

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

WISMETTAC ASIAN FOODS, INC.

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 630**

and

ROLANDO LOPEZ, an Individual

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 630**

**Cases 21-CA-207463
21-CA-208128
21-CA-209337
21-CA-213978
21-CA-219153**

Case 21-CA-212285

Case 21-RC-204759

Petitioner

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

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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the General Counsel cross excepts to limited portions of Administrative Law Judge Eleanor Laws’ (ALJ) decision, conclusions of law, remedy, and recommended order (ALJD), issued in the above-captioned cases on August 30, 2019, in order to correct certain inadvertent errors. Specifically, Counsel for the General Counsel files the following cross exceptions:

To the ALJ’s decision, conclusions of law, remedy, and recommended order that:

Exception No.

- 1** “By disciplining Rolando Lopez, disciplining and demoting and changing the work shift of Ruben Munoz, disciplining, suspended and terminating Alberto Rodriguez, terminating Pedro Hernandez, and refusing to consider for re-hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.” (ALJD 95:18-22.)

- 2** “Having refused to re-hire and consider for re-hire Fanor Zamora and Jeremiah Zermeno, these individuals are entitled to the remedy for unlawful refusal to hire – reinstatement and backpay – which subsumes the remedy for the Respondent’s unlawful refusal to consider them for hire.” (ALJD 96:39-42.)

- 3** “Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful discharges of Ruben Munoz, Pedro Hernandez, and Alberto Rodriguez, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.” (ALJD 98:33-36.)

Respectfully submitted,

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Dated at Los Angeles, California, March 13, 2020.

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WISMETTAC ASIAN FOODS, INC.

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Petitioner

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

On August 30, 2019, Administrative Law Judge Eleanor Laws (ALJ) issued her Decision in the above-captioned cases (ALJD).¹ In the ALJD, the ALJ correctly decided that Wismettac Asian Foods, Inc. (Respondent) unlawfully: promised employees better benefits and improved terms and conditions of employment if they rejected International Brotherhood of Teamsters, Local 630 (Union); disciplined, suspended, and terminated employees for engaging in union and protected concerted activities; refused to consider known union supporters for re-hire and failed to re-hire them; and solicited employees to revoke their union-authorization cards.

Counsel for the General Counsel excepts only to the ALJ's: (1) inadvertent failure to note in the Conclusions of Law section of the ALJD that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) by failing to re-hire Pedro Hernandez (Hernandez), Fanor Zamora (Zamora), and Jeremiah Zermeno (Zermeno), in addition to having refused to consider them for re-hire, to comport with her findings in the Analysis and Decision section of the ALJD; (2) inadvertent failure to note in the Remedy section of the ALJD that the Respondent refused to re-hire Hernandez and consider him for re-hire, in addition to having unlawfully terminated him, to comport with her findings in the Analysis and Decision section of the ALJD; and (3) inadvertent reference in the Order section of the ALJD to the discharge of Ruben Munoz (Munoz), as Munoz was not terminated by the Respondent, to comport with her findings in the Analysis and Decision section of the ALJD.²

In order to correct these certain inadvertent errors in the ALJD, Counsel for the General

¹ References to the Administrative Law Judge's decision are noted as "ALJD" followed by the page and line number(s).

² On September 30, 2019, Counsel for the General Counsel submitted an unopposed Post-Decision Motion to Modify the Conclusion, Remedy, and Order to Conform to the Administrative Law Judge's August 30, 2019 Decision, reflecting the same requests to correct certain inadvertent errors in the ALJD described in the present brief in support of limited cross exceptions. The ALJ has not yet ruled on the General Counsel's September 30, 2019 motion.

Counsel respectfully requests that the Board issue an order to modify the ALJD as set forth below.

II. RELEVANT FACTS AND DISCUSSION

A. The Respondent Unlawfully Failed to Re-Hire and Consider for Re-Hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno

In the Analysis and Decision section of the ALJD, the ALJ determined that the Respondent failed to re-hire and consider for re-hire Hernandez, Zamora, and Zermeno, in violation of Section 8(a)(3) and (1) of the Act. (ALJD 44:17-45:47.)³

However, in the Conclusions of Law section of the ALJD, the ALJ wrote:

By disciplining Rolando Lopez, disciplining and demoting and changing the work shift of Ruben Munoz, disciplining, suspending and terminating Alberto Rodriguez, terminating Pedro Hernandez, and refusing to consider for re-hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

(ALJD 95:18-22.) In this section, the ALJ inadvertently failed to state that the Respondent unlawfully refused to re-hire Hernandez, Zamora, and Zermeno, in addition to having unlawfully refused to consider them for re-hire, in accordance with her Analysis and Decision section.

