

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWMAN LIVESTOCK-11, INC.

And

RICARDO ASCENCIO, an Individual

Case 32-CA-084178

And

EFRAIN ASECNCIO LOZA, an Individual

Case 32-CA-084180

And

JOSE MANUEL BRAMBILA, an Individual

Case 32-CA-084191

**CHARGING PARTIES', RICARDO ASCENCIO AND EFRAIN ASECNCIO LOZA,**  
**BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW**  
**JUDGE'S DECISION**

The National Labor Relations Board  
Office of the Executive Secretary  
109914<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

Submitted by:  
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Date: December 23, 2013

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Charging Parties Ricardo Ascencio and Efrain Asencio Loza ("Charging Party") submit this brief in support of its exceptions to the decision of Administrative Law Judge Gerald A. Wacknov (the "ALJ" or the "Judge") in the above-captioned matter.

**STATEMENT OF THE CASE**

Charting Party excepts findings of fact in the above-captioned matter dated November 26, 2013, and to his recommended order, including that the Board has no jurisdiction over this action, that no back pay or reinstatement is owed to the affected employees and dismissing the complaint in its entirety. Those findings, conclusions and recommended order are not supported by the record evidence or the law.

Specifically, Charging Party excepts to the ALJ's findings and conclusions that: 1) the records shows that Newman Livestock ("Respondent") was no longer in business after May 2012, 2) that the General Counsel failed to definitively show that the volume of business exceeded \$50,000.00 during the period Petaluma Livestock Auction Yard ("Petaluma Livestock") did business with the Respondent, 3) the omission of evidence from the record to establish jurisdiction under the indirect flow standard and 4) that back pay or reinstatement would not be due to the affected employees subsequent to their terminations. For the reasons set forth below, the ALJ's findings, conclusions and recommended order should be vacated as to these exceptions.

### **STATEMENT OF FACTS<sup>1</sup>**

#### **1. Jurisdiction in the Case**

Respondent performed services of slaughtering livestock in Newman, California. (G.C. Exh. 1(g), Sec. 2(a)).<sup>2</sup> This company was in business from October 2011 through approximately May 2013. (TR. 20:19-24; 21:1-6; 25:5-17). During the period of mid-2011 through mid-2012 ("relevant time period"), the period encompassing the unfair labor practice, Respondent sold slaughtering services in excess of \$50,000.00 to purchasers in the State of California. One of the companies serviced by Respondent was Petaluma Livestock Auction Yard ("Petaluma

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<sup>1</sup> References to the record are as follows: TR. for transcript; G.C. Exh. for General Counsel Exhibits; R. Exh. for Respondent's Exhibits; ALJ D/O for Administrative Law Judge's Decision and Order.

<sup>2</sup> This allegation must be deemed to be admitted and found to be true. The Board's Rules and Regulations section 102.20 states that "any allegation in the complaint not specifically denied or explained in an answer field ... shall be deemed to be admitted to be true and shall be so found to be true by the Board." Respondent did not deny or explain this allegation in its Answer nor in its briefing.

Livestock”), which also leased the Newman location to Respondent.<sup>3</sup> (TR. 20:19-23; 21:22-25; 22:1-2). From October 2011 through December 2011, Respondent was performing weekly services that amounted to between \$5,000.00 to \$10,000.00 for Petaluma Livestock. (TR. 22:3-14; R. Exh. 3, p.22-24, attached to 10/23/13 letter).<sup>4</sup> Petaluma Livestock sold and purchased livestock to purchasers outside the state of California, including Oregon. (TR. 19:16-25; 20:1-4). In the state of Oregon, Petaluma Livestock did business with Bartell’s Meat during the relevant time period which amounted to approximately \$100,000.00 to \$150,000.00 of business. (TR. 20:5-13,17-18). Another company that received services from Respondent during the relevant time period was Southwest Hides, amounting to services of over \$20,000.00. (R. Exh. 2, p.1-2, attached to 10/23/13 letter; G.C. Exh. 1(i), ¶2 and attachment 2, p.1-2). Southwest Hides is a multi-state enterprise engaged in the processing and non-retail sale of animal hides. (G.C. Exh. 1(g), Sec. 2(c)).<sup>5</sup> Respondent provided slaughterhouse services to other companies as well during the relevant time period. (R. Exh.3, p.22-24, attached to 10/23/13 letter). In total, Respondent exceeded \$50,000.00 of services for indirect outflow. The ALJ found that the General Counsel failed to definitively show that the volume of business exceeded \$50,000.00 between Petaluma Livestock and Respondent, and did not incorporate evidence from the record to achieve jurisdiction.

