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 ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTATIVE LAW JUDGE'S DECISION**

## I. INTRODUCTION:

This case is before the Board on Respondent's exceptions to the Administrative Law Judge's decision, which issued on March 19, 2013. In his decision, Administrative Law Judge Arthur J. Amchan concluded that Respondent violated Section 8(a)(1) and (3) of the Act by soliciting employee grievances, promising to grant benefits, and then granting benefits. (ALJD p. 17) [1/] For the reasons set forth herein, Respondent's exceptions are without merit and Judge Amchan's factual findings, analysis and legal conclusion are accurate. [2/]

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[1/] References to the Administrative Law Judge's Decision will be designated as (ALJD p. ___); references to Respondent's exceptions and brief in support thereof will be designated as (Resp. Br. p. ___); references to the trial transcript will be designated as (Tr. p. ___); references to the General Counsel's and Respondent's trial exhibits are designated as (G.C. Ex. ___) and (Resp. Ex. ___), respectively.

[2/] As more fully set out in Counsel for the Acting General Counsel's Cross-Exceptions and Brief in support thereof, Judge Amchan did err in one regard: he concluded that Respondent did not further violate Section 8(a)(1) of the Act through the conduct of Webster Lubemba when he solicited employee grievances and implicitly promised to remedy them.

## II. RESPONSE TO RESPONDENT'S EXCEPTIONS

### A. The Administrative Law Judge's finding that Respondent violated the Act by and through Bouquin's conduct is supported by the record (Respondent's Exception 1)

Judge Amchan found based on uncontradicted evidence at hearing that Respondent violated the Act by soliciting grievances and making promises to Garda employees prior to a representation election. The Judge found that not only Bouquin but also Linares and Modarelli had solicited grievances and made promises to employees. [3]/ Contrary to Respondent's assertion, Linares was named as an agent of Respondent in the Complaint; in fact, Respondent *admitted* the allegation regarding Linares's status. And while he was not named in the Complaint, Modarelli's status as Respondent's agent was established through the evidence presented at the hearing and was undisputed by Respondent.

The Judge's additional findings of unalleged violations do not affect the outcome of the unfair labor practice case or the objections in the representation case. Judge Amchan found that Respondent implicitly promised to grant benefits by soliciting grievances in violation of Section 8(a)(1) of the Act and additionally that Respondent granted various benefits in violation of Section 8(a)(1) and (3) of the Act. He specifically found that "Bouquin solicited grievances and at least implicitly promised to remedy them in her conversation on August 7 with Jason Durbin and his partner." (ALJD, p. 8, ll. 38-40)

#### 1. Respondent, through Bouquin, unlawfully promised increased benefits and improved terms and conditions of employment by soliciting employee complaints and grievances in violation of Section 8(a)(1)

Solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Clark Distribution Systems*, 336 NLRB 747, 748

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[3]/ Counsel for the Acting General Counsel further submits in its Cross Exceptions that the Administrative Law Judge erred by not finding that Lubemba solicited grievances from employees.

(2001); *Hospital Shared Services*, 330 NLRB 317 (1990). Grievance solicitation during an organizational campaign creates a "compelling inference," that an employer has sought to influence employees to vote against union representation. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999).

In finding that Respondent, through Bouquin, violated the Act by soliciting grievances and promising to remedy those grievances, Judge Amchan found that the presence of outside management at the Columbus branch to remedy employee complaints was "completely unprecedented and clearly motivated by the Union's representation petition." (ALJD pp. 8-9, ll. 40-42) Respondent does not and cannot except to this finding, because the record is clear: outside management had never before visited the Columbus branch to remedy employee complaints. It was only after the representation petition was filed that Respondent identified the Columbus branch for its pilot program and moved it to the top of the priority list. Moreover, undisputed testimony established that Bouquin solicited grievances from employees and implicitly promised to remedy them.