Accordingly, Counsel for the General Counsel respectfully requests that the Conclusions of Law section of the ALJD, at ALJD 95:18-32, be revised to add: “...refusing *to re-hire and* consider for re-hire Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno,...” to reflect the ALJ’s findings that the Respondent violated Section 8(a)(3) and (1) of the Act by both refusing to re-hire Hernandez, Zamora, and Zermeno *and* consider them for re-hire.

³ The ALJ appropriately applied the elements of a discriminatory refusal-to-hire violation under *FES* in determining that the Respondent violated the Act by refusing to re-hire Hernandez, Zamora, and Zermeno. (ALJD 44:17-45:48.) See *FES*, 331 NLRB 9, 12 (2000). The ALJ also concluded that the Respondent violated the Act by refusing to *consider* Hernandez, Zamora, and Zermeno for re-hire, although the elements of a discriminatory *refusal-to-consider* violation differ from a *refusal-to-hire* violation. See *FES*, 331 NLRB at 12, 15. The ALJ’s remedial order for the refusal-to-hire violations of reinstatement to the positions to which Hernandez, Zamora, and Zermeno applied is appropriate and subsumes the remedy for *refusal-to-consider* violations. *Id.* at 12, 15.

B. The Respondent Unlawfully Terminated Pedro Hernandez, and Also Unlawfully Failed to Re-Hire Him or Consider Him For Re-Hire

In the Analysis and Decision section of the ALJD, the ALJ found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Hernandez on October 31, 2017.

(ALJD 36:33-39:10.) In the Analysis and Decision section, the ALJ also found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to re-hire Hernandez and consider him for re-hire, as noted above. (ALJD 44:17-45:47.)

However, in the Remedy section of the ALJD, the ALJ wrote:

Having refused to re-hire and consider for re-hire Fanor Zamora and Jeremiah Zermeno, these individuals are entitled to the remedy for unlawful refusal to hire – instatement and backpay – which subsumes the remedy for the Respondent’s unlawful refusal to consider them for hire.

(ALJD 96:39-42.) In this section, the ALJ inadvertently failed to state that the Respondent unlawfully refused to re-hire and consider for re-hire Hernandez as well, in accordance with her Analysis and Decision section.

Accordingly, Counsel for the General Counsel respectfully requests that the Remedy section of the ALJD, at ALJD 96:39-42, be revised to add: “Having refused to re-hire and consider for re-hire *Pedro Hernandez*, Fanor Zamora, and Jeremiah Zermeno...” to reflect the ALJ’s finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to re-hire and consider for re-hire Hernandez, in addition to finding that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Hernandez.

C. The Respondent Unlawfully Issued Ruben Munoz a Written Warning, Removed Him From His Lead Position, and Changed His Work Shift, But Did Not Terminate Him

In the Analysis and Decision section of the ALJD, the ALJ found that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing Munoz a written warning, removing him

from his lead position, and changing his work shift. (ALJD 32:19-36:31.) The evidence shows that Munoz was demoted, but not terminated, by the Respondent. (ALJD 9:10-10:43.)

However, in Paragraph 2(b) of the Order section of the ALJD, the ALJ wrote:

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Ruben Munoz, Pedro Hernandez, and Alberto Rodriguez, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(ALJD 98:33-36.) In this section, the ALJ inadvertently stated that Munoz was unlawfully discharged.

Accordingly, Counsel for the General Counsel respectfully requests that the Order section of the ALJD, at ALJD 98:33-36, be revised by removing the inadvertent reference to Munoz as one of the employees unlawfully discharged by the Respondent.

III. CONCLUSION

In light of the foregoing, Counsel for the General Counsel respectfully requests that the above modifications be made to the Conclusions of Law, Remedy, and Order sections of the ALJD so that these portions of the ALJD may conform to the ALJ's Analysis and Decision section set forth in the ALJD.

Respectfully submitted,

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Dated at Los Angeles, California, March 13, 2020.

STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Limited Cross Exceptions to the Administrative Law Judge's Decision** and **Brief in Support of Limited Cross Exceptions to the Administrative Law Judge's Decision** in Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, 21-CA-212285, and 21-RC-204759 have been submitted by E-Filing to the Executive Secretary of the National Labor Relations Board, Washington, D.C., on March 13, 2020. The following parties have been served with a copy of the same documents by e-mail:

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Respectfully submitted,

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DATED at Los Angeles, California, this 13th day of March, 2020.