



Respondent could not properly dispute the allegations against Modarelli and Linares because it had no knowledge that their conduct was at-issue in advance of the Hearing, and could not call them to testify. Their alleged violations were not “fully litigated.”

As established below, neither the Amended Complain nor Objections allege violations of the Act by Linares, Brown, or Modarelli. Furthermore, the specific violations of the Act identified in the Amended Complaint and Objections are not alleged to have been propagated by Modarelli, Brown, or Linares, and the motivation and conduct of these three was not an issue in this matter until the Hearing was underway. The General Counsel made this case solely and exclusively about the conduct of Webster Lubemba and Christine Bouquin. The Administrative Law Judge determined that the “focus” on these two was “misplaced” and determined that the real parties of interest were Modarelli, Brown, and Linares.

Contrary to the arguments made in the General Counsel’s Brief, Respondent had no pre-Hearing notice that the conduct of Linares, Brown and Modarelli was an issue in this case. Their conduct was not closely connected with that of Lubemba and Bouquin, and the General Counsel’s contention that his inclusion of the word “Employer” in the Objections provided notice that all of Garda’s “upper management personnel” could be accused of wrongdoing is absurd.

The Respondent is entitled to fully litigate the allegations against Modarelli, Brown, and Linares. The Administrative Law Judge’s Decision is legal error and the Complaint should be dismissed in-full.

## **II. ARGUMENT**

### **A. General Counsel’s Repeated References To The Judge’s Factual Findings Are Not Relevant To Respondent’s Exceptions**

The General Counsel spends much of his Response Brief – including all of the first four

sections – arguing in support of the Administrative Law Judge’s findings that “Respondent implicitly promised to grant benefits by soliciting grievances in violation of Section 8(a)(1) of the Act.” (G.C. Response Brief p. 2). These arguments wholly miss the mark.

Respondent’s Exceptions are centered on the Judge’s decision to include violations against Mr. Modarelli, Ms. Linares, and Ms. Brown in his Opinion. Respondent contends that the inclusion of these three individuals is legal error because Respondent did not have advance notice of these alleged violations. To be sure, Respondent cannot Except to the factual findings against Mr. Modarelli, Ms. Linares, and Ms. Brown because it had no reasonable basis to conclude that any allegations against these three were at issue in the Hearing, and did not bring any of these individuals from their residences in Florida and New Jersey to Columbus, Ohio for the Hearing in January.

Thus, the General Counsel’s continuing citations to the Judge’s factual findings and conclusions have no relevance to Respondent’s Exceptions. Whether or not the Judge concluded that there were two violations or twenty violations, the Respondent’s Exceptions dispute the legal basis for including Mr. Modarelli, Ms. Linares, and Ms. Brown in the Opinion at all, and the law clearly establishes that the improper inclusion of **any** individual not otherwise known in advance of the Hearing renders the whole Opinion legal error. NLRB v. Quality C.A.T.V. Inc., 824 F.2d 542, 548 (7th Cir. 1987) (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.). If the Board concludes that Modarelli or Linares or Brown’s conduct was improperly included in the Decision, the Decision must be struck down in-full. Id.

**B. The Amended Complaint And Objections Contain No Allegations Involving Modarelli, Brown, Or Linares – Their Inclusion In The Decision Is Legal Error**

The General Counsel does not dispute that Webster Lubemba and Christine Bouquin were the only two individuals mentioned by name in the substantive portions of the Amended Complaint. (Amended Complaint ¶ 5). Nevertheless, the General Counsel notes that “Linares was named as an agent of Respondent in the Complaint” and that “Respondent admitted the allegation.” (G.C. Response Brief p. 2). This is a red herring and grossly misrepresents the procedural history of this matter.

As an initial matter, the Respondent did admit Paragraph 4 of the Amended Complaint, which alleged nothing more than that Ivelices Linares was an “agent of Respondent.” (Amended Complaint ¶ 4). Respondent is not challenging Ms. Linares’ agency status, but again notes that Ms. Linares is not accused of any violations of the Act in the Amended Complaint, while Mr. Lubemba and Ms. Bouquin – who are also identified in Paragraph 4 – are accused of violations in Paragraphs 7 and 8. Amended Complaint ¶¶ 7-8).

Furthermore, and of great significance in this matter, when the Region investigated the allegations in the Unfair Labor Practice Charge filed by the Union preceding this Complaint, the Region originally asked Garda to respond to allegations of improper solicitations by Ms. Linares.<sup>1</sup> **Subsequently, however, the Region informed the Respondent that it would not be pursuing these claims against Ms. Linares, and these allegations are not included in the Amended Complaint, and were not raised by the General Counsel during the Hearing.** Thus, the Respondent had very good reason to believe that Ms. Linares’ conduct was not at-issue in this matter. Now that these allegations have re-appeared as the result of tangential witness

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<sup>1</sup> Indeed, these allegations against Ms. Linares were included in the EAJA letter from the Region to the Respondent, and addressed in Respondent’s Position Statement.

testimony, the General Counsel improperly revives these arguments and bootstraps them onto his claims against Lubemba and Bouquin.

And while the General Counsel spends considerable time emphasizing that Linares' name appears in the Complaint, Mr. Modarelli does not appear in the Amended Complaint, is not named in any of the formal documents of Unfair Labor Practice Charge, and was not a name discussed or referenced by the parties before the Hearing was underway.<sup>2</sup> To be sure, the primary argument the General Counsel presents in support of the inclusion of Mr. Modarelli is his recognition that "it is undisputed that Linares, Modarelli, and Brown were all members of Respondent's upper-level management." (G.C. Response Brief p. 5). That is true, but that is not the legal standard here, and Respondent seriously doubts that the General Counsel believes that the Company was obligated to have all of its "upper-level management" nationwide prepared to testify in Columbus in January.

