UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| LATINO EXPRESS, INC. | |
| and | CASE 13-CA-46528 |
| CAROL GARCIA, AN INDIVIDUAL | CASE 13-CA-46529 |
| and | |
| PEDRO GARCIA, AN INDIVIDUAL | CASE 13-CA-46634 |
| and | |
| TEAMSTERS LOCAL UNION NO. 777, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO | |

# GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Now comes Jeanette Schrand, Counsel for the Acting General Counsel, who, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief in Response to Respondent Latino Express' Exceptions to Administrative Law Judge Decision.[1]

## I. INTRODUCTION

Respondent excepts to many of the factual findings and credibility determinations of the ALJ. However, nothing contained in Respondent's exceptions or arguments in support thereof detracts from the ALJ's factual findings, conclusions, or legal analysis. As shown below, the ALJ's conclusions rely on reasonable credibility determinations and findings of fact, and are amply supported by legal precedent.

Respondent has also requested an oral argument in this case but offers no explanation or argument in support of its request. The Acting General Counsel submits that no oral argument is necessary because the record, exceptions, and briefs submitted by the parties will adequately present the issues and the positions of the parties.

As for the Respondent's seventeen Exceptions, several of them are either irrelevant to the substantive issues contained in the Complaint or are completely inaccurate statements of the record or the ALJ's decision. The vast majority of them, however, are nothing more than exceptions to the ALJ's credibility determinations. As to those relating to credibility, the

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[1] Throughout this document, Latino Express, Inc. will be referred to "Respondent" or the "Company", and Charging Party Teamsters Local No. 777, Affiliated with the International Brotherhood of Teamsters, AFL-CIO, will be referred to as the "Union". Transcript references will be "Tr. " followed by the page number; the Acting General Counsel's exhibits will be referred to as "GC X" and Respondent's exhibits will be referred to as "R X" followed by the specific exhibit number. The Administrative Law Judge will be referred to as the "ALJ" and the National Labor Relations Act will be referred to as the "Act". The ALJ's Decision will be referred to as ALJD followed by the page and line number(s) of the decision. Finally, unless specifically noted otherwise, "Complaint" will refer to the First Amended Consolidated Complaint, as amended at the hearing.

Acting General Counsel submits that the Board should not disturb the ALJ's credibility findings in the instant matter because they are fully supported by evidence in the record and objective considerations. As the Board is well aware, its established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *All Seasons Climate Control, Inc.,* 357 NLRB No. 70 *slip op.* at 1 (August 26, 2011), citing, *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d. Cir. 1951).

Here, Respondent has utterly failed to meet this burden. Instead, at best Respondent merely points to testimony of its primary witness, Company Vice President Henry Gardunio, a witness that the ALJ specifically discredited on virtually all critical issues, and claims it should have been believed. The Acting General Counsel submits that this falls well short of establishing, by a clear preponderance, that the ALJ's credibility resolutions should be overruled.

Given the fact that a number of Respondent's exceptions are either repetitive or factually related, they will be thematically grouped together according to the Section of the Act that they related to, and, with respect to the two 8(a)(3) terminations, they will be divided between the two discriminatees regarding certain issues.

## II. The ALJ's Section 8(a)(1) Findings and Conclusions Should not be Disturbed

All or part of seven of Respondent's Exceptions relate to the Section 8(a)(1) violations found by the ALJ. All told, the ALJ found eight separate categories of independent 8(a)(1) violations, with some having occurred on multiple occasions. (ALJD pp. 10-15) Many of these findings are based on completely unrebutted testimony and all are well-established violations of the Act.

### A. The Violations that Occurred on December 10

In Exceptions 5, 9, and 10 Respondent takes issue with the evidence and the conclusions by the ALJ regarding the various 8(a)(1) violations found to have occurred on December 10. That evidence, and the conclusions drawn from it by the ALJ, can be succinctly summarized as follows: In the morning, Supervisor Gabino requested a private meeting with employee Pedro Garcia and proceeded to tell him that he knew that some drivers were involved in a union organizing effort. (ALJD p. 5, lines 25-30). The ALJ concluded this created an unlawful impression of surveillance. (ALJD p. 11, lines 16-21)

On the afternoon of December 10, Pedro Garcia was called into a meeting with several members of management and was again confronted about the union. (ALJD pp. 5-6) During this meeting, when Garcia suggested improved wages, Respondent's President, Michael Rosas, Sr., told Garcia that the Company would consider giving the employees two weeks of paid vacation. (ALJD p. 6, lines 8-11) The ALJ concluded that since Respondent clearly knew about the union effort at the time, this was an unlawful promise to improve benefits made to discourage employees from supporting the Union. (ALJD pp. 11-12)

In Exception 5, Respondent apparently contends that the whole of employee Pedro Garcia's testimony regarding two meetings on December 10 was hearsay. However, the ALJ properly overruled Respondent's hearsay objections.

