

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**REGION 20**

**FAIRFIELD IMPORTS, LLC d/b/a  
FAIRFIELD TOYOTA, MOMENTUM  
AUTOGROUP, and MOMENTUM  
TOYOTA OF FAIRFIELD**

Cases            20-CA-035259  
                      20-CA-070368  
                      20-CA-088332  
                      20-CA-106248

**and**

**AUTOMOTIVE MACHINISTS LOCAL  
LODGE NO. 1173, DISTRICT LODGE  
190, INTERNATIONAL ASSOCIATION  
OF MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO**

**THE GENERAL COUNSEL'S CROSS-EXCEPTIONS  
TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

Submitted by  
Matthew C. Peterson  
Counsel for the General Counsel  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, California 94103-1735

TABLE OF CONTENTS

1

2 I. INTRODUCTION ..... 2

3 II. EXCEPTIONS AND ARGUMENT..... 2

4 A. Exception No. 1: ..... 2

5 B. Exception No. 2: ..... 4

6 C. Exception No. 3: ..... 4

7 D. Exception No. 4: ..... 6

8 E. Exception No. 5: .....**Error! Bookmark not defined.**

9 F. Exception No. 6: ..... 7

10 III. CONCLUSION..... 7

11

TABLE OF AUTHORITIES

FEDERAL STATUTES AND REGULATIONS

12

13

14

15 1. National Labor Relations Board Rules and Regulations and Statements of Procedure,  
Section 102.46 ----- 2

16

CASES

17

18 1. *Brooklyn Hospital Center*, 344 NLRB 404 (2005) ----- 6

19 2. *Goya Foods of Florida & Unite Here, CLC*, 356 NLRB No. 184,  
Slip Op. at 1 (June 22, 2011) ----- 6

20 3. *Latino Express, Inc.*, 359 NLRB No. 44 (2012) ----- 6, 7

21 4. *May Department Stores v. NLRB*, 326 U.S. 376, 388 (1945)----- 3, 5

22 5. *MCPc Inc.*, 360 NLRB No. 39, Slip Op. at 1 n.3, 4-5 (February 6,  
2014) ----- 3, 5

23 6. *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281,  
\_\_\_ S. Ct. \_\_\_, 2014 WL 2882090 (June 26, 2014)----- 7

24 7. *St. Joseph’s Hospital*, 337 NLRB 94, 94 n. 1 and 96 (2001) ----- 3

25 8. *Supervalu Holdings, Inc.*, 347 NLRB 425, 425 n. 5, 426, 437-38  
26 (2006) ----- 5

27

28

1 **I. INTRODUCTION**

2 Pursuant to Section 102.46 of the National Labor Relations Board’s (the Board) Rules  
3 and Regulations (Rules), Counsel for the General Counsel hereby files limited cross-exceptions  
4 to the June 3, 2014, Decision of Administrative Law Judge John J. McCarrick (ALJD), not to  
5 any of his findings or conclusions, but to certain provisions of the ALJ’s recommended Order  
6 and the corresponding Notice to Employees. These cross-exceptions are necessary to ensure that  
7 the remedy is effective and in compliance with standard Board orders.  
8

9 **II. EXCEPTIONS AND ARGUMENT**

10 **A. Exception No. 1:**

11  
12 The General Counsel excepts to the ALJ’s failure to enjoin Respondent from terminating  
13 employees because of their Union activities in the cease and desist language in Section 1(f) of  
14 the Order and in the corresponding Notice to Employees, incorrectly limiting those provisions  
15 specifically to employee Frank Bartolomucci. ALJD Slip. Op. 35:12-13, Appendix p. 2.  
16

17 Based on the ALJ’s conclusion that Respondent “committed unfair labor practices in  
18 violation of Section 8(a)(3) and (1) of the Act by terminating Frank Bartolomucci for engaging  
19 in union and other protected activities,” [ALJD 30:32-34], it would be appropriate for the Board  
20 to impose its standard remedial order by changing the referenced language in Section 1(f) of the  
21 recommended Order to read “Firing our employees for engaging in union activity or other  
22 protected-concerted activity” and by changing the corresponding language in the Notice to  
23 Employees to read “WE WILL NOT fire our employees for engaging in union or other  
24 protected-concerted activity.”  
25

26 Such an order enjoins Respondent from terminating not just discriminatee Frank  
27 Bartolomucci for engaging in union or protected-concerted activities, but any of its employees  
28

