facilities across the United States, some of which are unionized. (Tr. 130).

On July 25, 2012, the Union filed a representation petition seeking to represent the driver/messengers at the Columbus branch. Driver/messengers for Garda operate the Company's fleet of armored transport trucks. (Tr. 65). Each day, an armored truck has a designated route

with an assigned number of stops, and these stops are completed by the two driver/messengers operating the armored truck for the day. (Tr. 9). Garda's armored trucks in Columbus resemble a standard armored vehicle one would see on the street. They are built from secure materials, have locked windows, and are separated into two compartments to ensure employee safety. (Tr. 12). The trucks have air conditioning units and air vents, and are stored at the Columbus Branch. (Tr. 94-95).

In the summer of 2012, the Columbus Branch had 14 trucks in its fleet, although the Company did not have any permanent mechanics located at the Branch. (Tr. 246).

B. Garda's Risk Management And Health And Safety Operations

Around June 2012, Garda created the Director of Risk Management position for Christine Bouquin. (Tr. 128). As the Director of Risk Management, Ms. Bouquin is responsible for ensuring Garda's compliance with the broad range of regulatory agencies tied to worker safety, including OSHA, the EPA, DOT, and others. (Tr. 139).

Webster Lubemba is Garda's Health and Safety Manager, and works under Ms. Bouquin. (Tr. 235). Like Ms. Bouquin, Mr. Lubemba moved into this role in June 2012 after the Company restructuring. (Tr. 235-236). As the Health and Safety Manager, Mr. Lubemba is also responsible for ensuring compliance with a broad range of regulatory agencies, including OSHA, DOT, and the EPA. (Tr. 236). Mr. Lubemba drafts responses to OSHA inquiries and notices of potential violations, regularly communicates with investigators, and assists with compliance efforts. (Tr. 236-37). When notice of a potential regulatory violation reaches Mr. Lubemba, his job requires that he assess the claim/complaint, determine its validity, and resolve any potential infractions. (Tr. 237).

C. Garda's Heat Mitigation Program And Mitigation Of OSHA Violations In Columbus

In the early summer of 2012, Garda put Ms. Bouquin and Mr. Lubemba in charge of the Company's Heat Mitigation Pilot Program. (Tr. 244, G.C. Ex. 4). Garda had received a number of OSHA-related heat Complaints in the summer of 2011 and Risk Management was working on reducing OSHA-related complaints in 2012 and beyond. (Tr. 244-245).

As part of the Company's Heat Mitigation Pilot Program, on August 6th and 7th, 2012, respectively, Mr. Lubemba and Ms. Bouquin arrived in Columbus. (Tr. 252). Before arriving at the Columbus Branch, neither Mr. Lubemba nor Ms. Bouquin was aware of any grievances, compliance matters, or regulatory concerns in Columbus other than those affecting the armored fleet. (Tr. 162, 251). Nevertheless, both Ms. Bouquin and Mr. Lubemba aptly described the host of serious regulatory violations they uncovered upon their arrival. In addition to faulty air conditioning systems on half of the fleet, Mr. Lubemba explained that some of the remaining trucks were leaking so much fluid and oil that they could not be shut down during the day – "the truck had to be kept running" – and drivers had to bring cases of fluids with them on their routes. (Tr. 253). Seats were broken, locks were broken, seat belts were missing and not functioning, tires were uneven and wearing, and windshields were coming apart. (Tr. 168, 254). Mr. Lubemba explained that every problem with these trucks that he identified was "either an OSHA violation, [or] a DOT violation." (Tr. 254). Ms. Bouquin offered corroborating testimony. (Tr. 170). Mr. Lubemba noted that these trucks should have been pulled out of service "a long time ago" but had stayed on the road, so what originally started as a minor compliance issue, now involved critical issues of compliance and internal security. (Tr. 255).

In the garage of the Columbus facility, there were oil leaks that triggered both OSHA and EPA compliance concerns. (Tr. 167, 256-257). There were exposed electrical panels, extension

cords sitting in oil, and an assortment of other exposed electrical dangers. (Tr. 257, R. Ex. 4). Fire extinguishers were inaccessible so if any of the exposed oil caught fire there was no immediate source of fire abatement. (Tr. 258, R. Ex. 4).

