

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

LATINO EXPRESS, INC.

Respondent,

Case No. 13-CA-077678

13-CA-078126

and

13-CA-078127

INT'L BROTHERHOOD OF TEAMSTERS
LOCAL 777,

13-CA-079765

13-CA-082141

Charging Party,

and

RAMIRO LOPEZ, et al.,

Intervenors.

**REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO THE INTERVENORS' EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Pursuant to NLRB Rules and Regulations 102.46(h), the Intervenors file the following reply:

I. The Intervenors Sought Out and Retained Independent Counsel.

Counsel for the General Counsel ("CGC") makes the following inaccurate assertion on the first page of her Answering Brief to the Intervenors' Exceptions ("CGC Answering Brief"):

[T]here is no evidence in the record to establish that [Matthew Muggeridge, the Intervenors' Counsel, and also the undersigned attorney] in fact represents any employees outside of the Petitioner in the decertification petition and two additional employees.

CGC Answering Brief, p. 1, n. 1.

As a preliminary matter, the Intervenors strongly object to the CGC's inaccurate and prejudicial assertion, which should be discounted. The Intervenors freely retained Muggeridge as legal counsel for their attempt to intervene in the unfair labor practice proceedings which had blocked the decertification petition. The hearing transcript makes repeated and unequivocal reference to the fact that the Intervenors were represented by counsel. To cite but one example:

My name is Matt Muggeridge and I represent Ramero [sic] Lopez and his co-workers... For the record, I'd like to state that in the Motion to Intervene, footnote one, I would say [sic] that all the intervenors are represented by the undersigned attorney, that's me.

Tr. 43:8-13.

That the Intervenors had their own legal representative was assumed by the ALJ and CGC at the time of the hearing. At the hearing, the Union's representative, James Glimco, expressly raised a question about the legitimacy of the Intervenors' legal representative. The ALJ clearly accepted Muggeridge's representation concerning his status as the Intervenors legal representative.

Mr. Glimco: I had a question about he said he represents 37 people. How do you know that...?

ALJ Goldman: Well, we can get to that if we need to, but let's assume he does. He says he does. What if he does?

Tr. 51:6-11.

In discussing the sequestration of the Intervenors' attorney since he was a potential witness, ALJ Goldman stated: "You're Counsel for 37 at this point employees, I mean, you represented that. I accept that." Tr. 73: 1-3.

In the face of ample evidence to the contrary, the CGC attempted to raise a doubt as to whether attorney Muggeridge actually represented the Intervenors. Throughout her brief, she used quotation marks around the term *clients* when referring to the Intervenors. If Muggeridge did not actually represent the Intervenors, then the Motion to Intervene would amount to a species of fraud on the court. The truth is that a clear majority of Latino Express's workforce sought to Intervene in the case and retained Muggeridge to help them. Their names were attached to the Motion to Intervene. More employees joined the Motion when it was appealed to the Board after being first denied by ALJ Goldman, and their names were attached to that filing, as well. *See*, Request for Special Permission to Appeal Denial Of Petition to Revoke Subpoena and Denial of Intervenors Motion to Intervene, p. 1, n. 1.

II. The Board Should Grant The Motion To Intervene, But Is Not Compelled To Grant *Every* Motion to Intervene.

The CGC mischaracterizes the Intervenors' arguments in favor of granting

intervention, when she states: “[The Intervenors] failed to provide any case authority that wasn’t previously presented for the position that the ALJ and the Board **must** grant all Motions to intervene, a position that the Board has previously considered and rejected.” (Emphasis in original) CGC Answering Brief , p. 3. The Intervenors did not make that unsustainable argument.

Further, the CGC mischaracterized the Intervenors’ argument in favor of Intervention, and Board law on intervention, by asserting that Intervention is only granted when “the intended intervenors had information that would aid the ALJ in making a final determination regarding the merits of the case.” *Id.* In various instances, intervention has been permitted when the Intervenors had, as here, an interest to protect in the case, and not just relevant testimony to provide. *See, e.g., IAM, District Lodge 751 and The Boeing Company*, Case No. 19-CA-32431 (where remedy would have included termination of their work, the Board granted employees partial intervention status, holding that the Intervenors had articulated a sufficient interest in the case, namely, the right to choose to be non-union and the preservation of their jobs.) Testimony concerning the impact of the NLRB’s imposition of a bargaining order on the Intervenors would have been among other relevant testimony that could have been elicited in favor of the Intervenors’ interests here. Following the ALJ, the CGC’s brief wrongly argued that the only testimony the Intervenors had to offer concerned their feelings about the Union. This was a selective reading of the Motion to Intervene, itself. Such testimony could be irrelevant to the

litigation of some allegations. But the Intervenors' need for independent party status would have guaranteed that their interests were protected as needed throughout the hearing and beyond.

