

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

GARDA CL GREAT LAKES, INC.

Respondent

and

Cases 9-CA-087203
9-RC-085968

UNITED FEDERATION OF SPECIAL
POLICE AND SECURITY OFFICERS, INC.

Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE:

This case is before the Board on Respondent's exceptions and Counsel for the Acting General Counsel's cross-exceptions to the decision of Administrative Law Judge Arthur J. Amchan, which issued on March 19, 2013. Counsel for the Acting General Counsel excepts to the Administrative Law Judge's finding and conclusion that Respondent did not, through its agent Webster Lubemba, solicit grievances and promise to grant benefits and improve terms and conditions of employment in violation of Section 8(a)(1) of the Act.

II. SUMMARY OF THE FACTS:

A. Business of Respondent

Respondent operates a cash logistics business with national headquarters in Boca Raton, Florida. (Tr. 130-131) ^{1/} It employs messengers and drivers who pick up and deliver cash

^{1/} References to the official transcript will be designated as (Tr. ____); references to General Counsel's Exhibits will be designated as (G. C. Ex. ____); references to Respondent's Exhibits will be designated as (R. Ex. ____).

deposits to and from its customers throughout the United States at over 200 branches. (Tr. 130-131) Branch Manager Scott Jacks oversaw operations at the Columbus, Ohio branch until August 2012,^{2/} when Assistant Branch Manager Terry Hupp replaced him. (Tr. 132) Jack Deml, Business Representative for the Union, previously worked for Respondent as National Employee Relations Director and maintained an office at the Columbus branch until his resignation in March 2012. (Tr. 305) Christine Bouquin was hired as Director of Claims on May 29 and transitioned to Director of Risk Management within a few weeks of her hire. (Tr. 129) Bouquin reports to Lori Brown, Respondent's Chief Legal Counsel and Head of Human Resources. (Tr. 130) Webster Lubemba works for Respondent as the Health and Safety Manager. (G.C. Ex. 1(n), p. 2) Ivelices Linares is Respondent's Director of Labor Relations. (G.C. Ex. 1(n), p. 2) Senior Vice-President and Head of United States North, Vincent Modarelli, has an office in Wilmington, Delaware, and oversees operations in Respondent's North Division. (Tr. 152, 230-231)

B. Union Campaign and Election; Conditions of Columbus Branch Prior to Petition

The Union filed a petition and served it on Respondent by fax and regular mail on July 25, 2012, seeking to represent a guard unit at Respondent's Columbus branch. (G.C. Ex. 1(a)) The parties entered into an approved Stipulated Election Agreement that described a unit including all full-time and regular part-time driver/messenger guards and vault custodians employed at Respondent's Columbus, Ohio facility. (G.C. Ex. 1(k)) The election was conducted on August 30, and the Union lost 26 votes to 8. (G.C. Ex. 1(k))

Prior to the filing of the Union's petition on July 25, vehicles in the Columbus fleet suffered several mechanical issues, including leaking fluids, broken seats, and nonfunctional air

^{2/} All dates herein are in 2012 unless otherwise noted.

conditioning. (Tr. 51, 93-94, 95-96) When the air conditioning in the vehicles stopped working, the temperature inside the cab of the truck could get as hot as 135 degrees during the summer months. (Tr. 52, 73) The situation was made much worse because the windows in the vehicles do not open. (Tr. 13, 52)

Employees had made complaints to Columbus management about the condition of the fleet, but the complaints had gone unanswered. (Tr. 34, 84) Respondent management was aware that overheating in the trucks was a problem at the Columbus branch as well as at other facilities. (R. Ex. 3; Tr. 306-307) Although the truck maintenance issues were known to Respondent, maintenance on the fleet was sporadic, and typically not performed unless it was an issue that would take the truck out of service. (Tr. 96-97)

During the hottest months of the year, employees purchased their own water or other beverages. (Tr. 16, 53) Prior to the filing of the July 25 petition, Respondent rarely provided free water to employees at the Columbus branch. (Tr. 97) Respondent's management kept a refrigerator stocked with beverages in a separate area of the branch, but employees were expected to pay for those beverages, and in the months preceding the filing of the petition, that refrigerator had remained empty. (Tr. 16, 97, 99) The refrigerator was in an area of the branch separate from the garage, where drivers spent the majority of their on-site work time. (Tr. 16, 26, 97)