The emergency eye wash station contained no eye wash and was covered in combustible dust. (Tr. 258-259). If one of the employees had accidentally gotten engine coolant or oil in his eye, there was no way for the employee to flush the foreign substance out. (Tr. 259).

The men's bathroom used by the armored transporters was "filthy," "disgusting," and not properly functioning. (Tr. 258).

Furthermore, the Branch did not have any potable water available to employees. (Tr. 261). Despite OSHA's requirement that water be available to employees, there were no water fountains, potable sinks, or bottled water available to employees in Columbus. (Tr. 261, 291, 292).

As was their standard practice when observing OSHA violations, Mr. Lubemba and Ms. Bouquin began mitigating these OSHA violations right away. (Tr. 262). Ms. Bouquin and Mr. Lubemba contacted an outside vendor to make repairs to the armored vehicles and they had the garage, eyewash station, and restroom deep-cleaned by a cleaning company. (Tr. 23, 170, 260, 262). Ms. Bouquin also purchased a refrigerator from Lowe's, put water in the refrigerator, and made potable water available to employees at no charge to ensure that Columbus was meeting basic OSHA requirements. (Tr. 170). The Risk Management Team also addressed the host of safety and security concerns in the garage, from exposed electrical wires to obstructed safety equipment. (Tr. 168, R. Ex. 4).

In addition to repairing the air conditioning problems affecting the armored vehicles, Mr. Lubemba also arranged for the installation of auxiliary mechanical fans as part of Garda's Heat

Mitigation Pilot Program, and these fans were installed in the armored trucks in the Columbus Branch later in 2012. (Tr. 37, 268). The auxiliary fans and new refrigerator were the only new items in the Columbus Branch at the conclusion of the Risk Management Team's trip to Columbus. All other mitigation efforts involved cleaning or repairing active OSHA, DOT, or EPA issues. (Tr. 308). In short, as noted by the ALJ in his Decision, the "record is crystal clear that Respondent made tremendous improvements in the working conditions of unit employees during the critical period . . ." (Decision, JD-15-13, p. 7).

Ms. Bouquin explained that while she and Mr. Lubemba were only supposed to be in Columbus for a one-day in and out trip to check on the vehicles and conduct some hydration training, she called her boss shortly after her arrival, told her boss "we have a big problem here, and I don't feel comfortable leaving," and extended her visit until her and Mr. Lubemba felt comfortable with their mitigation efforts. (Tr. 167).

A couple weeks after his initial visit to Columbus, Mr. Lubemba returned to Columbus to check on the progress of the mitigation efforts and Pilot Program. (Tr. 285). During this follow-up trip, which took place before the election, he informed employees that Garda would not be including shorts or external air conditioning units as part of the Pilot Program. (Tr. 285-286).

Additionally, Mr., Lubemba made the necessary arrangements to ensure that cleaning companies visited the Columbus Branch on a regular basis. (Tr. 105-106). Today, cleaning crews clean the garage, bathrooms, and other interior areas of the Branch on a regular basis to ensure that the conditions discovered in early August do not reappear. (Tr. 105-106).

III. SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT'S EXCEPTIONS

1. Whether the ALJ erred in including new violations involving individuals not named in the Amended Complaint or Election Objections in his Decision in this matter, when the

Respondent did not have an opportunity to present an adequate defense to these violations during the Hearing or in its Post-Hearing Brief.

2. Whether the conduct of Mr. Modarelli, Ms. Linares, and Ms. Brown was fully litigated in this matter.

3. Whether the Respondent had sufficient notice of the allegations against Mr. Modarelli, Ms. Linares, and Ms. Brown in advance of the Hearing.

4. Whether the conduct and alleged violations by Mr. Modarelli, Ms. Linares, and Ms. Brown can be included in the ALJ's Decision because those individuals allegedly were "agents" of the Respondent, even when these "agents" and their alleged violations are not otherwise identified pre-Hearing or in any Pleadings.