1 for engaging in such activities. *See, e.g., MCPc, Inc.*, 360 NLRB No. 39, Slip Op. at 1 n.3, 4-5  
2 (February 6, 2014)(modifying ALJ’s Order and Notice to conform to Board’s standard remedial  
3 language and substitute Notice to Employees to conform to modified order; cease and desist  
4 provisions in modified Order and Notice enjoins respondent from discharging or discriminating  
5 against “employees” and “any of you,” respectively, for engaging in protected-concerted  
6 activities, while specifying the name of the discriminatee in the affirmative provisions); *St.*  
7 *Joseph’s Hospital*, 337 NLRB 94, 94 n. 1 and 96 (2001)(modified order and notice use general  
8 term “employees” in cease and desist provisions enjoining issuing employees warnings because  
9 they engage in union activities, while specifying the name of discriminatee in affirmative  
10 provisions).  
11

12           Imposing the standard Order and Notice language will ensure that any similar misconduct  
13 by Respondent would carry with it the potential for contempt proceedings, the possibility of  
14 which is an important deterrent of future violations. *See, e.g. May Department Stores v. NLRB*,  
15 326 U.S. 376, 388 (1945) (observing that the possibility of contempt sanctions “make[s] material  
16 the difference between enjoined and non-enjoined employer activities”).  
17

18           By phrasing the referenced language in the Order and Notice to Employees in such  
19 specific terms, the ALJ has potentially limited the proscriptive effect of the order, which might  
20 be read to reach only employee Frank Bartolomucci. Modifying the ALJ’s recommended Order  
21 and Notice to include the standard remedial language used by the Board in discriminatory  
22 termination cases like this one will ensure that the Board’s decision has the proper remedial  
23 effect.  
24  
25  
26  
27  
28

1           **B.     Exception No. 2:**

2           For the same reasons articulated in Exception No. 1, the General Counsel excepts to the  
3 ALJ narrowly limiting the cease-and-desist provisions of Section 1(h)(i), (ii), (iii), and (viii) of  
4 the ALJ’s recommended Order and corresponding Notice language regarding the unilateral  
5 change and information request violations to Frank Bartolomucci, rather than to employees  
6 broadly.<sup>1</sup> ALJD 35:25-46; Appendix p. 3.  
7

8           **C.     Exception No. 3:**

9           The General Counsel excepts to the ALJ’s use of the phrase “[a]t the request of the  
10 Union” in the affirmative provisions in Section 2 (a) through (d) of the Order and the  
11 corresponding affirmative language in the Notice to Employees enjoining Respondent from  
12 rescinding or revising certain rules that he found unlawful under Section 8(a)(1) of the Act.  
13 ALJD Slip. Op. 36:1 - 37:2; Appendix pp. 3-4.  
14

15           Based on the ALJ’s conclusion that Respondent “committed unfair labor practices in  
16 violation of Section 8(a)(1) of the Act” by maintaining and enforcing certain work rules and  
17 policies (“Outside Inquiries Concerning Employees,” “Publicity,” “At-Will Arbitration  
18 Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement,”  
19 and “binding arbitration agreement,” [ALJD 29:14 - 30:29], it would be appropriate for the  
20 Board to impose its standard remedial order by removing the phrase “At the request of the  
21 Union” from the referenced sections of the Order and Notice to Employees. The ALJ found  
22 these rules to be unlawful as written, independent of any obligation that Respondent had under  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Section 1(h)(viii) of the recommended Order should also include the phrase “requested” to make clear that  
28 Respondent’s obligation to provide copies of witness statements pertaining to employee terminations is only triggered  
upon request.

1 Section 8(a)(5) of the Act to notify or bargain with the Union before maintaining or enforcing the  
2 rules. *See Id.* and ALJD 3:41- 9:13.<sup>2</sup>

3 The Board’s order should enjoin Respondent from maintaining and enforcing these rules  
4 and policies found facially unlawful by the ALJ, regardless of whether the Union requests that  
5 they be rescinded. *See, e.g., MCPc, Inc., supra* at pp. 1 n.3, 4-5 (February 6, 2014)(modified  
6 Order and Notice provisions pertaining to the respondent’s maintenance of an overbroad  
7 confidentiality rule makes no mention of “upon union request” or similar language); *Supervalu*  
8 *Holdings, Inc.*, 347 NLRB 425, 425 n. 5, 426, 437-38 (2006)(modified Order and Notice does  
9 not limit rescinding unlawful rules to “upon the union’s request”).  
10