**2. Employees were terminated for Participation in protected concerted activity**

Respondent employed a work crew of approximately fifteen nonsupervisory employees to perform the various tasks of processing and butchering livestock. (TR. 25:12-14, 22-54; 26:1;

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<sup>3</sup> Respondent continued to lease and operate the slaughterhouse until May 2013, even though it did not conduct services for Petaluma Livestock during that entire period. (TR. 25:1-25; 26:1-5)

<sup>4</sup>ALJ included in the record the letters submitted by Respondent dated 10/23/13 and 11/12/13. (ALJ D/O p.2, 1.1-3)

<sup>5</sup> See footnote 2.

34:2-9; 44:2-11; 55:8-16). The tasks performed included corralling livestock, slaughtering, removing skin and deboning. (TR. 25:9-17; 28:25; 29:1-4; 40:4-8; 50:20-22). Employees worked between nine to twelve hours daily. (G.C. Exh. 5; TR. 29:5-8; 40:16-17; 50:23-25). Their start times were fixed, but there was no set end time. (TR. 40:14-15; 52:22-23). The employees performed daily slaughtering services until the work was done and would get instructions from their supervisor Linda Kanawyer as to what activities to perform. (TR. 29:22-25; 30:1-3; 41:3-5, 13-17; 51:11-13; 52:14-18). Initially the employees were receiving payment of wages for the work they performed in a timely manner. (TR. 42:4-5). However, in or about November of 2011, Respondent was no longer issuing checks and/or was issuing checks without sufficient funds. (TR. 42:15-17; 53:2-8). Respondent assured the employees that they would soon be paid their wages. (TR. 53:18-21). When this problem continued through December 2011, the employees were no longer willing to wait indefinitely for payment of wages to be issued. The employees collectively discussed amongst themselves the fact that they were not get paid their wages. (TR. 30:17-22; 31:2-12; 42:11-25; 53:9-11). In early January 2012, the employees collectively decided to demand payment of wages before continuing to perform services at the slaughterhouse. (TR. 43:4-7; 45:1-5; 54:8-11; 55:17-19). On behalf of and in the presence of the employees, co-worker Victor Vera told Linda Kanawyer that the employees were not going to perform work until the wages they had been promised were paid. (TR. 32:5-14; 33:3-12). Most of the employees were mono-lingual Spanish speakers, but all understood the word “fired” when Linda Kanawyer addressed both individual employees and the group of employees to terminate their employment at that moment. (TR. 34:10-16; 45:6-8; 54:12-19). The ALJ concluded that “the employees were discharged for concertedly refusing to work until they were paid the wages due them,” and that “such conduct is violative of the Act,” (“Act”

referring to National Labor Relations Act). (ALJ D/O p.3, l. 31-32). However, the ALJ went on to add that backpay is not owing as the employees decided not to return to work until they received payment of their wages, which has not occurred.

### **QUESTIONS PRESENTED**

1. Was Respondent no longer in business after May 2012? (*See* Exception 1.)
2. Did the General Counsel fail to definitively show that the volume of business exceeded \$50,000.00 during the time which Petaluma Livestock did business with Respondent? (*See* Exception 2.)
3. Did the ALJ omit evidence from the record that, if applied, would achieve jurisdiction under its indirect outflow standard? (*See* Exception 3.)
4. Is Respondent not liable for backpay to the employees who were unlawfully terminated? (*See* Exception 4.)

### **ARGUMENT**

#### **I. The ALJ Incorrectly Found that the Respondent was No Longer in Business After May 2012**

The ALJ's decision states that "the record shows that the Respondent was no longer in business after May, 2012." (ALJ D/O p. 2, l. 14-15). However, the president of Petaluma Livestock, Manuel Brazil, testified at the hearing that Petaluma Livestock was leasing the slaughtering facility in Newman to Respondent. (TR. 20:19-23). He testified that he made weekly visits to Respondent's business until May of 2013 and observed employees performing the slaughtering of livestock. (TR. 25:5-17). There is no evidence in the record that contradicts

Mr. Brazil's testimony. Although Respondent alleges that the work was not continuous from 10/11/2011 thru 05/30/2013, Respondent admits that "Newman Livestock 11 Inc. is officially out of business and has been since 5/3/2013." (Respondent 11/12/13 Letter, p. 1, ¶1). Therefore, a review of the record establishes that Respondent's company was operating beyond May 2012, and the decision should be corrected to reflect the accurate date of when Respondent's business was no longer operating.