IV. ARGUMENT

A. Relevant Legal Standards Establishing That Benefits May Be Conferred During The Critical Period For Legitimate Business Reasons

The Amended Complaint alleges that Ms. Bouquin and Mr. Lubemba unlawfully solicited employees and provided impermissible benefits to employees. To prove unlawful solicitation, there must be evidence that the employer solicited complaints during a period of union organizing activity with the purpose of influencing employees' choice – *motivation* matters in these cases. United Airlines Servs. Corp., 290 NLRB 954 (1988). In short, the merits of this case turn on motivation and intent.

B. Relevant Legal Standards Concerning Notice And The Right Of A Party To Fully Litigate An Allegation

Under 29 U.S.C. § 153(d), the General Counsel is vested with the sole power to determine the issues raised in a complaint, and the decision to omit an issue is final and unreviewable. *See* Williams v. NLRB, 105 F.3d 787, 790-01 n.3 (2d Cir. 1996) (citations omitted).

Section 102.15 of the Board's Rules and Regulations provides that a complaint "shall contain … a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." (emphasis added). Likewise, Section 10264.2 of the NLRB's Casehandling Manual, "[t]he allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met." Further, the Casehandling Manual specifically states that "[c]areful drafting of the complaint *** avoids many problems during trial and time-consuming briefs and arguments. The failure to properly draft or amend complaints can result in the loss of substantive rights." (Id.).

The Board has recognized that the requirement that a complaint contain sufficient specificity includes a requirement that the complaint specify: (1) the nature of the violations alleged; (2) the dates on which the alleged violations occurred; (3) the ***names*** of the agents of the respondent who allegedly violated the Act; and (4) the location at which the alleged violations occurred (emphasis added). For example, the Board has routinely found that "it is inappropriate to make unfair labor practice findings that were not fully and fairly litigated." Ken Maddox Heating & Air Conditioning, Inc., 340 NLRB No. 7, 2 (2003). *See also* Polymark Corp., 329 NLRB 9, 10 (1999) (declining to adopt the ALJ's finding of a violation where no such violation was alleged in the complaint, and where the General Counsel expressly limited the issues so as to exclude the type of violation that the ALJ later found); McKenzie Engineering Co., 326 NLRB 473, 473 (1998) (refusing to adopt the ALJ's finding of a an Act violation based upon a withdrawal of recognition by the Employer not alleged in the complaint); Camay Drilling Co., 254 NLRB 239, 240 n.9 (1981) (to determine a new issue, "when it is raised for the first time as

a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense.").

Further, longstanding United States Supreme Court precedent dictates that an unfair labor practice complaint must adequately put the charged party on notice of the violations it allegedly committed: "[T]he respondent [is] entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet the complaint[.]" NLRB v. Mackay Radio & Telegraph Co. , 304 U.S. 333, 350 (1938). In Pergament United Sales, Inc. v. NLRB, the Second Circuit discussed due process limitations on NLRB Complaints:

> It is a basic tenet of Anglo-American law that one accused of a wrong has the right to be notified of the specific charges raised against him and an opportunity to defend himself against them; the tenet is capsulized in the Fifth Amendment: 'No person shall . . . be deprived of life, liberty, or property, without due process of law.' U.S. Const. Amend V. Due process requires the Board to afford an alleged violator notice and an opportunity for a hearing on a charge under the Act[.]

Pergament, 920 F.2d 130, 134 (2nd Cir. 1990). The court further explained: "The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." Id. at 135.

Board law is clear. In those cases where a party fails to properly notify the opposing party of violations or allegations presented during the Hearing or Post-Hearing, the ALJ commits clear error if he bases his Decision on those violations. *See infra*. The reasoning behind this line of cases is similarly clear. If the Respondent has no advance notice of an allegation, it has no ability to properly defend against the allegation or "fully litigate" and challenge the allegation. Pergament United Sales, 296 NLRB 333, 334 (1989). The Board has consistently held that in those cases where a Complaint does not name an individual, or include catch-all language similar

to "with others unknown," allegations made against unnamed individuals raise "serious due process concerns" and cannot be used in the Judge's determination. Id. By definition, such allegations have not been "fully litigated" because the Respondent would "have altered the conduct of its case at the hearing, had a specific allegation been made." Id. at 334-335. Further, the Board has found that an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing. Middletown Hospital Association, 282 NLRB 541, 542 (1986); *see also* Q-1 Motor Express, 308 NLRB 1267 (1992).