11 Imposing the standard Order and Notice language will ensure that any similar misconduct  
12 by Respondent would carry with it the potential for contempt proceedings, the possibility of  
13 which is an important deterrent of future violations. *See, e.g. May Department Stores, supra* at  
14 388.  
15

16 By phrasing the referenced language in the Order and Notice to Employees in such  
17 specific terms, the ALJ has potentially limited the proscriptive effect of the order, which might  
18 be read to reach the unlawful rules and policies only if the Union requests that they be rescinded.  
19 Modifying the ALJ’s recommended Order and Notice to include the standard remedial language  
20 used by the Board in overbroad rules cases like this one will ensure that the Board’s decision has  
21 the proper remedial effect.  
22  
23  
24  
25

---

26 <sup>2</sup> The ALJ did correctly make the additional finding and conclusion that Respondent violated Section 8(a)(5) of the Act  
27 by modifying its At Will Arbitration Agreement without first notifying or bargaining with the Union, and appropriately  
28 used the “At the Request of the Union” in Sections 1(h)(vii) and 2(g)(vii) and the corresponding language in the Notice  
to Employees. ALJD 23:15 - 24:16; 31:5; 35:25 - 43; 37:40 - 38:12; Appendix p. 3.

1           **D.     Exception No. 4:**

2           The General Counsel excepts to the ALJ’s failure to include a make-whole remedy for  
3 any losses employees suffered as a result of his finding that Respondent unilaterally reduced  
4 employees’ wages by reducing labor time. ALJD 19:38 - 21:7; 31:3-4, 33:31-39:10.

5           Where a unilateral change results in a loss of earnings or other benefits, the Board  
6 routinely includes a make-whole remedy in its Order, and should do so here, and regardless of  
7 whether the Union requests that the change be rescinded. *See, e.g., Goya Foods of Florida &*  
8 *Unite Here, CLC*, 356 NLRB No. 184, Slip Op. at 1 (June 22, 2011)(modifying Order and Notice  
9 to “make whole the unit employees for all losses they suffered as a result of the Respondent's  
10 two unlawful changes in health insurance plans regardless of whether the Union requests  
11 rescission of the unlawful changes and restoration of the status quo plan. In issuing this remedy,  
12 we overrule *Brooklyn Hospital Center*, 344 NLRB 404 (2005), and similar cases to the extent  
13 they deny make-whole relief to employees in circumstances when a union does not demand  
14 rescission of the unlawful change and restoration of the status quo plan.”).

15           **E.     Exception No. 5:**

16           The General Counsel excepts to the ALJ’s failure to include in the recommended Order  
17 his conclusion that he “will order Respondent shall file a report with the Social Security  
18 Administration allocating any backpay awards to the appropriate calendar quarters pursuant to  
19 *Latino Express, Inc.*, 359 NLRB No. 44 (2012),<sup>3</sup> as set forth in his discussion under *Remedy*.  
20 ALJD 32:10 - 26; 33:31 - 39:10.

21  
22  
23  
24  
25  
26 <sup>3</sup> Although the Board’s decision in *Latino Express* may now lack precedential value as a result of the Supreme Court’s  
27 recent decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, \_\_\_ S. Ct. \_\_\_, 2014 WL  
28 2882090 (June 26, 2014), as it was decided, in part, by recess appointees Member Block and Member Griffin, the  
rationale is persuasive and should continue to be followed.



**AFFIDAVIT OF SERVICE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 15, 2014, I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

Counsel for Respondent:

PATRICK W. JORDAN  
[pwj@pjordanlaw.com](mailto:pwj@pjordanlaw.com)  
NANETTE JOSLYN  
[nj@pjordanlaw.com](mailto:nj@pjordanlaw.com)  
JORDAN LAW GROUP

Counsel for the Union:

DAVID A. ROSENFELD  
[drosenfeld@unioncounsel.net](mailto:drosenfeld@unioncounsel.net)  
CAREN P. CENSER  
[csenser@unioncounsel.net](mailto:csenser@unioncounsel.net)  
Weinberg, Roger & Rosenfeld

July 15, 2014

Matthew C. Peterson, Designated Agent of  
NLRB

Date

Name

/s/ Matthew C. Peterson

Signature