## **II. The ALJ Inappropriately Dismissed the Claim for Lack of Jurisdiction**

Pursuant to Section 2(6) of the Act, the Board's jurisdiction extends to all enterprises whose operations affect interstate commerce. 29 USC § 152(6). The Board's jurisdictional standard applicable to non-retail enterprises is that jurisdiction is asserted over all non-retail enterprises which have an outflow or inflow across State lines of at least \$50,000.00, whether such outflow or inflow be regarded as direct or indirect. *In re Towley Sweeping Service, Inc.*, 339 NLRB 301 (2004). Indirect outflow refers to sales of good or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard. Where the employer performs services on goods owned by another, it is the value of the employer's sales and services which is considered in determining whether to assert jurisdiction. *Devco Diamond Rings*, 146 NLRB 556 (1964).

### **A. General Counsel's Witness Established Jurisdiction in this Proceeding**

As their first witness, General Counsel called to the stand the president of Petaluma Livestock, Manuel Brazil. During his testimony, Mr. Brazil was asked about the amount of business his company conducted with Respondent during the relevant time period. Mr. Brazil provided estimates of the amount of business his company had with Respondent. (TR. 22:3-14).

This testimony was appropriate and admissible as reliable evidence.<sup>6</sup> As president of his business, Mr. Brazil has firsthand knowledge of the amount of business his company performs. A review of the record establishes that Mr. Brazil's testimony is accurate as to his estimate of \$5,000 to \$10,000 of weekly business between Petaluma Livestock and Respondent. Respondent's business records support these estimates. As an exhibit to its letter submitted 10/23/13, Respondent attached Exhibit 3, p. 22-25, showing the value of services received by Petaluma Livestock. Services to Petaluma Livestock for October 2011 amounted to \$16,210.00; services to Petaluma Livestock for November 2011 amounted to \$44,160.00; services to Petaluma Livestock for December 2011 amounted to \$41,730.00. This amounts to \$102,100 in these three months. Looking at these figures on a weekly basis, from October 11 through the end of October, it averages to \$5,403; for the month of November, this averages out to \$11,040; and for December (the figure itself suggests that services were performed for the entire month of December as opposed to only December 1st)<sup>7</sup> averages to \$10,430. Mr. Brazil's testimony was credible as his estimates of services between \$5,000 to \$10,000 was an accurate assessment of the business between Petaluma Livestock and Respondent. The relevant evidence in the record is sufficient to show that the ALJ's resolution that Mr. Brazil's testimony was unreliable or speculative is incorrect.

Moreover, Petaluma Livestock is a California based enterprise that engages in the processing and sale of livestock to corporations, LLCs and different companies. (TR. 19:16-25). It is not disputed in the record that Petaluma Livestock sold goods and services to customers

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<sup>6</sup> Mr. Brazil is not a party to this action and has no personal interest in the resolution of this particular case since he is not liable for the termination of these employees and is not subject to any decision rendered from the Board. There is no evidence in the record that would render his testimony invalid or speculative.

<sup>7</sup> The ALJ speculated that services between Petaluma Livestock and Respondent extended to only December 1. (ALJ D/O p.2, l.39-41).

outside the State of California in excess of \$50,000.00 during the relevant time period. Mr. Brazil gave a specific example of such business. In his testimony, he stated that Petaluma Livestock engaged in business with Bartell's Meat in Oregon that amounted to business between \$100,00.00 to \$150,000.00. (TR. 20:11-18). The lack of production of records from Mr. Brazil is not an issue given that his testimony is founded in his direct dealings with other enterprises. No evidence was put forth in the record to question Mr. Brazil's knowledge of his companies' services and sales. As such, General Counsel's witness' testimony does establish that Respondent meets the Board's non-retail jurisdiction through indirect outflow.

