

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

LATINO EXPRESS, INC.

And

**13-CA-077678
13-CA-078126
13-CA-078127
13-CA-079765
13-CA-082141**

**TEAMSTERS LOCAL UNION NO. 777,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL’S CROSS EXCEPTIONS AND BRIEF IN
SUPPORT OF GENERAL COUNSEL’S CROSS EXCEPTIONS TO THE DECISION
AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Now comes Sylvia L. Taylor, Counsel for the General Counsel, in accordance with Section 102.46 of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Act, and who respectfully submits the following Cross Exceptions and Brief in Support of those Exceptions to the Decision and Recommend Order of Administrative Law Judge David I. Goldman, that issued on October 30, 2013.¹

EXCEPTIONS

Counsel for the General Counsel takes exceptions to the following conclusions of the ALJ:

1. That portion of the ALJ’s decision in which the ALJ found that the evidence was

¹ Hereafter Latino Express, Inc., will be referred to as “Respondent” or “Employer”; Teamsters Local Union No. 777, Affiliated with the International Brotherhood of Teamsters, AFL-CIO will be referred to as “the Union” or “Local 777”; the Administrative Law Judge will be referred to as the “ALJ”; the National Labor Relations Board will be referred to as the “Board”. References to the ALJ’s decision will be referred to as “ALJD”; references to the Board’s decision will be referred to as “BD”. With respect to the record developed in this case, citations to pages in the initial transcript will be designated as “Tr.”, followed by the page number. General Counsel’s exhibits will be designated “G.C.”, the Union’s exhibits will be designated “U.”, and Respondent’s exhibits will be designated “Res.”, each designation followed by its respective exhibit number.

insufficient to conclude that the Respondent engaged in bad faith bargaining from June 2011 through March 2012. (ALJD p. 15, lines 34-35)

2. That portion of the ALJ's decision in which the ALJ found that the certification year should not be extended in accordance with the Board's holding in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). (ALJD p. 27, footnote 21)

BRIEF IN SUPPORT OF THE EXCEPTIONS

I. Background

Latino Express is a school bus company which provides transportation for Chicago Public Schools and field trip charters. (ALJD 3) Teamsters Local 777 conducted an organizing campaign of employees at the Company, which culminated in the Union winning an election and being certified by the Board as the bargaining representative of drivers on April 18, 2011. (ALJD 3; see also *Latino Express Inc.*, 358 NLRB No. 94, slip op. at 5-6 (July 31, 2012)) The Union requested via letter dated April 28, 2011 that the parties begin negotiating for a first contract. (ALJD 3) However, the negotiations did not begin until nearly two months later, with the first bargaining session held on June 10, 2011. (ALJD 3; GC 6) Overall, the parties conducted 22 bargaining sessions, with the last session held on April 10, 2012. (Tr. 372; GC 6)

On April 24, 2012, the Employer withdrew recognition from the Union based on a decertification petition. (ALJD 8)

II. ANALYSIS AND ARGUMENT

Exception 1: The ALJ erred when he found that the record evidence was insufficient to conclude that the Respondent engaged in bad faith bargaining from June 2011 through March 2012. (ALJD p. 15, lines 34-35)

Argument and Legal Authorities in Support of Exception 1:

The ALJ correctly held that Respondent violated Section 8(a)(5) of the Act when it made a unilateral change to the employees working conditions, failed and refused to bargain with the Union, and unlawfully withdrew recognition from the Union. (ALJD 2) In finding that Respondent violated the Act, the ALJ properly held that Respondent's regressive bargaining, assertion of unlawful proposals in its final offer, insistence on not bargaining over health care, unlawful unilateral implementation of the driver accountability act, and its support for the decertification petition violated Section 8(a)(5) of the Act. (ALJD 18-19)

Notwithstanding finding that the Employer had committed multiple egregious violations of the Act, the ALJ deemed that the Respondent did not engage in overall bad faith bargaining from June 2011 through March 2012. (ALJD 2) The ALJ's decision regarding the pre-March 2012 bad faith bargaining is fundamentally flawed as the ALJ made legal conclusions that are not supported by the facts of the case or appropriate legal authority.