With respect to Garcia's testimony concerning his conversation with supervisor Victor Gabino on the morning of December 10, Gabino was an admitted supervisor and agent of Respondent. Accordingly, the statements made by Gabino to Garcia were properly admitted as admissions by a party opponent under Rule 801(d)(2) of the Federal Rules of

Evidence. *Ferguson Enterprises, Inc.,* 355 NLRB No. 189, slip op. at p. 1, fn 2 (September 22, 2010)(citing cases). Respondent's exception on this issue must therefore be overruled.[2]

In Exception 9, Respondent follows up on Exception 5 and attempts to contend that the Acting General Counsel has not carried his burden as to the alleged impression of surveillance by Gabino.[3] However, since the ALJ credited Pedro Garcia's unrebutted testimony the ALJ properly concluded that Respondent violated the Act as alleged. Specifically, by telling Garcia that he knew that employees wanted a union, Gabino created the impression Garcia's union activities were under surveillance. (ALJD p. 10, line 44 to p. 11, line 21).

Next, in Exception 5, Respondent claims that Garcia testified that he did not understand everything that was said in the meeting on the afternoon of December 10 and at one point he relied on another employee's translation of statements made by Respondent's managers, which Respondent alleges was hearsay. As the ALJ's decision reflects however, Garcia testified at length as to what occurred in the meeting with Rosas, Sr., Rosas, Jr., and Martinez. (ALJD at p. 6, lines 1-11) The fact that due to his language skills he had to testify through a translator does not mean, as Respondent contends, that Garcia lacked any understanding of what transpired at the meeting. Instead, he participated in the discussion and made his views on unionizing clear—even in the face of coercive promises to improve benefits. (Tr. 98-102) In addition, Respondent failed to offer any of its three supervisors as witnesses to rebut Garcia's testimony. Therefore, like Garcia's testimony regarding the

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[2] Of course, Rosas, Sr.'s statements to Garcia were also not hearsay since he is also an admitted supervisor and agent of Respondent. (ALJD p. 2 lines34-35) Thus, to whatever extent one could read Respondent's exceptions to include a claim that Garcia's testimony as to Rosas, Sr.'s statements were improper hearsay, that exception must likewise be rejected.

meeting with Gabino, his testimony here was probative and unrebutted, and specifically credited by the ALJ. Respondent's exception to this credibility finding by the ALJ should therefore be overruled.

In Exception 10, Respondent also takes issue with the ALJ's conclusions regarding events on December 10. This time, Respondent misconstrues the ALJ's decision and blatantly distorts the evidence in an effort to support its contention that it did not unlawfully promise to improve its employees benefits.[4]

Respondent claims that the ALJ stated that the promise of improved benefits by Rosas, Sr., was relayed to Garcia through his co-worker, Ramiro, who was translating Rosas, Sr.'s, statements for him. (Respondent's Exceptions at p. 10) However, neither the ALJ's decision, or the testimony, support this claim. No where does the ALJ state that the promise of improved benefits was relayed to Garcia through Ramirez. The ALJ's finding of fact on that issue is that "Garcia argued in favor of higher wages for standby drivers, while Michael Rosas Sr. responded that the Company would consider giving the employees 2 weeks of paid vacation [and] added that the Company would schedule a meeting to propose those benefits to the drivers after the holidays. (ALJD p.6 lines 8-11). In addition, Garcia testified directly regarding what Rosas, Sr., said, and not, as Respondent contends, that this statement was relayed to him through Ramiro. (Tr. 100-04) Thus, Respondent's contention that the promise of improved benefits was hearsay since it came from Ramiro must be rejected.

### B. The ALJ's Additional Finding that Respondent Created an Impression of Surveillance

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[3] Since the Exception states that it relates to an 8(a)(1) allegation it is unclear why Respondent includes a discussion of various 8(a)(3) principles. However, that discussion will not be addressed here as it is irrelevant to Respondent's exception.