### **C. Modarelli and Linares' Conduct Was Not Fully Litigated**

The General Counsel contends that Modarelli and Linares' conduct was fully litigated because: 1) Respondent had the opportunity to cross-examine other witnesses; 2) the allegations "were within the purview of the Union's objections;" and 3) the allegations were "closely connected" to the Complaint. None of these arguments passes muster.

To begin, the Respondent's ability to cross-examine witnesses Hall and Durbin has no bearing on whether Respondent has the opportunity to present an adequate defense and prepare

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<sup>2</sup> The General Counsel's heavy emphasis on the fact that Linares was named as an "agent" – although not accused of any wrongdoing – cuts against his argument that Respondent should have known that Modarelli's conduct was at-issue, since his name appears nowhere at all pre-Hearing. The General Counsel also claims that "a reasonable respondent would have anticipated that Linares' testimony would be critical to its defense." Ostensibly then, the General Counsel concedes that Respondent reasonably did **not** anticipate that Modarelli would be critical to its defense. General Counsel cannot have it both ways here.

“an explanation that refutes the charge of unlawful behavior.” Pergament United Sales Inc. v. NLRB, 920 F.2d 130, 134 (2nd Cir. 1990). This argument is unworthy of serious consideration. The Respondent has the legal right to “explain its conduct” and defend its conduct independently once it has notice of the alleged violations – cross-examination of an adverse witness does not satisfy this standard. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350 (1938). By the General Counsel’s logic, any issue raised by any adverse witness – no matter its presence in the Complaint – would be before the Judge because the Respondent has the option to cross-examine the witness. There is no authority for this patently incorrect legal proposition advanced by the General Counsel.

Second, the allegations against Mr. Modarelli and Ms. Linares were not – to use the General Counsel’s phrase – “within the purview” of this case. Again, the Amended Complaint and Objections do not contain any facts or allegations involving Vincent Modarelli, Lori Brown, or Ivelices Linares and there is no “catch-all” language in the Amended Complaint. (*See generally* Complaint ¶ 6 and Election Objections). The Judge’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). As noted in the Respondent’s Exceptions Brief, the Amended Complaint 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, and none of them were part of the Risk Management Team with Mr. Lubemba and Ms. Bouquin. (Tr. 21-22, 69-70, *see generally*, Decision, JD-15-13).

Notably, the only argument the General Counsel presents to support his contention that Modarelli and Linares are “within the purview” of the case is that Linares is identified as an agent in the Amended Complaint. As discussed, Linares is not accused of any misconduct in the Complaint, and the Region intentionally chose not to pursue the allegations against Linares presented in the EAJA letter. Furthermore, Modarelli’s name appears nowhere in any formal documents and was not within the purview of this case before the Hearing was underway.

Finally, the unalleged violations against Mr. Modarelli and Ms. Linares are not “closely connected to the subject matter of the complaint.” The General Counsel again argues that, because the “Union’s objections were phrased in terms of the Employer’s conduct,” “Modarelli and Linares’ conduct would clearly be encompassed by this Complaint allegation.” (G.C. Response Brief p. 6). Broadly referencing “Employer” conduct in Election Objections does not give the General Counsel or Judge license to sweep any and all allegations against all “agents” of a party into a Complaint. While General Counsel is correct that the allegations and findings against Modarelli and Linares also involve alleged solicitations of grievances, there are few similarities between the conduct of these two and the conduct of Lumemba and Webster. Modarelli and Linares were not part of the Risk Management Team; they did not travel to Columbus with Lubemba and Webster; and the allegations of “increased benefits” that appear in the Amended Complaint, including: “new refrigerator, free beverages/water, cleaning of Respondent’s Columbus, Ohio facility, and repairing employees’ work vehicles” are repairs made only by Bouquin and Lubemba. (Tr. 23, 37 170, 260, 262; Amended Complaint ¶6). The Board regularly has found that an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing, as was the case here. Middletown Hospital Association, 282 NLRB 541, 542 (1986); *see also* Q-1 Motor Express, 308

NLRB 1267 (1992).

Moreover, the “closely connected” language on which the General Counsel relies is still subject to the Constitutional due process requirements of Pergament. 920 F.2d at 134 (2nd Cir. 1995). In other words, just because an allegation is related to one that appears in an Amended Complaint does not mean that an employer has had “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. The Golden State Foods case cited by the General Counsel found that an allegation not specifically pled in a Complaint was “closely connected,” but acknowledged that the “Respondent introduced its own witnesses who denied making the statements.” 340 NLRB 382, 382 (2003). Garda did not have the same opportunity here.

Finally, the General Counsel ignores the Judge’s statement that the parties “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). It is crystal clear that neither the General Counsel nor the Respondent considered the allegations against Modarelli, Linares, or Brown during the course of the Hearing or the Briefing. It is only now, after the Judge’s favorable Decision that the General Counsel works to shift the focus of this case away from Lubemba and Bouquin.

The Amended Complaint, Objections, Hearing, and Briefing in this case addressed the discrete, specific improvements and solicitations made by Webster Lubemba and Christine Bouquin in Columbus, Ohio in early August 2012. The motivation and conduct at-issue in this case was that of Mr. Lubemba and Ms. Bouquin alone. The Region limited its Complaint to these issues after reviewing the parties’ position statements, and no other matters were “fully litigated” before the Administrative Law Judge. The allegations against Modarelli, Linares, and Brown were not fully litigated, in contravention of well-settled Board law.

### III. CONCLUSION

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

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by regular U.S. Mail, postage prepaid and electronic mail, this 13th day of May, 2013 upon:

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