

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CON-WAY FREIGHT INC.

and

Case 21-CA-135683

JAIME ROMERO, an Individual

CON-WAY FREIGHT INC.

and

Case 21-CA-140545

JUAN PLACENCIA, an Individual

CON-WAY FREIGHT INC.

Employer

and

Case 21-RC-136546

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 63

Petitioner

**RESPONDENT/EMPLOYER'S REPLY BRIEF IN RESPONSE TO
GENERAL COUNSEL'S ANSWERING BRIEF**

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I. INTRODUCTION

Respondent Con-way Freight Inc.'s Brief in Support of its Exceptions to the Administrative Law Judge's Decision shows that, contrary to the ALJ's findings, the clear preponderance of the evidence establishes Con-way neither discriminated against former employees Jaime Romero and Juan Placencia because of their union activities in violation of Section 8(a)(3) of the Act, nor did Con-way violate Section 8(a)(1) of the Act. As discussed below, General Counsel's Answering Brief fails to rebut Con-way's arguments.

II. ARGUMENT

A. Romero's Suspension And Termination Were Lawfully Motivated

1. The Clear Preponderance of the Evidence Shows Romero Was Suspended Pending Further Investigation of a Vehicular Accident and Subsequently Terminated Because He Made False Statements about His Involvement in the Accident and Not Because of His Union Activities

Romero was suspended pending further investigation and subsequently terminated because he made false statements to management about his involvement in a vehicular accident. Romero's two falsehoods were that (1) the other vehicle (V2) hit him when, in truth, he hit V2, and (2) he failed to report or even subsequently acknowledge he was distracted while driving immediately before he made contact with V2.

In response to Con-way's Brief in Support of its Exceptions, General Counsel's Answering Brief merely rehashes the ALJ's findings. However, the DriveCam footage of the accident (Jt. Exh. 1) *irrefutably* shows that Romero, during the three second period immediately before the accident, took his eyes off the road, first, by looking out his driver's (left) side window and, next, by looking down at and manipulating his electronic device with his thumb, which led to him drifting across the right side his lane and hitting the left side of V2's trailer with his passenger (right) side mirror. The record evidence further demonstrates that although

management, after showing Romero the footage, gave him the opportunity to retract his misreporting of the accident and acknowledge he drifted into V2 because he was distracted while driving, he refused to do so. As such, the clear preponderance of the evidence establishes the ALJ erred in finding that Romero did not make false statements to management about his involvement in the accident and, therefore, that his termination was pretextual.

General Counsel's argument, that the accident was "minor" because it caused no permanent damage to Romero's truck or personal injury, is of no import. Romero's false statements and failure to take responsibility for the accident after being shown the DriveCam footage constituted serious misconduct and, under Con-way Policy 541, grounds for immediate termination. General Counsel's additional assertion (Ans. Brief, as corrected, pp. 9, 43), that Regional Safety Manager Don Anderson's lack of access to the sound graph on the DriveCam footage he viewed the day after the accident demonstrates pretext, is completely nonsensical. It is undisputed Anderson had access to the *entire* audio portion of the footage when he viewed it the day after the accident and heard *all* the sounds on Joint Exhibit 1 leading up to and during the accident, including the beeping of the lane departure warning system in Romero's truck. Neither Anderson nor Con-way has ever contended that he or anyone else in management had access to, or relied upon, the sound graph before Romero's employment was terminated.

General Counsel's Answering Brief further fails to address Con-way's arguments that (1) ULX Service Center management had been aware of Romero's prounion activity since 2009, more than 5 years before he was terminated, yet did not take any adverse employment action against him because of his union activities at any time during this period, and (2) there is no evidence of union animus by any of the Con-way management representatives who investigated the accident or made the decision to terminate Romero's employment.

B. The Clear Preponderance Of The Evidence Shows Con-way Was Not The Proximate Cause Of Placencia's Arrest

General Counsel's Answering Brief improperly applies a simplistic "but for" causation test instead of the proper "proximate cause" test in arguing that Con-way "caused" Placencia's arrest. General Counsel argues that, had Con-way not placed a call for service to the LAPD for an officer to be onsite when Placencia returned to ULX for Con-way to safely ask Placencia for his written statement regarding the knife brandishing incident and place him out of service, Placencia would not have been arrested that day. However, as discussed in Con-way's Supporting Brief (pp. 41-48), the record clearly shows the LAPD *independently* decided to arrest Placencia based upon the criminal threat report made by Camarena. As further discussed in Con-way's Supporting Brief (pp. 50-53, 55-58), Camarena did not have actual or apparent authority from Con-way to make this complaint to the LAPD, he decided on his own to make this complaint solely on his own behalf to protect himself and his family. That a Con-way manager drove Camarena to the police station because he was not feeling well and did not feel comfortable to drive himself does not make Camarena an apparent agent of Con-way. Additionally, as discussed in Con-way's Supporting Brief (pp. 55-58), Con-way did not request or intend for Placencia to be arrested, nor was his arrest that day reasonably foreseeable. As such, Con-way did not proximately cause, and cannot be held liable for, Placencia's arrest.