[4] The Acting General Counsel submits the ALJ inadvertently referred to Michael Rosas Jr., rather than Rosas, Sr., in his decision at page 12, line 3. Earlier in his decision, the ALJ clearly recognizes that it was Rosas, Sr., who offered to consider giving the employees two weeks of paid vacation time. (ALJD p. 6, lines 6-11)

With respect to the Respondent's claim in Exception 9 that there is no evidence to support the ALJ's conclusion that Gardunio stated "to Garcia and some unidentified drivers that he knew something was going on and would kick those drivers out once he found out, also created an impression of surveillance," (Respondent's Exceptions at p. 7) Respondent has apparently confused the two witnesses with the last name Garcia. By finding this violation, the ALJ credited Carol Garcia's unrebutted testimony that sometime shortly after her September 20 conversation with Gardunio, and after she began discussing her displeasure with Respondent's reimbursement policy with her co-workers, Gardunio came into the driver's room and abruptly announced to her and other employees that he knew that something was going on, that he knew something about employees going to private meetings, and that if he found out who it was he would kick them out. (Tr. 249-250; 313-14) As the ALJ properly concluded, his statement violated the Act as alleged in the Complaint. Therefore Respondent's exception on this issue must be overruled.

**C. The Threat of Discharge**

As for the threat of discharge that Respondent excepts to in Exception 10, the credited evidence supports the violation. Current employee Frank Hernandez testified that sometime in late January or early February 2011, during a discussion with a group of drivers concerning the union organizing effort, Gardunio said that a direct consequence of a union would be that the Company would have to bid higher on future jobs and would therefore have no choice but to let drivers go. (ALJD p. 9, line 23-25; Tr. 456-57) Employee Pedro Garcia also testified about a similar conversation with Gardunio around this same time. (Tr. 109-110) According to Pedro Garcia, Gardunio said that the employees should be cautious about trying to get a union because the Board of Education does not like to work with

companies that have unions because they want low rates and a union would mean higher rates. (Tr. 112) Gardunio followed this up with sinister statement that if the employees had a union "he would probably not be able to get the contract and that would represent a lack of work for us." (Tr. 112) Thus, contrary to Respondent's contentions, there is ample record evidence to support finding that Gardunio unlawfully threatened employees with discharge, as found by the ALJ and Respondent's exception should be overruled.

**D. Respondent's Repeated Unlawful Solicitations of Grievances**

In Exception 11, Respondent yet again takes issue with the ALJ's credibility determinations against it but fails to explain why those credibility determinations are incorrect. This time, Respondent claims that the ALJ erred in concluding that Gardunio unlawfully solicited employee grievances and that he did so after he knew that employees were engaged in union organizing activity. This flies in the face of the ALJ's specific refusal to credit Gardunio's claim that he did not know about the union effort until after January 6. (ALJD p. 8, lines 35-41) Respondents exception in this regard must therefore be rejected.

**E. Respondent's Admitted Interrogation of Employees by Gardunio**

In Exception 12, Respondent challenges the ALJ's finding that Respondent interrogated employees. Respondent claims that the violation is based on testimony by Salgado and Hernandez, but ignores the fact that Gardunio himself openly admitted that he asked an employee his position on the union. (Tr. 589-591; 598)

In addition, the exception is nothing more than another request to overturn the ALJ's credibility determinations since Respondent claims that the evidence shows that Gardunio was invited to join the conversation but the ALJ specifically rejected Gardunio's claims in this regard. (ALJD p. 9, lines 49-p. 10, lines 49-50.) Moreover, contrary to Respondents

vague claims, the evidence plainly supports the ALJ's conclusion that Gardunio's question was coercive, based on a totality of the circumstances. (ALJD p. 13, lines 8-18)

### F. Respondent's Admitted Prohibition on Employee Communications Regarding Terms and Conditions of Employment

Respondent's thirteenth exception takes aim at the ALJ's finding that Respondent violated Section 8(a)(1) by unlawfully prohibited Carol Garcia from discussing the reduction in the amount she had to pay to Respondent for a prior accident. This exception, however, merely displays its lack of understanding of the violation, since Respondent mischaracterizes the ALJ's as having found that it unlawfully prohibited her from discussing self-organizing, per se.