Prior to the filing of the petition, the Columbus branch garage was, by all accounts, filthy: soot covered walls and surfaces; restrooms were filthy, lacked hot water, and had no soap in their dispensers; truck fluids, including oil, leaked onto the floor of the garage. (Tr. 15-16, 51, 87, 110-111, 170, 258) When oil spilled on the garage floor, management covered over the spill with cat litter, swept it up, and threw it away. (Tr. 87, 170) Branch management made periodic

efforts to clean the garage, limited to superficial cleanings, when the branch expected outside visitors. (Tr. 92, 104) Branch management had never hired an outside cleaning crew to clean the branch. (Tr. 13, 23)

According to Respondent's own estimation, the condition at the Columbus branch garage had taken years to reach the point it was at prior to July 25. (Tr. 279-280) From 2009 to 2012, Deml observed members of outside management visiting at the Columbus branch. (Tr. 306) He also personally observed the conditions inside the garage and regularly brought the branch condition and the condition of the Columbus fleet to the attention of his boss, Respondent's Vice-President of Employee Relations, Linda Slattery. (Tr. 306-307) Slattery informed him that those were operations concerns and not his affair. (Tr. 310) Columbus employees had also voiced their concerns to management about the condition of their workplace in the past. (Tr. 51)

C. Employer Response to Union Petition; the Heat Management Pilot

On June 20, Robert Larmore, the Branch Manager at Respondent's Edison, New Jersey branch, sent an email to senior management officials notifying them of OSHA complaints at his branch. (R. Ex. 1, p. 2) Responding to the email, Modarelli stated, "Robbie, this is not a coincidence ... 7 OSHA complaints re: A/C *and then a union organization effort ...* get on top of this and in front of your people starting NOW!" (R. Ex. 1, p. 2) (emphasis added; caps in original) Modarelli forwarded his message along with the original email from Larmore to Linares and Brown. (R. Ex. 1, p. 2) On June 28, Bouquin emailed Modarelli, Linares, and others in management, letting them know that she was in the process of evaluating remedies to the heat-related issues. (R. Ex. 1, p. 1) Bouquin did not send the email to anyone in management at the Columbus branch, and the email thread made absolutely no reference to the Columbus branch. (R. Ex. 1)

Bouquin was originally hired as the Director of Claims on May 29, but was quickly promoted to Director of Risk Management. She was made aware of the heat issues at the Edison branch sometime during the third week of June. (R. Ex. 1, Tr. 146) At the direction of her superiors, Bouquin subsequently undertook an investigation with the assistance of Health and Safety Manager Lubemba to find solutions to Respondent's excessive heat issues. (Tr. 146) At some point between June 28 and August 5, Bouquin devised a pilot heat management program, which she titled "Project Cool." (G.C. Ex. 4, p. 1)

Documentary evidence directly connected Respondent's heat issues to union organizing activity with Respondent's organization. On July 16, Xiomara Tennyson, an employee at Respondent's Needham branch, emailed Senior Vice-President Steve Morss (Modarelli's counterpart in Respondent's executive hierarchy, see Tr. 153) regarding the condition of the trucks and the heat issues. (G.C. Ex. 13) Tennyson stated, "I know the union is reaching out to the workers and I try my best to defend and hear them out. I am only exercising my duties as Peer Committee member. If I can show them I can defend and speak for them they may not be so inclined to petition for a union. [sic]" (G.C. Ex. 13) Morss emailed Brown on August 1, stating that Tennyson was "a great example of the type of people we want to hire for our future growth." (G.C. Ex. 4, p. 4) In turn, Brown forwarded Morss's email to Bouquin and Linares, stating, "Sounds like [the Needham] location might be a worthy candidate for some of the strategies you were mentioning yesterday. *The union activity there certainly justifies the effort.*" (G.C. Ex. 4, p. 4) (emphasis added).

The first indication that Columbus would be included in this pilot program was on that same date, August 1, a week after the Charging Party's representation petition had been filed. (G.C. Exs. 2, 4, p. 3) Bouquin replied to Brown's email, copying Linares and Morss; the email

included listed seven branches. (G.C. Ex. 4, p. 3) Bouquin stated in her email that she relied on the following factors in compiling the list: “complaints, citations, heat related claims filed, [and] *potential union activity*.” (G.C. Ex. 4, p. 3) (emphasis added) Included on the list were Needham, MA (where as Tennyson’s email demonstrates, there was both dissatisfaction over the condition of the vehicles and union organizing activity), Edison, NJ (where, according to Modarelli’s July 20 email, several OSHA complaints had precipitated a union organizing campaign), and Columbus, OH. (G.C. Ex. 4, p. 3) Bouquin would visit Columbus personally with Lubemba just a few days later.