Although Respondent excepts to the Judge's findings of unalleged violations by individuals not named in the Complaint, its brief suggests it also believes the Judge erred when he attributed the knowledge, motivation, or conduct of Modarelli, Linares', and Brown [4]/ to Respondent. This argument is patently absurd. Each of these three individuals was identified at trial *by Respondent's own witnesses* as members of senior management. Further, Respondent admitted to Linares job title and agency and supervisor status in the Complaint. The involvement of other senior management officials in the process of launching the pilot program

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[4]/ Despite Respondent's assertion to the contrary, the Judge did not find any violation based on the conduct of Lori Brown, Respondent's Chief Legal Counsel and Director of Human Resources. In fact, Judge Amchan made only two references to Brown in his entire decision: once in reference to her inclusion on an email chain with other senior management officials regarding prioritization of the heat mitigation program (ALJD p. 4, l. 24), and once in finding that she was one of the members of management supporting Bouquin and Lubemba in the heat mitigation program (ALJD p. 8, l. 7).

was implicitly at issue in the hearing. The Acting General Counsel is entitled to present evidence demonstrating that members of Respondent's management evidenced animus and the motivation necessary to establish the elements to make its case. It is Respondent's responsibility to be prepared to defend against such evidence.

Respondent was on notice that the involvement of Respondent's management at large was at issue in this case. This is crystal clear from Respondent's own evidence: Bouquin referred to Brown as her "boss" and stated she had been appointed Director of Risk Management to respond to heat complaints. Respondent presented evidence that Bouquin emailed members of senior management to discuss how to address the heat-related complaints within the organization. (R. Ex. 1) Perhaps tellingly, Respondent initially neglected to present the email from Modarelli that precipitated Bouquin's own email: Modarelli explicitly drew the connection between heat-related complaints and union organizing activity, and instructed managers to "get in front of your people NOW." (See ALJD, p. 3, fn. 6)

To the extent that Judge Amchan's findings that Respondent violated Section 8(a)(1) through Bouquin by soliciting grievances and promising to increase benefits were based on evidence involving members of senior management not named in the Complaint, Counsel for the Acting General Counsel submits that there is absolutely no legal grounds for reversing this finding on such basis. And to the extent that Respondent's arguments rely on its flagrant misrepresentation that Linares was not named in the complaint, counsel for the General Counsel respectfully requests that Respondent withdraw such arguments and exceptions.

**2. Respondent unlawfully granted benefits to discourage union support in violation of Section 8(a)(1) and (3)**

An employer may not promise or grant benefits to employees for the purpose of discouraging union support. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21 (2010). The employer's motive is relevant to promises or conferral of benefits, as the

employer's motive for conferring a benefit during an organizing campaign must be to interfere with or influence the union organizing. Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act. *Id.* (citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), and *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992)). Accordingly, Respondent bears the burden of proving a legitimate business reason for granting the benefits. *Clock Electric, Inc.*, 338 NLRB 806, 807 (2003).

In this case, the Judge cited direct evidence demonstrating that the benefits conferred on employees were motivated by union animus. Specifically, the Judge found that Respondent selected the Columbus and Fairfield branches for inclusion in its heat mitigation pilot program based on an "imminent representation election." (ALJD p. 8, ll. 13-14) Moreover, the Judge found that Respondent specifically considered union activity in compiling the list of branches selected. (ALJD p. 4, ll. 31-32) Because the evidence demonstrated that there had been no heat-related workers compensation claims or illness at the Columbus branch, the Judge inferred that it was given priority because of the Charging Party's representation petition.

The record demonstrates that it was Bouquin who created the list of branches for the heat mitigation pilot program. In emails to other members of management, Bouquin specifically cited union activity as a factor she considered in creating the list. The Judge relied on this evidence in determining that the benefits conferred in association with the heat mitigation program were granted in response to the union organizing activity at the Columbus branch. But the Judge did not err in relying on evidence that other members of management were involved in the decision-making process. As explained above, it is undisputed that Linares, Modarelli, and Brown were all members of Respondent's upper-level management. Moreover, both the Complaint and the

Union's objections alleged that Respondent had violated the Act and did not specify a particular actor.