What the ALJ actually found was that by prohibiting Garcia's communications on the issue of the accident reimbursement policy, Respondent was thereby unlawfully restricting her communications as to terms and conditions of employment, which Section 7 protects. (ALJD p. 13, line 49 to p. 14, line 24)

As the Supreme Court explained in *Central Hardware Co., v. NLRB,* 407 U.S. 539, 542-543 (1972) "early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." See also *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1987); *Indian Hills Care Center,* 321 NLRB 144 (1996). Thus, it is a well-established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to co-workers about wages and other terms and conditions of employment. *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999)(absent a demonstrated legitimate and substantial business justification an employer's instruction not to discuss an employee's suspension with anyone

violated the Act, particularly when the prohibition restricted employees "from possibly obtaining information from their coworkers which might be used in their defense").

Similarly, the Board has long held that an employer's conduct violates Section 8(a)(1) of the Act when it publishes and maintains any type of rule which prohibits employees from discussing matters relating to their terms and conditions of employment with their fellow employees as doing so has a tendency to coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999)(a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1)).

As the ALJ found, Respondent's policy requiring employees to repay the Company for accidents clearly relates to a term and condition of employment. (ALJD p. 14 lines 22-23) In addition, the ALJ expressly rejected Respondent's vaguely proffered justification for its admitted prohibition, namely, to avoid possible jealously among employees. (ALJD p. 14, lines 14-24) As such, the undisputed evidence, and well-established Board law, support the ALJ's decision finding Gardunio's prohibition on communications violated the Act and Respondent's exception must therefore be rejected.

**G. Respondent's Threat to Close and Statements of Futility**

In Exception 14, Respondent takes issue with the ALJ's decision as to two 8(a)(1) violations, a threat to close and a statement of futility. As to the threat to close, the ALJ concluded that admitted supervisor Victor Gabino told employee Frank Hernandez that if the employees brought in the Union the Company might close and re-open elsewhere to avoid the Union. (ALJD p. 10 lines 1-3; Tr. 457-458) Contrary to Respondent's claim, Hernandez never directly asserted that it was "the Union" (rather than the company) who would move

the company if the Union came in. Rather, in the absence of any contradictory testimony by Gabino, the ALJ merely read the whole of Hernandez's testimony on the issue instead of accepting Respondent's strained reading of one of his answers that also includes inaudible portions (Tr. 457, lines 15-21). In other words, the ALJ looked at all of Hernandez's testimony, including the following:

> Q: do you recall anything else Mr. Gabino said about the company moving locations?
>
> A: They could fire people from the company. Some of the drivers will lose their jobs.

and reasonably concluded that the evidence shows that Gabino was referring to the Company closing in order to avoid the Union. The "they" in the above passage only makes logical sense if it refers to the company and not the Union and the ALJ's conclusion in that regard is entirely reasonable.

As for the threat of futility, by expressly finding this violation (ALJ D at p. 14 lines 45-53) the ALJ impliedly credited Garcia's testimony that during their September 20, 2010, conversation Gardunio dismissed the idea of a union at Respondent and ominously warned that a union "will never happen" and that none of the CPS bus companies have a union. (Tr. 236) In addition, it should be noted that Respondent does not except to the ALJ's additional finding of an unlawful statement of futility, namely one by supervisor Victor Gabino. Specifically, the ALJ credited the unrebutted testimony of Frank Hernandez to the effect that Victor Gabino made an unlawful statement of futility when he told Hernandez that Respondent might close the facility and re-open elsewhere in order to avoid the Union. (ALJD p. 15, lines 4-8; p. 10, lines1-3) Thus, Respondent has effectively conceded this violation by failing to take exception to it.

Respondent's Exception 14 should therefore be rejected in its entirety.

## III. The ALJ's Factual Findings and Conclusions Regarding the Terminations

The Acting General Counsel alleged, and the ALJ correctly concluded, that Respondent violated Section 8(a)(3) when it terminated both Carol Garcia and Pedro Salgado. Contrary to Respondents claims, there is ample evidence to support these conclusions by the ALJ and Respondent's various exceptions thereto must be rejected.

### A. Evidence of Protected Union Activity by Garcia and Salgado and the Employer Knowledge of that Activity

Respondent contends in Exception 15 that there is no evidence to support the ALJ's conclusion that Carol Garcia engaged in protected concerted activity or that Respondent was aware of her activity. Given Respondent's blanket contention in Exception 16 that the Acting General Counsel failed to present sufficient evidence to "shift the burden" as to Salgado's termination, Respondent appears to likewise takes issue with the ALJ's conclusions as to his union activity and the Employers' knowledge of it. Similarly, in Exception 4, Respondent claims that the ALJ's factual findings that supervisor Sara Martinez saw employees outside the seafood restaurant with Union agents and reported this to Gardunio is in error. (ALJD, p. 5 lines 18-21)

These claims by Respondent are difficult to comprehend in light of the undisputed evidence and, more fundamentally, are nothing more than yet another attack of the ALJ's credibility determinations that Respondent has failed to demonstrate should be disturbed.