Of further note, General Counsel's Answering Brief fails to address Con-way's additional argument (Supporting Brief, pp. 53-55) that Camarena's criminal report to the LAPD was protected by the First Amendment to the U.S. Constitution and the *Noerr-Pennington* doctrine.

C. Placencia's Suspension And Termination Were Lawfully Motivated

1. The ALJ's Findings and Conclusion that Placencia Did Not Brandish a Knife at Camarena in a Threatening Manner Are Clearly Erroneous

In its Supporting Brief, Con-way explains in great detail how the clear preponderance of

the evidence shows the ALJ's findings and conclusion that Placencia did not brandish his knife at Camarena in a threatening manner are clearly erroneous. Instead of addressing Con-way's analysis of the evidence and arguments, General Counsel's Answering Brief merely recounts the testimony of the General Counsel's witnesses and then generally submits "that the weight of the evidence strongly supports [the ALJ's] conclusion." (Answering Brief, p. 48)

As discussed at length in Con-way's Supporting Brief (pp. 29-34, 62-64), there are numerous material, substantial, and fundamental contradictions in the testimony of Placencia, and his two former coworkers, John Cabrera and Sal Navarro. Among other things, their version of the events vary significantly as to their respective locations in the break room and dispatch office during the incident, what they each were doing at the time, in which hand was Placencia holding his knife, and which other employees were present in the break room during the incident.¹ These contradictions clearly underscore that Placencia, Cabrera, and Navarro completely fabricated their testimony. Moreover, contrary to the ALJ's finding, as members of the employee Union organizing committee, Cabrera and Navarro have a stake in the outcome of Placencia's case and the union election and were not "disinterested" witnesses. Also, two ULX employees, Gerardo Lopez and Victor Cruz, testified at the hearing that Cabrera told them Placencia had exposed his knife to Camarena *with the blade open, not closed*, and Navarro's testimony that the two LAPD police officers followed ULX Service Center Manager Paul Styers out of the facility to confront Placencia at the shopping center where Placencia had stopped is

¹ Indeed, even Counsel for the General Counsel cannot get it straight as to where Placencia and his coworkers were located during the incident. In her Answering Brief (p. 23), she incorrectly states that "Cabrera was right in front of Placencia during Placencia's interaction with Camarena," whereas the record testimony clearly shows Cabrera and Navarro placed Placencia in front of the left dispatch office window, where Camarena was standing and Roman was sitting, and Cabrera in front of the dispatch office window to Placencia's right. (Tr. 527, 691-692) Placencia contradicts them both by placing himself at the break room table located 10 to 15 feet away from and sideways to the dispatch counter and by placing Cabrera sitting on top of the table. (Tr. 220, 223, 225, 458-459, 464-465)

flatly contradicted by Officer Lagac himself and Styers, who both testified that the LAPD Officers left ULX before Styers. It is further telling that the ALJ discredited Placencia's testimony regarding his meeting with the two labor consultants (Camarena and Edward Echanique) on about September 23, 2014, in which he claimed they had threatened loss of wages and benefits and futility of collective bargaining, and the portion of his conversation with Camarena on the evening of October 6, 2014 in which Placencia again claimed that Camarena threatened futility of collective bargaining.

As further discussed in Con-way's Supporting Brief (*Id.*), the differences between Camarena's and Freight Operations Supervisor Steve Roman's testimony relied upon by the ALJ to discredit their version of the events were minor and immaterial, and they credibly reported and testified no one else was in the break room or the dispatch office besides Camarena, Roman, and Placencia at the time of the incident. Moreover, there is no dispute Placencia held a knife in his hand during the incident. For Camarena's statement, "That's not a knife, this is knife," and accompanying gesture mimicking the knife-brandishing scene in *Crocodile Dundee* to make any sense at all, the knife in Placencia's hand had to be open with the blade exposed just like in the scene from the movie.

General Counsel's Answering Brief further fails to address Con-way's arguments that (1) ULX Service Center management had been aware of Placencia's prounion activity since early 2013, more than a year before he was terminated, yet did not take any adverse employment action against him because of his union activities at any time during this period, and (2) there is no evidence of union animus by Roman or by any of the management representatives who investigated the knife-brandishing incident or made the decision to terminate Placencia's employment.

D. The ALJ Erred In Finding Con-way Violated Section 8(a)(1) Of The Act²

1. The Union Lanyard Issue Is *De Minimis*

As General Counsel's Answering Brief implicitly recognizes, there are a host of NLRB decisions holding that an isolated violation of the Act is *de minimis* and does not warrant a remedial order. *See, e.g., Bellinger Shipyards*, 227 NLRB 620 (1976); *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); *Square D Co.*, 204 NLRB 154 (1973); *Ladies Garment Workers (Twin-Kee Mfg. Co.)*, 130 NLRB 614 (1961); *see also NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993) (no violation for employer to briefly restrict two employees from wearing T-shirts with anti-drug testing message). Here, Placencia continued to wear his union lanyard on a daily basis without any management comment or interference after his discussions with Styers and Personnel Supervisor Rick Licon in mid-September 2014. Clearly, there was no deleterious effect whatsoever on his organizing activity or Section 7 rights.