Finally, Board law establishes that it is of no consequence whether the error would change the outcome of the ALJ's Decision. Such an error is a violation of the basic principles of due process, and it is the opportunity to dispute the new violations which must be afforded the parties. NLRB v. Quality C.A.T.V. Inc., 824 F.2d 542, 548 (7th Cir. 1987).

C. In Concluding That Vincent Modarelli, Lori Brown and Ivelices Linares Violated Section 8(a)(1) Of The Act, the ALJ Improperly Expanded The Scope Of The Amended Complaint To Include Unnamed Individuals And Matters Not Fully Litigated By The Parties.

a. The ALJ's Decision erroneously includes alleged violations by three individuals who are not named in the Amended Complaint or Election Objections

As noted, the Amended Complaint in this matter mentions ***only*** Christine Bouquin and Webster Lubemba by name. (Amended Complaint ¶5). Paragraph 5 of the Complaint alleges:

> (a) About August 7, 2012, Respondent, by Christine Bouquin, at Respondent's Columbus, Ohio facility, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment, if they refrained from union organizational activity.
>
> (b) About August 7, 2012, Respondent, by Webster Lubemba, at Respondent's Columbus, Ohio facility, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment, if they refrained from union organizational activity.

The Amended Complaint contains no allegations or facts involving Vincent Modarelli, Lori Brown, or Ivelices Linares – their names do not appear in the Amended Complaint or Objections. Furthermore, there is no "catch-all" language in the Amended Complaint or Objections that would otherwise notify the Respondent of allegations against unnamed Garda employees; only broad references to the "Respondent" and "employer" are in the Pleadings. (*See generally*, Complaint ¶ 6 and Election Objections).

Beyond that, the General Counsel's case-in-chief and Post-Hearing Brief focus almost exclusively on the conduct of Ms. Bouquin and Mr. Lubemba. The General Counsel argues that it was the Risk Management Team that made the challenged improvements, solicited employee grievances, and that these improvements were done in order to dissuade employees from voting for the Union. (*See generally*, G.C.'s Post-Hearing Brief). In his Post-Hearing Brief, the General Counsel has entire sections devoted to the "Credibility of Bouquin" and the "Credibility of Lubemba," but nothing on Mr. Modarelli, Ms. Brown, and Ms. Linares. (G.C. Post-Hearing Brief pgs. 20-22). Indeed, the ALJ's Decision acknowledges that the General Counsel's Amended Complaint addresses only the conduct Bouquin and Lubemba: "the complaint allegations regarding solicitation of grievances and promises to remedy[] them are limited to Bouquin and Lubemba." (Decision, JD-15-13, p. 9).

Despite the dearth of reference to Modarelli, Linares, and Brown during the Hearing, and the fact that they were not named in the Amended Complaint, the Administrative Law Judge based his opinion, in large part, on allegations made against these three individuals during the Hearing. (JD-15-13, pgs. 8-9). Specifically, the ALJ made the following findings and conclusions based on the alleged conduct or motivation of Mr. Modarelli, Ms. Brown, and Ms. Linares:

- The Judge determined that "the priority given to Columbus was in large part a result of the representation petition filed on July 25" based on allegations made against Ms. Linares. (Id. at p. 4.).

- The Judge found that "Linares suggested or directed Bouquin and Lubemba visit the Columbus branch prior to Linares' arrival at the facility." (Id. at p. 5.).

- The Judge held that "Modarelli told employees that if they withdrew the representation petition and gave Garda six month to make their working conditions better, that Modarelli would make sure that employees were happy. If not, Modarelli told employees they could have the Union without an election, Tr. 57. On cross-examination, employee Jason Durbin testified that Linares did not say she would make things better if employees voted no in the representation election, Tr. 62. However, he made it clear that it was Modarelli who made the promises he testified to on direct, rather than Linares, Tr. 63." (Id. at p. 6.).