As to the employees' union or protected, concerted activity, there is no question that Carol Garcia had issues with Respondent's accident policy and engaged in protected concerted activity by discussing her concerns with her co-workers. (ALJD p. 6, lines 15 to p. 7, line 14) As detailed in the ALJ's decision, she objected to paying the $800 initially requested by Respondent for her June 2010 accident and repeatedly spoke to her co-workers

about it, including Pedro Salgado. (Tr. 244-47) This resulted in a meeting at a local Chinese restaurant where several employees, including both Carol Garcia and Pedro Salgado, discussed issues they wanted addressed at the Company, including improved wages, fairer charter assignments, and not having to pay for accidents. (Tr. 87-89; 250-51; 353-355) The employees also decided that employee Frank Hernandez would research and contact an appropriate union. (Tr. 89; 251)

Hernandez's contact with the Union ultimately lead to both Garcia and Salgado signing Union authorization cards and soliciting others to sign cards for the Union. (Tr. 252, 255, 261; 355-357; 361; GC X-5 and 7) In addition, on December 9, 2010, both Carl Garcia and Pedro Salgado attended a meeting with Union representatives. (ALJD p. 5 lines 7-13; Tr. 59-60; 90-92; 260-64; 358; 444-45, GC X-2) Thus, there is a plethora of evidence that Garcia engaged in union activity and Respondents exception to the contrary must be rejected.

As for Respondent's exceptions regarding its knowledge of Garcia's and Salgado's protected union activity, these too must be rejected. The ALJ correctly concluded, based on unrebutted testimony, his credibility determinations, and reasonable inferences therefrom, that Sara Martinez saw the group of employees leaving the union meeting on December 9 and immediately reported this to Gardunio. (ALJD p. 5, lines15-21)

As for the part of Respondent's Exception 4 regarding the ALJ's conclusion that Martinez immediately reported her observations to Gardunio, it clear that Respondent is actually excepting mainly to the judge's credibility determination. Since Respondent has failed to explain why this credibility determination was plainly wrong, Respondent's exception must be rejected.

Gardunio admitted that Martinez reported her observations to him about the union meeting on December 9 (Tr. 612) and although Gardunio testified, Respondent never asked him to explain when he learned of the employees' meeting at the seafood restaurant. However, he did characterize the gathering of employees as a meeting, rather than just a gathering of employees who happened to be eating together at a nearby restaurant. (Tr. 612)

In addition, The ALJ found it suspicious that Martinez would report to Gardunio that "she observed a group of employees leaving a restaurant and nothing else." (ALJD p. 5 lines 47-49) Based on his credibility determination that Gardunio's testimony was not believable, the judge properly inferred knowledge of employee Carol Garcia's union activity to Gardunio at the time that Gardunio fired Garcia, which occurred the day after supervisor Martinez saw Garcia and other employees outside the seafood restaurant with Union officials. (ALJD p. 16 lines 1-3)

Therefore, considering Gardunio's admitted anti-union stance, given all of the other evidence regarding Respondent's knowledge of the employees union activity as of December 10 (in particular the conversations between the various supervisors and Rosas, Sr., and Pedro Garcia), and given that supervisor Sara Martinez was not called to rebut the claim that she saw the employee with the Union agents on December 9, it is entirely reasonable to infer that Martinez immediately told Gardunio about the December 9 union meeting.

Based on the foregoing, Respondent's contentions in Exceptions 4,15, and 16 that there is no evidence of protected union activity by Garcia and Salgado, and no evidence of employer knowledge of that activity, are fatally flawed and must be overruled.[5]

### B. The Evidence Fully Supports the ALJ's Conclusion that Carol Garcia's Termination was Motivated by Antiunion Considerations

[5] Respondent does not except to the ALJ's conclusion that Respondent harbored animus against union activity by its employees. (ALJD p. 16, lines 8-9)