Counsel for the General Counsel clearly showed that during the course of the 10 months of negotiations that did not result in a first contract, Respondent's conduct both away from and at the bargaining table evidenced that it was not negotiating in good faith. Away from the bargaining table, Latino Express ignored during the entirety of the Union's certification year that Teamsters Local 777 now represented the Company's drivers and had to be given notice and an opportunity to bargain over any material changes to employees' terms and conditions of employment. Respondent's refusal to accept its certified union is readily evident in unilateral changes made by Respondent almost immediately after the Union was certified in May 2011; again in September 2011 in the midst of contract negotiations; and finally in April 2012 when the company knew certain employees were circulating a decertification petition and assisted in their

efforts. This conduct away from the table demonstrates, as part of the totality of the circumstances, that Respondent engaged in bad-faith bargaining.

Section 8(d) of the Act provides in part that the obligation to bargain collectively means:

the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

29 U.S.C. § 158(d). In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Regency Service Carts, Inc.*, 345 NLRB 671 (2005), citing to *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001); *Hydrotherm, Inc.*, 302 NLRB 990 (1991); *Houston County Electrical Cooperative, Inc.*, 285 NLRB 1213 (1987). The objective is to determine whether a party "is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *PSO, supra*, 334 NLRB at 487. The Board looks at several factors to evaluate a party's conduct, including unilateral changes in mandatory subjects of bargaining and unreasonable bargaining demands. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

With respect to unilateral changes, an inference of bad faith is permitted when an employer makes such changes to working conditions during contract negotiations. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that a unilateral change in conditions of employment "is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal").

In this case, the ALJ found that Latino Express committed three unilateral changes in employees' terms and conditions of employment throughout the course of bargaining. (ALJD 12 and 15) The first occurred almost immediately after the Union was certified and the last was just prior to its withdrawal of recognition. Thus, Respondent committed three per se violations of Section 8(a)(5) that are reflective of an employer which did not intend to negotiate in good faith.

The ALJ erred in finding that the Employer's away-from-the-table indicia of bad faith bargaining as evidenced by the three unilateral changes, was not indicative of a finding of overall bad faith bargaining.² (ALJD 15) Although the ALJ properly held that the Employer's unilateral changes to the employees' breakroom, the unilateral changes contained within the "welcome back letter", and the unilateral implementation of the driver accountability act were unlawful, he refused to find that those unlawful changes amounted to bad faith bargaining. (ALJD 12 and 15) He explained that they simply provided evidence of discrete violations and could not carry the load of establishing overall bad faith. (ALJD 15) The ALJ's reasoning is flawed in at least three aspects.

First, the ALJ found that the May 2011 unilateral changes regarding removal of the pool table, elimination of cable channels, and replacement of the breakroom television with a smaller model were weakened as indicia of bad-faith bargaining because they occurred before the bargaining began. But the ALJ identifies no reason why the timing of the changes is significant, and logic would dictate that a unilateral change occurring shortly before bargaining begins, as here, is just as indicative of an employer's intent as a unilateral change occurring during

² The ALJ also erred in finding that the Employer's failure to send a bargaining representative with final authority to the sessions was an indicator of delay. (ALJD 15 fn. 11) In fact, the final decision maker did not review any written tentative agreements until February 2012, eight months into negotiations. (Tr. 415, 512-13, 546-47, 549) Counsel for the General Counsel posits that there was no reason other than delay.

bargaining. Indeed, other cases have found that changes before the commencement of bargaining do indicate bad faith. See, e.g., *Sivalls, Inc.*, 307 NLRB 986, 1008 (1992).

Second, the ALJ, although finding that the September 6, 2011, “welcome back” letter, which also contained significant unilateral changes, “demonstrate[d] a lack of commitment to the bargaining process,” he declined to find that an indicium of bad faith. But this finding is contrary to long-standing Board precedent that holds that such unilateral changes are more than mere discrete violations, they are indicia of bad faith bargaining. *Atlanta Hilton & Tower*, 271 NLRB at 1603.