- The Judge held that "Vincent Modarelli explicitly promised to remedy employee grievances if they did not choose union representation. Additionally, Ivelices Linares, in telling Columbus employees that they were at the top of the list for replacement vehicles, was also explicitly promising to remedy employee complaints about the condition of their vehicles, including but not limited to the air conditioning. Although the complaint allegations regarding solicitation of grievances and promises to remedy[] them are limited to Bouquin and Lubemba, the Union's objection #1 is phrased in terms of the Employer's conduct. I find Modarelli's and Linares' conduct constitute objectionable conduct and violations of Section 8(a)(1)." (Id. at p. 9.).

- The Judge noted that witness Scott "Hall testified that Linares told employees that Garda was told to terminate 17 employees in Fairfield New Jersey for failure to pay union dues. He also testified that: She told us that Garda doesn't have to negotiate with the Union, and basically that negotiations with unions were a myth and that they didn't do that at Garda." (Id. at 6).

- The Judge based his findings and conclusions on the conduct of Mr. Modarelli, Ms. Linares, and Ms. Brown, in part, on the fact that "all the employee testimony in this case is uncontradicted." (Id. at p. 3, ftnt 1.).

- The Judge held that "Respondent did not present any evidence as to what Modarelli and/or Linares said to employees when they met with them. Since the employee testimony regarding what Modarelli and/or Linares said is uncontradicted, I credit that testimony." (Id. at p. 5.).

- The Judge held that "Bouquin and Lubemba, although agents of the Respondent, were foot soldiers in Garda's efforts to remedy problems at the Columbus facility and at the same time discourage employees from selecting union representation. It is not their motivation that matters in this case, but the motivation of Garda as a corporation." (Id. at 8).

- Most significantly the ALJ held that "[a]lthough the complaint allegations regarding solicitation of grievances and promises to remedy[] them are limited to Bouquin and

Lubemba, the Union's objection #1 is phrased in terms of the Employer's conduct. I find Modarelli's and Linares' conduct constitute objectionable conduct and violations of Section 8(a)(1)." (Id. at p. 9.).

- In his Conclusions of Law, the ALJ held that "The Respondent solicited employee grievances and complaints with the implicit promise to remedy them during the critical period" and that the "Respondent" has "engaged in objectionable conduct." (Id. at 9).

Additionally, the ALJ opened the "Analysis" section in his Decision with the following: "This case presents two different but related issues: 1) whether Garda (not as Respondent contends, Christine Bouquin and Webster Lubemba) violated the Act and committed objectionable conduct in granting improvements to the working conditions of bargaining unit employees . . . and 2) whether the Respondent (rather than Bouquin and/or Lubemba) violated the Act in soliciting employee grievances and complaints . . . (Id. at p. 6.). Thus, while the Amended Complaint raises violations against Ms. Bouquin and Mr. Lubemba, the ALJ unilaterally expanded the scope of the allegations to include all "agents of the Respondent" – a term that is not defined or limited anywhere in the Decision, and which is not supported by the Pleadings. (Id. at p. 8.).

b. Well-settled Board law prohibited the ALJ from finding violations against Mr. Modarelli, Ms. Linares, or Ms. Brown; the Decision contains legal error

The ALJ committed legal error in analyzing and relying upon violations and allegations attributed to Mr. Modarelli, Ms. Linares, and Ms. Brown. Respondent had no indication that the conduct of any of these three individuals was subject to litigation, and the Union and General Counsel did not provide notice sufficient to permit the Respondent to "fully litigate" the claims against these three. Pergament, 296 NLRB at 333. Indeed, the ALJ acknowledges that Ms. Bouquin and Mr. Lubemba were the "focus" of the Hearing and the parties' briefs. (Id. at p. 8). The General Counsel goes farther, as his Post-Hearing Brief, like the Amended Complaint, focuses almost exclusively on the conduct of Ms. Bouquin and Mr. Lubemba.

Despite the focus of the parties on Mr. Lubemba and Ms. Webster, the ALJ's Decision emphasizes the conduct of Mr. Modarelli, Ms. Linares, and Ms. Brown. In his Decision, the Judge specifically states that the Amended Complaint's reference and the parties focus on Ms. Webster and Mr. Lubemba is "misplaced" because "it is not their motivation that matters in this case, but the motivation of Garda as a corporation." (Id. at p. 8.). It is through this broad agency language that the Judge improperly sweeps the three unnamed Garda employees into this case.