Based on the above evidence, the ALJ reasonably concluded that the timing of Garcia's termination, coupled with the departure from Respondent's past practice of immediately terminating employees who engaged in terminable threats warranted the inference that her termination was motivated by her protected union activity.[6] (ALJD p. 15, line 46 to p. 16, line 8) Although not expressly styled as a separate exception, in its argument in support of Exception 15 Respondent complains about the ALJ's rejection of Respondent's claimed reason for terminating Garcia, that is, that she was terminated for threatening Gardunio. However, as with so many of Respondent's exceptions, this is simply another attack on the ALJ's refusal to credit Gardunio, this time on the ultimate question regarding his motivation for terminating Garcia. In short, the ALJ discredited him on every major point, including the excuse he offered for firing Carol Garcia the day after she was seen attending a Union meeting. Respondent points to nothing in the record other than his discredited testimony to support its exception in this regard. Indeed, Respondent has not even attempted to explain why the ALJ's credibility decisions are unsupportable, much less that a clear preponderance of evidence exists to warrant overruling them. As such this Exception must be rejected.

### C. The Evidence Fully Supports the ALJ's Conclusion that Pedro Salgado's Termination was Motivated by Antiunion Considerations

Respondent's Exceptions 2, 3, 6, 7, 8, and 16 take issue with various findings by the ALJ related to Respondent's termination of Pedro Salgado. In sum, Respondent claims that that by accepting cash from his supervisor, on one occasion, for work he undisputedly

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[6] In Exception 3 Respondent discusses its inability to understand how it could be seen as "inconsistent" to terminate one employee immediately for a threat yet wait 2 months before terminating discriminatee Carol Garcia for her alleged threat. How this relates to the articulated exceptions is not clear, but what is obvious is that it is highly inconsistent to terminate one employee "on the spot" yet wait nearly 3 months to fire Garcia.

performed, Salgado stole from Respondent. Respondent therefore contends that his termination was not a violation of the Act. However, perhaps the most glaring problem with Respondent's contentions regarding its termination of Salgado is that, as the ALJ repeatedly noted, there is absolutely no evidence that Salgado ever stole anything. This explains the conspicuously nonexistent references in Respondent's exceptions is any to evidence that Salgado ever stole anything.

In Exceptions 2 and 3, Respondent finds fault with several discreet aspects of the ALJ's decision. Specifically, in part (a) of Exception 2, and a portion of Exception 3, Respondent excepts to the ALJ's failure to conclude it had a specific policy against paying drivers in cash and the ALJ's similar refusal to conclude "that no cash can be accepted as part of a driver's wages". (Respondent's Exceptions at p. 3). In part (b), of Exception 2, Respondent excepts to the ALJ's failure to state the role of the drivers, specifically Pedro Salgado, in "the theft" which presumably refers to the theft that Del Torro Jr. admitted he engaged in during his testimony.

Respondent fails, however, to point to anything in the record that supports any of these "missing" factual findings. Rather, as the ALJ correctly found, all the record supports with respect to paying drivers is that the Company's procedure is to pay drivers via check. (ALJD p. 3 lines 45-47) Respondent produced no evidence of any specific policy on the issue or that there was another other specific prohibition on drivers accepting cash. Indeed, such a prohibition would be absurd, since it is the Respondent as the employer that controls the method of paying the employees, not the other way around.

In addition, in its argument in support of Exception 3 regarding drivers accepting cash wages, Respondent woefully misstates the ALJ's decision. Contrary to Respondent's claim, the ALJ characterized Gardunio's testimony as evasive on the issue of whether a driver was at fault for accepting cash "from the charter director" (ALJD p. 4 lines 39-42) not for receiving cash "from customers" as Respondent claims. (Respondent's Exceptions at p. 3)

Finally, the ALJ reasonably concluded that unbeknownst to the rest of management, Del Torro was paying some drivers in cash in order to conceal *his own* theft. (ALJD p. 3, line 21, p. 4 lines 1-2)(emphasis added) Thus, contrary to part (b) of Exception 2, the ALJ fully recognized and explained the drivers' role in Del Torro's theft scheme: they were paid for their work in cash and this allowed Del Torro to pocket the remaining money that should have gone to Respondent. (ALJD p. 3 line 30 to p. 4 line 2)

However, Respondent presented absolutely no evidence that Salgado, or any of the other drivers who were paid by Del Torro in cash, ever received more compensation than he was due for performing charter work. (ALJD p. 3 lines 48-51; p. 4 lines 31-34) It is therefore simply inaccurate to claim, as Respondent does, that the ALJ failed to state the drivers' (compared to Del Torro's) role in the theft. There simply was no evidence of any theft by a driver and Respondent has pointed to none.