2. The ALJ's Finding Camarena Implicitly Threatened Placencia with Physical Harm Is Clearly Erroneous

In its Supporting Brief (pp. 8-11), Con-way explained how the clear preponderance of the record evidence shows that Freight Operations Supervisor Armando Rosado was present for the *entire* portion of the "battered wives" discussion between Placencia and Camarena on October 6, 2014, in which the ALJ found that Camarena implicitly threatened Placencia with physical harm. General Counsel's Answering Brief does not dispute this point. Nor can it as Placencia's written statement of this discussion (G.C. Exh. 7) places Rosado at this *entire* portion of the discussion

² The allegation that ULX Service Center Manager Styers threatened Placencia with unspecified reprisals has been fully briefed. General Counsel's Answering Brief did not raise anything new that was not addressed in Con-way's Supporting Brief. Therefore, this allegation will not be discussed in this Reply Brief.

from beginning to end. Moreover, Placencia never testified that Rosado was absent for this portion of the discussion, and Camarena and Rosado both testified he was present. As such, the ALJ's finding that this portion of the discussion occurred "outside of Rosado's presence" (ALJD, 24:1), is clearly wrong. Because the ALJ found Rosado was a credible, impartial, and disinterested witness and fully credited his version of the events on October 6th, because Rosado corroborated Camarena's testimony that he never pantomimed using a gun or other violent behavior or referred to a gun during the "battered wives" part of his discussion with Placencia, because he characterized the entire conversation as professional throughout and ending amicably with both Placencia and Camarena shaking hands, and because it is undisputed Placencia never reported to Rosado or anyone else in management that Camarena allegedly threatened him, the ALJ's finding that Camarena implicitly threatened Placencia is clearly erroneous.

E. The ALJ Erred In Finding A Broad Remedial Order Appropriate

In its Supporting Brief (pp. 82-84), Con-way explained, with case authority, why the ALJ's recommended broad remedial order in this case is unwarranted. General Counsel's Answering Brief does not contest Con-way's position. Besides the cases cited in its Supporting Brief, Con-way also relies on the Board's recent decision in *Latino Express, Inc.*, 361 NLRB No. 137 (12/15/14). In that case, Members Hirozawa, Johnson, and Schiffer unanimously adopted the previous decision issued by Board Members Hayes, Griffin and Block in 358 NLRB No. 94 (7/31/12), that the respondent employer's unlawful conduct during the midst of a union organizing drive did not warrant a broad order. The employer, including its co-owner/vice president, engaged in numerous 8(a)(1) violations affecting all of the employer's drivers, including unlawfully: (1) promising improved benefits; (2) granting an across-the-board wage increase; (3) threatening employees with discharge; (4) threatening employees with facility

closure; (5) creating the impression of surveillance; (6) coercively interrogating employees; (7) soliciting employee grievances and promising to remedy them; and (8) prohibiting employees from discussing their terms and conditions of employment. The employer also unlawfully fired two employees who were known leading union adherents. Although the Acting General Counsel sought a broad cease-and-desist order, the Board found such an order was not warranted.

In contrast to *Latino Express*, only three independent 8(a)(1) allegations remain in this case, the ALJ having dismissed the other three 8(a)(1) allegations pled in the Complaint. Moreover, these allegations involve only one employee, Placencia, whereas in *Latino Express* the independent 8(a)(1) conduct affected all the drivers. Like *Latino Express*, there are only two alleged discriminatees. Like the Board's decision in *Latino Express* and the cases cited in Con-way's Supporting Brief, the suspension/discharge allegations involving Romero, the arrest/suspension/discharge allegations involving Placencia, and the three remaining 8(a)(1) allegations involving Placencia are neither widespread nor so egregious as to warrant a broad order. Nor has it been shown, or even contended, that Con-way has a proclivity to violate the Act. The ALJ's recommended broad remedial order should be rejected by the Board.

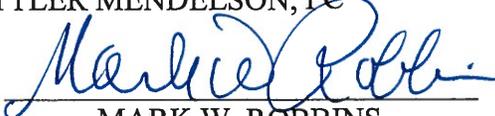
III. CONCLUSION

For the reasons stated in Con-way's Exceptions, Supporting Brief and this Reply Brief, the Consolidated Complaint should be dismissed in its entirety.

Dated: April 4, 2016

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April 2016, I e-filed the attached Respondent/Employer's Reply Brief in Response to General Counsel's Answering Brief with the Office of the Executive Secretary of the NLRB on the NLRB's E-Filing system, and served a copy of this Reply Brief by electronic mail upon the following:

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