References to the "Respondent" or "Employer" in a Pleading do not permit an ALJ or party to raise allegations against *any and all* otherwise unidentified "agents" of a party during a hearing. This is not legally sufficient "catch-all" language. Board law requires that the "nature of the violations" and the "names of the agents" be provided so that the opposing party has some reasonable knowledge the allegations and accused and can prepare a defense. Maddox, 340 NLRB No. 7 at 2. The General Counsel did not (and could not) challenge the motivation of unnamed salaried employees of the Respondent with respect to the allegations in the Amended Complaint; he challenged only the conduct and motivation of Ms. Bouquin and Mr. Lubemba, and those are the limits of the allegations in this matter. Maddox, 340 NLRB No. 7 at 2; Polymark Corp., 329 NLRB 9, 10 (1999).

The full scope of the prejudice of the inclusion of these three "agents" into the case is far-reaching. First, the ALJ credits every allegation made against these Mr. Modarelli, Ms. Linares, and Ms. Brown because they are "uncontradicted." (Id. at p. 3, ftnt. 1.). Of course, had the Respondent known that the conduct of these three would have been an issue in the Hearing, it would have prepared a proper response to the allegations made during the Hearing and called these individuals to testify. Second, the ALJ does not explain what basis the Respondent could have for assuming that the conduct of Mr. Modarelli, Ms. Linares, and/or Ms. Brown was at-

issue in advance of the Hearing. The Amended Complaint in this matter specifically alleges that the violations of the Act took place "about August 7, 2012" and that they took place "at Respondent's Columbus, Ohio facility." (Complaint ¶ 5-6). Mr. Modarelli is based out of New Jersey, Ms. Brown and Ms. Linares are based out of Boca Raton, Florida, and it is not clear that any of these three were in Columbus on August 7, 2012. (Tr. 21-22, 69-70, *see generally*, Decision, JD-15-13). Certainly, none of these three were part of the Risk Management Team. In short, the Complaint's reference to the Columbus, Ohio Branch on August 7, 2012 provided no advance notice that any of these individuals would be accused of improper solicitation, increased benefits, or improved terms and conditions of employment at the Columbus Branch.

c. The Respondent is entitled to an opportunity to present its defenses to the allegations against Mr. Modarelli, Ms. Linares, and Ms. Brown

Finally, and significantly, while the ALJ did determine that Ms. Bouquin "solicited grievances and at least implicitly promised to remedy them," violations committed by Ms. Bouquin and/or Mr. Lubemba do not render the errors concerning the unnamed individuals moot. (Decision, JD-15-13, p. 5). In other words, the ALJ's separate determinations concerning the conduct of Ms. Bouquin and Mr. Lubemba do not remedy the other legal errors explained herein. The Board has held that, in cases involving alleged violations of which a party has no notice, it is of no consequence "[w]hether or not new evidence would have changed the result, '[i]t is the opportunity to present argument under the new theory of violation, which must be supplied.'" Piggly Wiggly Midwest, 30-CA-18574 (Jan. 3, 2012) (citing NLRB v. Quality C.A.T.V., Inc., 824 F.2d 524 (7th Cir. 1987).

Advance knowledge of the allegations against Mr. Modarelli, Ms. Linares, and Ms. Brown, and the opportunity to properly prepare a defense to these allegations "would have altered the conduct of [Respondent's] case at the hearing." Pergament, 296 NLRB at 335. Due

process requires that the Board afford an alleged violator notice and an opportunity to refute the allegations of unlawful behavior. Id. at 334. The Respondent is entitled to these rights under the law.

V. CONCLUSION

Based upon the foregoing facts, arguments, and authorities, the Respondent respectfully requests that the Region overturn the Decision of the Administrative Law Judge in this matter dismiss the Complaint in-full.

Respectfully submitted,

/s/ Erik Hult

Erik Hult
ehult@littler.com
LITTLER MENDELSON, P.C.
21 East State Street
16th Floor
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by regular U.S. Mail, postage prepaid and electronic mail, this 16th day of April, 2013 upon:

Joseph Tansino
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Jack Deml
UFSPSO
P.O. Box 397641
Gahanna, Ohio 43230

/s/ Erik Hult