In Exception 16 Respondent claims that there is no evidence to support the ALJ's conclusion that Pedro Salgado's termination was motivated by anti-union considerations and that he was treated disparately.[7] In Exceptions 7 and 8 the substance of the exception is to

[7] With respect to Exception 6 and the paragraph in Respondent's Exception 15 devoted to what was said by Salgado at the January 6 meeting (Respondent's Exceptions at p. 15) the Acting General Counsel is at a loss to understand why Respondent considers this relevant to any substantive issue. As the ALJ noted, regardless of exactly what Salgado said, two things are clear: Salgado raised the issue of cash payments to drivers for charter work, and Respondent has pointed to no evidence that Salgado ever received more money for his work than he was entitled to, i.e., that he ever stole anything. (ALJD p. 8, lines 42-48; ALJD p. 3, lines 49-51; ALJD p. 4, lines 31-34) Moreover, in Exception 6, Respondent grossly misquotes the ALJ. Respondent claims that the

the judge's statement that he found it "incredible that the Company was still investigating the other drivers." (Respondent's Exceptions at p. 7)

As detailed above however, Salgado, like Carol Garcia, engaged in union/protected concerted activity (including attending union meetings, signing an authorization card and soliciting others to do so) and Respondent was aware that he attended the union meeting on December 9 because Martinez saw him leaving the meeting that evening. In addition, as the ALJ found, Respondent was also aware of Salgado's involvement in the union effort based on his conversation with Supervisor Gabino on January 7. (ALJD p. 16, lines 33-35; ALJD p. 8, lines 20-24)

Respondent's claimed reason for firing Pedro Salgado was that he was "stealing charter money." (ALJD p. 16, lines 27-28; GC X-8, 9) However, as noted above, Respondent produced no evidence of any theft by Salgado. (ALJD p. 3, lines 49-51; ALJD p. 4, lines 31-34) This fact, coupled with the disparate way that Respondent treated him compared to other similarly situated drivers was properly relied on by the ALJ as evidence of unlawful motivation. (ALJD p. 16, lines 41-44; p. 9, lines 6-12 and 32-40)

It is also critical to note that Respondent's own witness, Del Torro, Jr., did not support Respondent's claimed justification for firing Salgado. According to Del Torro, Jr., it wasn't until after the January 6 driver meeting that he was called into Gardunio's office and told he was suspected of misconduct. (R-X 7D at p. 5; Tr. 331) At that time however, Del

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ALJ summarized Salgado's comments as "rais[ing] the issue of the cash that they received for doing charters[,]" and thereby the ALJ "weaken[ed] the admitted knowledge by Salgado that drivers were receiving cash for their wages." (Respondent's Exceptions at pp. 6-7) However, the ALJ's decision does not read as quoted by the Respondent. Rather, the ALJ accurately summarized Salgado's question to Gardunio as follows: "Salgado asked Gardunio why drivers were being paid in cash." (ALJD, p. 9 lines 37-39) In addition, it is hard to understand how such a summary could weaken evidence of Salgado's knowledge of cash payments since he readily admitted to having personal knowledge of cash payments when he described in detail the time he received such a payment himself.

Torro, Jr., admitted that he told Gardunio that there were numerous employees who had accepted cash payments, including Salvador Simental, Juvencio Montoya, Sosimo Saldivar, Pedro Garcia, Pedro Salgado, David Guerrero, Alfonso Avila, Telmo Hernandez, and Nicolas Paredes. (Tr. 332-334; 342; R-X 10)

The record evidence in this case also shows that the vast majority of the other drivers were never disciplined at all.[8] Instead, the documents show that only two of these employees, Jose Rios and Juvencio Montoya, were disciplined, and they received relatively light punishment given their supposedly admitted misconduct. (R-X 5A, 5B) (R-X 6A-C)

Although Gardunio claimed that Alfonso Avila was also disciplined for cash payments, and despite the fact that a subpoena was issued to Respondent seeking all such discipline, no discipline records were ever produced to substantiate that claim. (Tr. 657-58) The comparatively slight discipline meted out to only two of nine alleged guilty employees is particularly incomprehensible given Gardunio's contention that it is the Respondent's policy that accepting cash is "stealing." (Tr. 612-13) Notwithstanding this critical admission, for the exact same offense six employees received no proven discipline, two got a slap on the wrist, and Salgado lost his job. As such, contrary to Respondent's claim, there is ample evidence to support the ALJ's conclusion that Salgado was treated disparately and that this supported the Acting General Counsel's case.