Third, the ALJ fails to see the forest for the trees. The unilateral changes are wholly consistent with the conduct occurring after April 2, 2012. The ALJ identifies no triggering event, or logical basis for essentially finding that Respondent experienced a sort of negative epiphany in April causing it to suddenly begin to reverse course from lawful bargaining to surface bargaining, a mere few weeks before the certification bar was due to expire. Instead, given the entire history of Respondent’s conduct, including unfair labor practices leading to an injunction and contempt proceedings demonstrating a wholesale disregard for its obligations under the Act, as well as its post-April unfair labor practices, it is far more reasonable to find that the unilateral changes demonstrate that Respondent bargained throughout with the same contempt for the rule of law as it has displayed since the Union began to organize. Respondent clearly continues to believe, as it has throughout, in a cynical strategy that if it resists long enough, a decertification petition will eventually make the nuisance of the Union go away.

In addition to the above unilateral changes, which clearly bolster the General Counsel’s allegations of bad faith bargaining, the ALJ found that the allegation of overall bad-faith bargaining for the period beginning April 2, 2012, was proven by Counsel for the General

Counsel. (ALJD 18) The ALJ correctly found that Respondent's regressive bargaining, assertion of unlawful proposals in its final offer, final insistence on not bargaining over health care, unlawful unilateral implementation (a few days later) of the driver accountability act, and its support for the decertification petition violated Section 8(a)(5) of the Act. This pattern of unlawful unilateral changes while negotiations were ongoing is indicative of an employer who bargained in bad faith. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (the Board looks at several factors to evaluate a party's conduct, including unilateral changes in mandatory subjects of bargaining and unreasonable bargaining demands.)

With respect to bargaining proposals, the Board examines proposals to determine whether, based on objective factors, bargaining demands constitute evidence of overall bad faith or surface bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988). Unrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences and reach an acceptable common ground. *A-1 King Size Sandwiches*, 265 NLRB 850, 858 (1982). Bad faith is indicated when the proposals are so predictably unpalatable to the other party that the proposer should know agreement is impossible, or when the proposals would leave the unions and the employees "with substantially fewer rights and less protection than they would have had if they had relied solely on the Union's certification." *Id.* at 877.

As fully demonstrated at trial, from November 2011 until the end of negotiations in April 2012, Respondent insisted on predictably unpalatable proposals for discipline and charter work. The Employer demanded throughout negotiations that employees discharged allegedly for just cause and laid off employees not have access to the grievance procedure. Further, in the items Respondent included as examples of just cause, the language used was so broad and vague as to give the company unfettered, unilateral power to terminate employees. Defining the terms

“insubordination,” “threat,” “moral turpitude,” and “unable or unfit to drive a bus” indeed would take a library of arbitration decisions. But under Respondent’s proposal, no grievance could be processed for an employee whom the Company terminated for one of those stated reasons. The Board has found that an employer whose proposals vest nearly total discretion in the company while offering little in return exhibits a lack of intent to bargain in good faith. *Hydrotherm, Inc.*, *supra*, 302 NLRB at 995.

The ALJ erred when he found that there could be no finding that the Employer’s proposal of an ineffective grievance procedure was unlawful, because they did not make a concomitant demand that employees waive their right to strike. (ALJD 14) In reaching his conclusion, the ALJ stretched the Board’s holding in *San Isabel Electric Services*, 225 NLRB 1073 , 1079 fn. 7 (1976), in denying the standard finding that unilateral changes coupled with unpalatable proposals constitute bad faith bargaining under Section 8(a)(5) of the Act. The Board’s holding in *San Isabel* never found that the absence of a linkage between an ineffective grievance procedure and no strike clause was mandatory to a finding that an employer engaged in bad faith bargaining. It simply stated that the absence made the argument more difficult. However, Counsel for General Counsel submits that when coupled with Respondent’s numerous violations, a finding of bad faith bargaining is the only appropriate conclusion.