Because the evidence in the record clearly supports the Judge's findings that Respondent violated Sections 8(a)(1) and (3) of the Act, the Acting General Counsel respectfully requests that the Board affirm these findings.

### B. The Administrative Law Judge Appropriately Found that Respondent Also Violated Section 8(a)(1) Through the Conduct of Modarelli and Linares (Respondent's Exception 2)

It is well settled that the Board may find unalleged violations if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Golden State Foods*, 340 NLRB 382 (2003); *Yellow Ambulance Services*, 342 NLRB 804, 824 (2004); *Gallup Inc.*, 334 NLRB 366, 367 (2001); *Yale New Haven Hospital*, 309 NLRB 363, 368-369 (1992); *Hi-Tech Cable*, 318 NLRB 280 (1995). Here, this test has been fully satisfied. The Complaint allegation involved alleges that Respondent "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." While it is true that this allegation named Bouquin and Lubemba as having engaged in such conduct, the Union's objections were phrased in terms of the Employer's conduct. The Union's objections were consolidated with the Complaint, and so Modarelli's and Linares' conduct would clearly be encompassed by this Complaint allegation.

The Judge's findings that Respondent violated the Act through Modarelli and Linares are closely connected to the allegations in the Complaint. Evidence at hearing established that Modarelli and Linares both explicitly promised to remedy employee grievances if they did not choose union representation. These promises were made during the same time period as the allegations against Bouquin and Lubemba and involved the similar subject matter, i.e. the

conditions of vehicles in the Columbus fleet. Employee Scott Hall testified that on August 8, Linares told Columbus employees that they were at the top of the list for replacement vehicles and were part of a heat mitigation pilot program. (Tr. 104) Employee Jason Durbin testified that during Modarelli's visit in August, Modarelli told employees that if they withdrew the petition, he would make sure that the employees were happy and would improve their working conditions. (Tr. 57, 63) Linares was present when Modarelli made this promise to employees. (Tr. 63)

Notably, the Judge also found that Linares told employees that a union had told Respondent to terminate 17 employees in Fairfield, New Jersey for failure to pay union dues, and that Linares told Columbus employees that it was a "myth" that Respondent was required to negotiate with the union. (ALJD, p. 6, ll. 13-18) The Judge noted that such comments would be clear violations if they had been alleged. The Judge was clearly cognizant of which allegations were "closely connected" to the allegations in the Complaint.

Contrary to its assertion, Respondent had adequate opportunity to defend against the allegations leveled by employee witnesses during the hearing. Respondent had the opportunity to cross-examine Hall and Durbin on their testimony but did not impeach these credible witnesses. Respondent had the opportunity to present witnesses to rebut this evidence but failed to do so. Although Linares was named in the Complaint, Respondent made the tactical choice not to call her at hearing. Obviously she would have been able to testify about statements she made to employees, as well as the statements Modarelli made to employees in her presence. Moreover, it is clear from the evidence that Linares was an important member of the team responsible for launching and implementing Respondent's purported "heat mitigation pilot"; Respondent's own evidence proves this point. (R. Ex. 1) A reasonable respondent would have

anticipated that Linares's testimony would be critical to its defense. The Board should draw an adverse inference from her failure to appear.

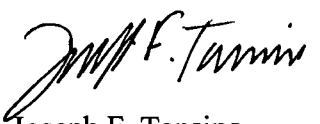
Modarelli's and Linares' conduct was fully litigated: as discussed above, Respondent cross-examined Hall and Durbin concerning they testimony with regard to the statements made by these individuals. The allegations were within the purview of the Union's objections and were closely connected to the allegations in the Complaint. The Acting General Counsel requests that the Board uphold the Judge's decision and find that Modarelli's and Linares' conduct was fully litigated. *Yale New Haven*, supra (finding appropriate although complaint did not allege that supervisor made unlawful comment); *Hi-Tech Cable*, supra (respondent cross-examined witness concerning conduct in question).

## III. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel submits that Respondent's exceptions should be rejected in their entirety and that the Administrative Law Judge's legal and factual conclusions be affirmed.

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