Finally, the fact that Respondent takes issue with the ALJ's rejection of Gardunio's claim that he was still investigating the possible theft of charter money by some drivers

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[8] Respondent contends in Exceptions 7 and 8, and 16 that the other drivers who participated in the theft were also terminated and have filed charges of their own. Respondent points to nothing in the record to support this contention because none exists. Instead, it appears that in order to counter the Acting General Counsel's contention to the ALJ that Salgado was treated disparately, in mid-June 2011, well after the hearing in this matter closed, Respondent terminated all nine of the employees named by Del Torro as having accepted cash from for charter work. In addition, the Acting General Counsel has issued a Complaint against Respondent alleging that these terminations violated both Section 8(a)(3) and 8(a)(4).

(included in Exceptions 7 and 8 and 16) is particularly curious given Gardunio's candid admission that he didn't care to get to the bottom of the matter. (Tr. 747) Instead, he preferred to take the employees' word for it, even though Del Torro, Jr. told him the employees had lied. (Tr. 747) Thus, Gardunio's indifference to other employees' accepting cash and then lying about the frequency of this behavior further underscores the pretextual nature of Respondent's treatment of Salgado, as found by the ALJ. In making this conclusion, the judge analyzed the evidence relevant to the discharge of Pedro Salgado and weighed it against Respondent's allegedly legitimate reason for Salgado's discharge in light of all of the evidence.

## III. Respondent's Additional Miscellaneous Exceptions

In Exception 1, Respondent contends that the ALJ erred in finding that Respondent's former Charter Director, Raymundo Del Torro, Jr., was a statutory supervisor. In support thereof, Respondent claims that this finding "is contrary to the Parties position." However, although Del Torro, Jr. was not specifically alleged as a supervisor in the Complaint because he was not alleged to have engaged in any unlawful conduct on behalf of Respondent, the Acting General Counsel took the position at the hearing that he was, in fact, a supervisor under the Act. (Tr. 93-94) Thus, at most, the ALJ's finding as to Del Torro, Jr.'s supervisor status is only contrary to Respondent's position.

In addition, Respondent's position is particularly interesting since it was based on testimony elicited by Respondent that unequivocally established his Del Torro, Jr.'s Section 2(11) supervisory status. Specifically, based on questioning by Respondent's counsel, Del Torro testified that he used independent judgment to assign charter work to drivers, including the drivers' locations, where they end up, their experience, and "how good they are." (Tr.

323) Thus, as correctly found by the ALJ, Del Torro Jr. was a supervisor under the Act. Accordingly, although not particularly relevant to any substantive issue, the Acting General Counsel requests that Respondent's Exception 1 be overruled because the finding is correct under well-established Board law.

Part of Exception 3 takes issue the ALJ's failure to note Respondent's claim that it requires drivers to pay for accidents for the drivers benefit, namely so that the accidents would not "hinder their driving records". However, Respondent fails to explain how recognition of this supposed benefit is relevant. Moreover, Respondent presented no evidence from any drivers that demonstrated they considered this a benefit. Another portion of Exception 3 takes issue with the ALJ's failure to note that its contracts with CPS were expiring at the end of 2011. While this is an accurate statement, that is, the record shows that Respondent's contract was a three year agreement set to expire in June 2011, the next logical question is: so what? Apparently, Respondent intends to claim that this somehow means that its promises of benefits in December 2010 and January 2011 were not violations of Section 8(a)(1), as found by the ALJ. (ALJD p. 11, lines 30-p. 12 line 19) However, Respondent's vague assertion that because its contract was going to expire in June 2011 and that bids are therefore due on some unknown date "before the three year contract ends" implicitly recognizes that Respondent failed to present any evidence regarding the bidding procedure or to explain when bids are due. The Acting General Counsel therefore respectfully requests that these aspects of Respondent's Exceptions be overruled.

Finally, Exception 17 broadly takes issue with the ALJ's entire decision, without any additional support or argument. Such a catchall exception must be rejected since it fails to comply with the basic requirements of Section 102.46(b)(1).

## IV. CONCLUSION

For the reasons explained above, each of Respondent's Exceptions are without merit and should be rejected.

DATED in Chicago, Illinois, this 7th day of September 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge have been served, this 7th day of September, 2011, in the manner indicated on the following parties of record:

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