But on the date that the Charging Party was filing its union representation petition, Respondent was still considering a different branch for the pilot program launch: on July 25, Bouquin corresponded by email with Robert Benedict, Branch Manager at Respondent’s Grand Rapids branch, regarding an impending visit by OSHA inspectors. (G.C. Ex. 19) An employee in Grand Rapids had been hospitalized due to dehydration. (G.C. Ex. 19, p. 3) Bouquin suggested by email to Lubemba that they include the Grand Rapids branch in their pilot program. (G.C. Ex. 19, p. 1) Bouquin stated her belief that “this may be an opportune time/location to launch the program.” (G.C. Ex. 19, p.1) However, the Grand Rapids branch was not on the list of seven branches in Bouquin’s August 1 email. (G.C. Ex. 4, p. 3)

D. Visit to Columbus Branch; Improvements Following Union Petition

On August 1, Bouquin informed Lubemba by email that she wanted to begin the rollout for the pilot program “this/next week in at least our first two branches.” (G.C. Ex. 2) The first two branches listed in the email to Lubemba were Columbus, OH and Edison, NJ. (G.C. Ex. 2) On August 2, Bouquin again emailed Lubemba: “It sounds like Ivalesis [sic] would prefer the roll-out to be prior to her arrival on Wednesday, so that would mean Tuesday.” (G.C. Ex. 3, p.

1) Bouquin and Lubemba visited the Columbus branch on Tuesday, August 7, and Linares arrived separately and met with Columbus branch employees the following day. (Tr. 197-198) On August 3, the Friday before Bouquin and Lubemba's visit to the Columbus branch, Linares sent an email about truck fans to Morss, Bouquin, and Brown, in which she made it clear that Columbus was selected for the pilot program because of the union election: "Based on the upcoming election in Fairfield, I recommend they be on the priority list, and possibly Columbus, dependent on what Christine is able to make happen for us there." (G.C. Ex. 4, p. 2)

During Bouquin's and Lubemba's visit to the Columbus branch on August 7, they surveyed the facility and spoke with employees. (Tr. 46, 72, 166) Bouquin spoke with messenger/driver Jason Durbin. (Tr. 46-52) Bouquin identified herself and Lubemba as "the fix-it people" and told Durbin that she was hired to go from branch-to-branch and make it a better place to work. (Tr. 46-47) Bouquin asked Durbin why morale was down at the Columbus branch and what he thought would make it better. (Tr. 50) Durbin complained to Bouquin about the cleanliness of the branch and the lack of functional air conditioning in the trucks. (Tr. 51) He told her that employees at the branch had voiced their concerns to their Branch and District Managers and felt that they were ignored. (Tr. 51) Bouquin was very sympathetic: she agreed that it was "ridiculous" that messengers and drivers would be working in trucks without air conditioning and stated she would not do it herself. (Tr. 52) Bouquin told Durbin that she would see about getting shorts implemented as part of the drivers' uniforms, that there should be fans on the trucks, and that the air conditioning should work. (Tr. 53) She said that Respondent should supply employees with water. (Tr. 52)

Bouquin also spoke with driver Scott Hall. (Tr. 72) Bouquin asked Hall about the situation with the air conditioning in the vehicles; Hall complained that the situation was

“absolutely ridiculous.” (Tr. 72-73) She asked if the trucks had been fixed recently and indicated to him that she had arranged to have trucks repaired. (Tr. 72) She then asked Hall his opinion about having shorts as part of the company uniform; Hall told her that he thought that would be a good idea. (Tr. 73)

The day after Bouquin and Lubemba visited the Columbus branch and spoke individually with employees, Linares talked about unionization with employees during a mandatory meeting. (Tr. 81) Linares spoke to employees about why it was a bad idea to have a union; she characterized it as a cash flow problem. (Tr. 78) Linares told employees that Respondent did not have to negotiate with the Union. (Tr. 82) Linares told employees that they were at the top of the list for replacement vehicles and referenced the pilot program. (Tr. 104) Although Respondent’s emails suggest that Bouquin and Linares had coordinated their visits to the Columbus branch, Bouquin denied this at trial, and Respondent did not call Linares as a witness. (Tr. 195)

Modarelli also personally visited the Columbus branch at some point between August 7 and the union election on August 30. (Tr. 57) During his visit, he asked employees to give him 6 months to make their working conditions better; he told them if conditions did not improve, that he would “just give us the Union.” (Tr. 63)

After the July 25 petition and the branch visits by Bouquin, Lubemba, Linares, and Modarelli, the Columbus branch underwent several marked improvements. Bouquin arranged with Jacks to have the air conditioning repaired for seven trucks in the Columbus fleet. (Tr. 169, G.C. Exs. 4; 5, p. 1) On August 7, the refrigerator that had previously been located by the employee punch clock was moved to the garage. (Tr. 25, 52, 99-100) Management purchased a second refrigerator and stocked both refrigerators full of free, bottled water.

