

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

CAPITOL TRANSPORTATION, INC.,

and

ARCADIO VIÑAS, an Individual,

Cases 12-CA-180495

12-CA-181123

and

12-CA-187845

12-CA-188221

UNION DE TRONQUISTAS DE PUERTO

12-CA-199292

RICO, LOCAL 901, INTERNATIONAL

12-CA-201424

BROTHERHOOD OF TEAMSTERS,

12-CA-213526

and

ELIAS TORRES, and Individual

**COUNSEL FOR THE GENERAL COUNSEL'S MOTION FOR ERRATUM
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.35 and 102.45 of the Board's Rules and Regulations, Counsel for the General Counsel moves for the Honorable Administrative Law Judge (ALJ) Michael A. Rosas to issue an erratum to the Administrative Law Judge's decision (ALJD) issued on April 30, 2019 in the above-captioned cases. The ALJD apparently inadvertently omitted certain provisions from his recommended remedy, Board Order and Notice to Employees that are necessary to effectuate the policies of the Act, consistent with the ALJ's findings of fact, conclusions of law, recommended cease and desist orders and Notice to Employees.

It is well settled that an administrative law judge may issue an erratum after the decision issues. *Daniel Construction Co.*, 239 NLRB 1335, 1335 fn. 2 (1979), enfd. mem. 634 F.2d 621 (4th Cir. 1980), cert. denied 450 U.S. 918 (1981). The administrative law judge is authorized to issue post-decision errata to correct material typographical errors, but not to change matters of substance, such as findings on the merits. Board Rules and Regulations, Section 102.35 and

102.45; *Wilco Business Forms*, 280 NLRB 1336, 1336 fn. 2 (1986). In addition to typographical errors, an erratum may be utilized to correct obvious omissions, but only omissions explicitly encompassed by what was said in the decision.

General Counsel respectfully seeks the issuance of an erratum to correct the following apparent obvious omissions:

1. The ALJ erred by failing to include in the recommended remedy and Board Order requirements consistent with his findings of fact and conclusions of law, that Respondent make whole unit employees who were laid off after July 1, 2016, when subcontracted or temporary agency employees were assigned to work, or in violation of their seniority rights, for any loss of earnings and other benefits resulting from their layoffs, without prejudice to their seniority or any other right or privileges previously enjoyed, plus interest. Thus, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by “constantly laying off unit employees after July 1, 2016, in order to assign unit work to subcontracted and/or temporary employees, and then leave those positions vacant.” (JD page 9, line 23 to page 10, line 12; page 11, lines 31-35). Accordingly, paragraph 2(b) of the recommended Order states that Respondent shall cease and desist from “Laying off employees on dates when subcontracted or temporary agency employees are assigned to work, or in violation of employees’ seniority rights, without the Union’s consent and without first giving the Union notice and an opportunity to bargain about the decision to make such changes.” (JD page 12, lines 36-39). In addition, the fourth WE WILL NOT paragraph of the ALJ’s recommended Notice to Employee contains cease and desist language and the fifth WE WILL paragraph of the Notice to Employees contains affirmative remedial language for the unlawful layoffs of unit employees when subcontracted or temporary agency employees were working, or

in violation of their seniority rights. However, the ALJ erred by failing to include the make whole remedy for this violation of the Act in the recommended remedy and Order.

2. The ALJ erred in the recommended remedy by citing *Latino Express, Inc.*, 359 NLRB No. 44 (2012), a case decided by a Board that included two persons whose appointments to the Board were found to be constitutionally infirm by the Supreme Court in *NLRB v. Noel Canning*, 135 S. Ct. 2550 (2014), and by failing to require that in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), Respondent shall compensate Lleras, Viñas, Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and in accordance with *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and, within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating backpay to the appropriate calendar year(s).

3. The ALJ erred in paragraph 2(c) of the recommended Order and the second WE WILL paragraph of the recommended Notice to Employees by using remedial language from *Latino Express, Inc.*, supra, rather than remedial language set forth above in item 2 from *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), and *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

4. The ALJ erred by failing to include remedial language from *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), and *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016) in the recommended Notice to Employees, with respect to all unit employees who were

laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights.

5. The ALJ erred by failing to include in the recommended Order a requirement that Respondent rescind the unilateral transfer of unit work to subcontracted or temporary agency employees and restore the status quo by restoring the unit to where it would have been without the unilateral change. In this regard, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring bargaining unit work to subcontractors and temporary agency employees. (JD page 9, line 23 to page 10, line 12; JD page 11, lines 31-35). Consistent with this finding, paragraph 1(c) of the ALJ's recommended Order states that Respondent shall cease and desist from "Unilaterally transferring unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain." (JD page 12, lines 41-42). Similarly, the seventh WE WILL NOT and seventh WE WILL paragraphs of the recommended Notice to Employees contain remedial language consistent with the ALJ's unfair labor practice finding in this regard. Appropriate affirmative remedial language in the recommended Order regarding this unfair labor practice is also necessary to effectuate the policies of the Act.

6. The ALJ erred by failing to include in the recommended Order a requirement that Respondent, upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement. In his findings of fact and conclusions of law, the ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by "failing and refusing

to meet and bargain with the Union over a successor agreement after December 29, 2016.” (JD page 10, lines 38 to page 11, line 9; JD page 11, lines 38-39). The ALJ also included appropriate cease and desist language for this violation of the Act in paragraph 1(f) of the recommended Order (JD page 13, lines 9-15), and included appropriate cease and desist and affirmative language for this violation of the Act in the eight WE WILL NOT and eighth WE WILL paragraphs of the recommended Notice to Employees. The missing affirmative remedial language should be added to the recommended Order.

In summary, Counsel for the General Counsel is not requesting the ALJ to alter substantive findings or conclusions of law in his Decision, and this motion is totally consistent with the ALJ’s determinations. Counsel for the General Counsel only seeks an erratum correcting unintentional but important omissions from the ALJ’s recommended remedy, Order and Notice. Making these corrections will simply complete the intended Decision and make it fully effective. Consequently, Counsel for the General Counsel respectfully requests the ALJ to issue a post-decisional erratum that corrects his Decision as set forth above in items 1 to 6.

Dated at San Juan, Puerto Rico this 22th day of May 2019.

Respectfully submitted,

s/ Enrique González Quiñones

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, I served Counsel for the General Counsel's Motion for Erratum to the Administrative Law Judge's Decision in the matter of Capitol Transportation, Inc., Cases 12-CA-180495 et als., upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

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