III. The Intervenors Were Denied Adequate Representation At the Hearing.

In repeated instances, the CGC contends that the Intervenors were "fully represented" at the hearing. To the contrary, the Intervenors' counsel was sequestered since he was a potential witness. The attorney was not allowed to be present in the courtroom except when his clients were testifying. He was not allowed to cross-examine any witnesses with a view to rebutting testimony unfavorable to the Intervenors' interests. He was not allowed to ask any questions of his own clients, with a view to clarifying or solidifying their testimony. He was not allowed to review the full transcript of the hearing. He was not allowed to submit a post-hearing brief.

The CGC incorrectly asserted that "If Muggeridge wanted to clarify the contradictions in their testimony, he was free to do so during his examination of those witnesses at trial." CGC Answering Brief, p. 6. This inaccurate assertion can only have been made by someone unfamiliar with the ALJ's rulings with regard to the Intervenors' counsel's participation at the hearing. In denying the Motion to Intervene, the ALJ ruled that the Intervenors were not parties to the case. Further, having upheld the GC's subpoena, the ALJ also ordered their attorney sequestered as a potential witness. The ALJ modified this order slightly by allowing the Intervenors' counsel to be present during their

testimony. Even then, the ALJ limited that participation to raising evidentiary objections during his clients' testimony. Tr. 215: 6-12. In short, the Intervenors' attorney was not free to cross-examine any witnesses at trial.

In her brief the CGC argued that "if Muggeridge truly wanted to protect the interest of the people he purports to represent, he could have merely advised them to seek legal representation from someone that was not required to give testimony at the unfair labor practice hearing." CGC Answering Brief, p. 6-7. The Intervenors could not reasonably have acquired other suitable legal counsel. Their attorney is employed by the National Right To Work Legal Defense and Education Foundation, a non-profit, legal aid organization with limited resources for providing free legal representation to employees in defense of their civil and constitutional rights. Even if the Intervenors could have identified alternative, suitable counsel, it is virtually impossible that they could have paid for it.

Further, the hearing took place on the same day the ALJ denied the Motion to Intervene and imposed the sequestration order. Retaining alternate counsel on such short notice would have been impossible. Retaining counsel after the fact would have been too late. After the hearing, the damage of not having legal representation during the hearing was already done. Under the circumstances of this case, it is difficult to credit the good faith of the CGC's suggestion that the employees could simply have found another lawyer.

Lastly, the CGC does not admit that the Intervenors' interests might be left unprotected by the unfair labor practice proceeding. In this case, the Respondent had its own legal counsel. The Intervenors' were powerless to control how their Employer litigated the case. The CGC argued that "there is no necessity that intervenor status be granted to ensure that Respondent retained competent counsel or adequately protect [sic] its interest at trial." CGC Answering Brief, p. 6. That argument misses the point: the Intervenors sought to protect *their own interests* at trial but were denied an opportunity to do so, both by the denial of their Motion to Intervene and by the limitations placed on their attorney. To the extent the Board's processes freeze employees out of litigation which will affect their rights, those processes are unfair. To the extent the Board's processes make the vindication of the employees' rights conditional on the skill and litigation strategy of their employer, those processes are a denial of due process. It makes no sense to assume that an alleged "bad actor" employer will protect the interests of employees.

IV. The Dismissal of the NLRB's Subpoena of Intervenors' Counsel Does Not Moot the Issue of the Subpoena's Validity.

Contrary to the CGC's assertion in her brief, the GC's voluntary dismissal of its subpoena enforcement application does render the issue moot. *See*, CGC Answering Brief, p. 8, n. 1.

The NLRB's subpoena of the Intervenors' counsel led to his sequestration, which

denied the Intervenors' their right to adequate assistance of counsel at the hearing on October 9, 2012, as argued above and elsewhere. The subpoena enforcement action was not abandoned by the NLRB until January 23, 2013, long after the irreparable damage to the Intervenors' rights to protect their interests at trial.

Further, contrary to the CGC's contention, the Intervenors did not make the claim in their exceptions or elsewhere that "the General Counsel only issued the subpoena in an effort to impair the Intervenors' representation at trial." CGC Answering Brief, p. 8. Rather, the Intervenors argued that the subpoena was unnecessary and inappropriate: unnecessary because there were other ways to obtain the testimony sought, and inappropriate as contrary to public policy. *See*, Intervenors' Brief, p. 15. The Intervenors argued that the subpoena enforcement had as a *consequence* –not a *motive*– the removal or at least severe limiting in effectiveness of the Intervenors' legal counsel at the hearing. This was no "specious implication" or "unfounded contention" to use the CGC's inflammatory descriptions of the argument. That is what happened.

V. Conclusion.

For the foregoing reasons, and in light of the entire record, the Intervenors urge the Board to overturn the ALJ's decisions and rulings here excepted to. The Intervenors urge the Board to grant their intervention and order a new hearing. In the alternative, in light of changed circumstances in the workplace, including an overwhelming majority opposition to Union representation, and in light of judicial economy, the Intervenors urge the Board

to revoke the ALJ's bargaining order remedy and order an immediate decertification election to definitively resolve the question of representation.

Dated this 6th day of January, 2014.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE INTERVENORS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was electronically filed with the NLRB Executive Secretary, via the NLRB website, this 6th day of January, 2014. A copy of the foregoing was also electronically served upon:

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