Moreover, throughout the course of negotiations, the Company continued adding regressively to the just cause list, making the proposal even more unreasonable. As the ALJ found, Latino Express elevated its unlawful activity by adding prohibitions on conduct that, on their face, were unlawful pursuant to Board law. (ALJD 16) Defining just cause to include “disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication” is an overly-broad restriction on employees’ rights

to engage in protected concerted activity. See, e.g., *Knauz BMW*, 358 NLRB No. 164, slip op. (September 28, 2012) (“Courtesy” rule which stated “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership” found unlawful); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule banning “negative conversations about associates and/or managers” found unlawful); *University Medical Center*, 335 NLRB 1318 (2001) (rule prohibiting “other disrespectful conduct” overly broad and unlawful).

Respondent also made regressive additions restricting employee union activity, which are unlawful on their face. (ALJD 16) Respondent proposed the prohibition of “distributing union literature on Company time” and “attending a union meeting on Company time.” Yet the Board has held that the use of the terms “company time” and “company property” are ambiguous, because they fail to convey that employees can engage in union activities during breaks and other non-work hours, thus rendering rules using such terms unlawful. See, e.g., *Dish Network Corp.*, 359 NLRB No. 108, slip op. (Apr. 28, 2013) (handbook rules prohibiting employees from electronically posting critical comments about the company on or outside of “Company time” were unlawful); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994) (policy prohibiting solicitation or distribution “on company property, on company time” unlawful). The details of the parties’ bargaining established that Respondent simply was going through the motions with a desire to delay the proceedings until the certification year passed.

The Company’s final proposal regarding charters was similarly outrageous and found to be unlawful. Latino Express wanted to exclude from contract coverage and bargaining unit work all “charter routes, charter routes on weekends, [and] charter routes in excess of 100 miles.” It included this broad, all-encompassing exclusion of charters despite the fact that the only

agreement the parties had reached in contract negotiations was to permit a mechanic to drive a charter if it was more than 100 miles. (ALJD 17) One of the principal reasons that employees sought out the Union and organized was due to their complaints about how lucrative charter work was assigned, believing it to be unfair. Accordingly, this proposal is predictably unpalatable and evidences bad faith.

As of the last bargaining session, the parties had not reached a single agreement on economic issues. (Tr. 374, 413) The remaining issues to be resolved were wages, including the pay rate drivers would receive for charters; health insurance; life insurance; the drug testing policy; the discharge and discipline of employees provisions, involving the just cause issues previously described; whether the Company would be a union or open shop; and the number of paid holidays. (Tr. 513-16, 528,550-553; SG 342-412) Not a single one of those issues could be considered minor on their face. To have 10 months of bargaining and over 20 sessions each lasting multiple hours and still have this mountain of substantial issues remaining is indicative of delay tactics.

Counsel for the General Counsel submits that Respondent's proposals regarding discharge and just cause, access to the premises, and charter work are of the same kind the Board repeatedly has found predictably unpalatable and reflective of bad faith. See, e.g., *Regency Service Carts, supra*, 345 NLRB at 675-76 (employer proposals giving it unfettered discretion in decisions to discipline and discharge employees and restricting access to grievance procedure to prevent challenges to layoffs, discharge, and discipline established bad faith); *PSO, supra*, 334 NLRB at 488 (employer's final proposal stating that it could discipline or discharge an employee for just cause and defining just cause as proof that employee was unfit for duty, coupled with requirement that arbitrator only could reverse the penalty if the union could prove the employer's

decision was arbitrary and capricious, evidenced bad faith); *Hydrotherm, Inc., supra*, 302 NLRB at 991-92 (employer proposal defining just cause as any violation of written rules of the employer issued pursuant to unlimited management rights' clause and restricting arbitrator from ordering reinstatement and backpay, or otherwise altering the penalty imposed by the employer, demonstrated bad faith).³

The record fully supports the determination that Latino Express never intended to reach a first contract. Although it took steps to make it appear it was bargaining in good faith, the totality of its conduct in making unilateral changes and unreasonable bargaining demands, as well as assisting with the decertification petition of certain employees established that it did not wish to come to an agreement. Respondent simply was going through the motions with a desire to delay the proceedings until the certification year passed. Counsel for the General Counsel requests that a finding be made that Respondent engaged in bad faith bargaining from June 2011 through March 2012 in violation of Section 8(a)(5) of the Act.