**B. Jurisdiction is also established by combining Respondent's sales of services to separate enterprises**

There is no limitation that the amount of \$50,000.00 must be from sales or services to a single enterprise. Here, aside from Petaluma Livestock, General Counsel identified Southwest Hides as a separate enterprise for which Respondent provided slaughtering services. The consolidated complaint alleged, and Respondent did not contest, that Southwest Hides is a multi-state enterprise engaged in the processing and non-retail sale of animal hides, with animal hide processing plants in Washington, Idaho, Texas, Nebraska, Alabama and California.<sup>8</sup> Respondent made an admission that it conducted \$20,793.00 worth of sales with Southwest Hides. (G.C. Exh. 1(i), ¶2, attachment 2, p.1-2; R. Exh. 2, p.1, ¶3 of 10/23/13 letter). If the Board accepts the ALJ's assessment that Petaluma Livestock conducted business for less than a 7 week period at \$5,000 each week, amounting to roughly \$30,000 in sales, then collectively Respondent's business with these two enterprises exceeded the \$50,000 threshold to establish jurisdiction. The ALJ mistakenly omitted evidence from the record of the business dealings between Southwest

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<sup>8</sup> See footnote 2.

Hides and Respondent, that when taken collectively with the services provided to Petaluma Livestock, establish jurisdiction over Respondent.

**III. The ALJ's determination that back pay is not owed to the unlawfully terminated employees and the recommendation for dismissal of the complaint in its entirety is unfounded by law**

The ALJ correctly found that Respondent violated the Act by discharging employees for concertedly refusing to work until they were paid the wages due to them,<sup>9</sup> equivalent to a work stoppage or an economic strike. ALJ D/O p. 3, l. 31-34. However, there is reversible error in the ALJ's recommendation that the complaint be dismissed in its entirety because "backpay would not be due any employees subsequent to their termination, as they had decided not to return to work until they were paid what was owed them, and there is no showing that they were paid what was owed them or requested reinstatement and were nevertheless refused reinstatement." ALJ D/O p.3, l. 36-39. In *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), the Board held that "a discharged striker is entitled to backpay from the date of discharge until the date he or she is offered reinstatement. To the extent that this holding represents a departure from prior policy, that policy is hereby overruled." *See also Scioto Coca-Cola Bottling Company*, 251 NLRB 766, n.2 (1980), applying *Abilities and Goodwill* that "an unlawfully discharged striker is an unlawfully discharged employee and entitled to be treated as such." In this instance, the record supports the ALJ's determination that termination of these employees was in violation of the Act. However, the discharged employees had no duty to request reinstatement in order to be remedied backpay and "to require a discharged striker to request reinstatement would be no less futile than it would be for a discharged employee." *Id.* at \*\*5. The record clearly establishes

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<sup>9</sup> See Statement of Facts, Section 2 above.

that the employees were terminated for having reused to work, which converted their status from an economic striker to an unlawfully discharged striker. As such, an award of backpay would not be precluded in this instance as the discharged employees had no duty to request reinstatement.<sup>10</sup> The record is absent from a showing by Respondent that there was an offer of reinstatement after having terminated the employees. If the Respondent wishes to raise any defenses, although none appear to exist, Respondent can do so at the compliance proceedings. Therefore, the ALJ's recommendation that the complaint be dismissed in its entirety should be vacated since, as established above, the discharged employees are entitled to backpay.

### **CONCLUSION**

For all of the foregoing reasons, the Charging Party respectfully requests that the Board only affirm the ALJ finding that Respondent violated the Act, and grants its exceptions to modify the order to adopt the exceptions presented herein.

Respectfully submitted,

By: /s/ Esmeralda Zendejas  
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Date: December 23, 2013

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<sup>10</sup> When asked if he attempted to return to the company to work for Respondent after being fired, witness Victor Vera made it clear that he did not "Because of the situation in which we were fired, the way we were fired and because we were owed money. I mean how could I go back?" (TR. 38:18-24).

## CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, I caused copies of the **CHARGING PARTIES'**, **RICARDO ASCENCIO AND EFRAIN ASECIO LOZA IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** to be served upon the following by the NLRB's e-filing system:

National Labor Relations Board  
1099 14<sup>th</sup> Street, N. W.  
Washington, DC 20570-0001

I further certify that on December 23, 2013, I emailed (and faxed where indicated) the foregoing Brief in Support of Its Exceptions To the Administrative Law Judge's Recommended Decision and Order to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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