(Tr. 25-27, 99-100, 171-172) Management hired an outside crew to thoroughly clean the branch. (Tr. 21-22, 170-171, 262; G.C. Ex. 6)

Hupp asked employees whether they would be interested in shorts as part of their uniform. (Tr. 37-38) Bouquin had also asked employees about shorts during her visit on August 7. Subsequently, two deliveries of shorts were scheduled for the Columbus branch on August 15; however, the shorts “program” was canceled by email on August 14. (G.C. Ex. 20, p. 3) Hupp forwarded the email canceling the shorts delivery to Linares, stating: “This will be another negative feeling. Crews were told we could have them and they were ordered. [O]nce we get them they have to be returned.” (G.C. Ex. 20, p. 2) Linares then forwarded Hupp’s to Lubemba, asking him: “Do you think one of you guys could make your way back down to Columbus and explain to the guys what happened with the implementation of the shorts so that it doesn’t appear as though it’s another unfulfilled promise? I can help craft the message we want to come across, but I think it’ll go over better if one of you could tell employees face-to-face.” (G.C. Ex. 2, p. 2) The following day, August 15, Lubemba forwarded Linares’ email to Bouquin, who agreed: “I agree and do believe it will be important to deliver the right message face-to-face.” (G.C. Ex. 2, p. 1) On or about August 20, Lubemba returned to the Columbus branch and polled 34 employees on the issue of shorts being a uniform item; he learned that only two employees were interested in shorts. (G.C. Ex. 6) He asked employees about other uniform ideas and received feedback, which he reported to Linares and Bouquin by email dated August 21. (G.C. Ex. 6)

ARGUMENT:

A. The Administrative Law Judge erred in concluding that there was no evidence that Lubemba solicited Respondent's employees at the Columbus branch.

Judge Amchan determined that it was Respondent's motivation as a corporation that mattered, rather than Bouquin and Lubemba's. (ALJD, p. 8, ll. 31-35) Nonetheless, he found violations of Section 8(a)(1) based on the conduct of individuals named in the Complaint, Bouquin and Linares, as well as the conduct of Senior VP Modarelli. (ALJD, p. 8-9, ll. 37-11) But the Judge failed to find a violation based on the conduct of Lubemba, despite clear evidence that he engaged in similar conduct.

After implementation of Respondent's shorts program was canceled, Lubemba was dispatched to return to the Columbus branch. Lubemba's own testimony clearly reflects that the purpose of his return visit was to manage the expectations of employees. (Tr. 286) Linares had expressed concern that the cancellation of the shorts program would appear to be "another unfulfilled promise." (G.C. Ex. 20, p. 4) Bouquin agreed, stating it was "important to deliver the right message face-to-face." (G.C. Ex. 20, p. 1) [Accordingly, Lubemba returned to Columbus, less than 3 weeks after his initial visit, and polled 34 employees about shorts and other uniform ideas. (Tr. 286)] He reported the results of his survey of employee opinion in an email to Linares and Bouquin on August 21. (G.C. Ex. 6) Lubemba's conduct forms part of a continuity of action by Respondent in response to the Charging Party's July 25 representation petition. Respondent promised employees shorts when on August 7 Bouquin asked employees whether they would be interested in wearing shorts as part of their uniform. Lubemba's subsequent solicitation for alternative uniform ideas from employees was motivated by Respondent's fear that employees would perceive that this was an unfulfilled promise. Such solicitation was intimately connected to the earlier promises made by Bouquin and Linares, and

similarly created an implication that Respondent would improve terms and conditions of employment.

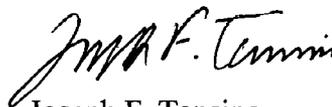
The Judge made no reference to this evidence and dismissed the allegations against Lubemba with a mere footnote. The Acting General Counsel respectfully submits that the Judge erred in disregarding this evidence and requests that the Board find that Respondent violated Section 8(a)(1) of the Act through Lubemba when he unlawfully solicited employee opinions regarding their terms and conditions of employment during an organizing campaign.

II. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel respectfully submits that the decision of the Administrative Law Judge should be reversed insofar as it concludes that Respondent did not also violate Section 8(a)(1) of the Act when its agent Lubemba solicited employee grievances and implicitly promised to remedy those grievances.

Dated at Cincinnati, Ohio this 29th day of April 2013.

Respectfully submitted,



Joseph F. Tansino
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271