Exception 2: The ALJ erred when he held that the certification year should not be extended in accordance with the Board's holding in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). (ALJD p. 27, footnote 21)

Argument and Legal Authorities in Support of Exception 2:

The ALJ erred in finding that the Board's application of the one year certification extension in *Mar-Jac Poultry, Inc.*, 136 NLRB 785, 787 (1962) was not the appropriate remedy in this case.

³ Numerous other proposals contained in Respondent's Final Offer (GC 18) solidify the conclusion that Latino Express had no intention of reaching a contract. The Management Rights provision in Article 4 granted Respondent broad authority to unilaterally change working conditions and unilaterally institute new work rules. The Work Rules/Policies provision in Article 13 restricted the Union's ability to bargain over new rules, stating only that Respondent would "substantively confer" over the changes prior to implementation. The Offer proposed a contract length of one year in Article 56, a period of time barely more than the entirety of the parties' negotiations. Finally, the Final Offer also sought an open shop (Article 2), proposed no wage increase for employees (Article 22), and provided no health insurance, life insurance, paid holidays or time off (Articles 24-26). These proposals are indicative of an employer who wanted its employees' union to cede all representational function.

As outlined by the ALJ, “The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned.” This “is a standard remedy where an employer’s unlawful conduct precludes appropriate bargaining with the union.” *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992); *Accurate Auditors*, 295 NLRB 1163 (1989).

As the record evidence has shown, Latino Express has continued its long and arduous path of unfair labor practices by refusing to bargain in good faith with Teamsters Local 777 for a first contract covering its drivers, unilaterally changing terms and conditions of employment, and by unlawfully withdrawing recognition from the Union. (ALJD 2) In finding that Respondent violated the Act, the ALJ properly held that Respondent’s regressive bargaining, assertion of unlawful proposals in its final offer, insistence on not bargaining over health care, unlawful unilateral implementation of the driver accountability act, and its support for the decertification petition violated Section 8(a)(5) of the Act. (ALJD 18-19) As shown above, Respondent engaged in a pattern of bad faith bargaining from June 2011 through March 2012. It is clear that during the course of the 10 months of negotiations that did not result in a first contract, Respondent’s conduct both away from and at the bargaining table evidenced that it was not negotiating in good faith. The General Counsel posits that the special *Mar-Jac* remedy is required in order to address the egregious and ongoing nature of Respondent’s conduct, and the ALJ erred when he failed to grant the accurate remedy.

CONCLUSION

The ALJ erred in finding that the record evidence showed that Respondent did not engage in bad faith bargaining from June 2011 through March 2012, and for failing to extend the certification year. Based upon the foregoing, Counsel for the General Counsel submits that the ALJ incorrectly applied the law in the instant case, the decision not to grant an extension of ten months⁴ to the certification should be overturned, and a finding be made that Respondent should be made to bargaining with the Union for 10 months. Accordingly, Counsel for the General Counsel requests that Respondent be ordered to post a broad cease and desist order and Notice to Employees remedying the stated violations of Section 8(a)(5) of the Act, read the Notice to Employees in English and Spanish, rescind all unilateral changes, rescind its April 24, 2012 withdrawal of recognition, recognize Teamsters Local 777 as the drivers' collective-bargaining representative, and resume bargaining on a first contract, for a period of 10 months.

DATED at Chicago, Illinois, this 23rd day of December, 2013.

/s/ Sylvia L. Taylor

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⁴ Because bargaining did not begin until June 2011, the 10 month extension represents the time remaining in the certification year when the bargaining began.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS EXCEPTIONS** was electronically filed with the Executive Secretary of the National Labor Relations Board on December 23, 2013, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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