Final Statement

LATAM & LANEXPRESS UNION (2019)

Non-official English translation

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CHILE'S NATIONAL CONTACT POINT | RESPONSIBLE BUSINESS CONDUCT DIVISION | UNDERSECRETARIAT OF INTERNATIONAL ECONOMIC AFFAIRS

FINAL STATEMENT

LATAM & LanExpress Union

Content

I. Introduction

1. Chile's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines), located in the Responsible Business Conduct Division of the Undersecretariat of International Economic Affairs (SUBREI), hereby issues its Final Statement in the case "LATAM & Sindicato LanExpress".

2. The Final Statement describes the process and the results of the analysis of the specific instance to which it refers. It is based on information received from the parties and the steps taken by the NCP. If there was confidential information submitted to the NCP in the course of the procedure, it has not been disclosed in this statement. According to the NCP's rules of procedure, the NCP will always issue a Final Statement, which is public, whether or not it has been preceded by an Initial Statement or good offices.

3. The Final Statement marks the closure of the NCP procedure, without prejudice to the possibility of a follow-up stage.

II. Parties

a) Identification of the submitter

4. The submitter party is the Sindicato de Tripulantes de Cabina de LanExpress (hereinafter, the submitter or the union). This union corresponds to workers of the company Transporte Aéreo S.A.

b) Identification of the company

5. The companies in this specific instance are Latam Airlines Group S.A. and its subsidiary Transporte Aéreo S.A. (hereinafter, the company or LATAM). LATAM is a multinational air transport company, mainly owned by Chilean capital.

III. Issues raised

a) Summary of the facts

6. On 14 February 2018, a collective bargaining process began between the union and Transporte Aéreo S.A., with the union presenting a collective bargaining agreement draft. The company responded to the proposal on 23 February of that year.

7. On 23 March 2018, the company's latest offer was submitted, which was rejected by the union on 29 March 2018. This offer was never withdrawn by the company.

8. On 10 April 2018, after unsuccessful mediation by the Labour Directorate, the union's workers went on legal strike.

9. On 18 April 2018, the company submitted a new offer in accordance with the provisions of art. 356 of the Labour Code. On 20 April 2018, the union voted and rejected this new offer.

10. On 25 April 2018, the time limit established in Article 357 of the Labour Code Procedure expired,

which allows workers involved in collective bargaining to individually return to their jobs, if the last offer meets the gaining requirements of the same article.

11. On the same day (25 April 2018) and after the individual reinstatement process, the union sent a communication to the company, informing it of the end of the strike and expressing its willingness to adhere to the company's latest offer (of 23 March 2018). The company, in a statement issued on 26 April 2018, disputed the legality of the union's actions, arguing that the manner of ending the strike did not comply with the legislation in force.

12. In this regard, it should be noted that the law in force - since 1 April 2017 - does not expressly regulate the survival of the company's "last offer", once the strike has been approved, unlike the former Article 378, paragraph 3°, of the Labour Code, which established that the "last offer" remained valid unless it was formally withdrawn.

13. On 27 April 2018, upon consultation made by Transporte Aéreo S.A., regarding the scope of the union's letter of 25 April, the Head of the Legal Department of the Directorate of Labour determined - through Ord. No. 2044 - that this communication had not had the effect of ending the strike, since the last offer (of 23 March 2018) had previously been rejected by the majority of the workers.

14. On 4 September 2018, the union filed a claim of mere certainty against Transporte Aéreo S.A., before the 1st Labour Court of Santiago (case RIT O-2753-2018), requesting: to declare that the end of the strike, on 25 April 2018, was legal; that the last offer made by the company - on 23 March 2018 - was in force at the time it was signed by the union, with the new collective instrument between the parties being in force from 1 April 2018 until 31 March 2021; that, since the union's communication to the company - on 25 April 2018 - on the signing of the collective instrument, not individual reinstatement could have taken place, as the reinstated workers were subject to the signed collective agreement.

15. On 25 September 2018, the 1st Labour Court of Santiago rejected the union's lawsuit in its entirety.

16. On 5 October 2018, the union filed an appeal for annulment against the judgment of the 1st Labour Court of Santiago (Labour-Collection Case No. 2652-2018), before the Court of Appeals of Santiago.

17. Subsequent to the filing of the specific instance request, on 2 July 2019, the Court of Appeals of Santiago upheld the appeal filed by the union and issued a replacement judgment, ruling that: (1) the termination of the strike (agreed on 25 April 2018) is legal; and (2) that the last offer of the employer (Transporte Aéreo S.A.), dated 23 March 2018, was in force at the time it was signed by the union, so that it constitutes the collective instrument to govern the parties, between 1 April 2018 and 31 March 2021, as well as those workers who were reinstated individually, as such reinstatement is not in accordance with the law.

18. On 7 August 2019, Transporte Aéreo S.A. filed an action of inapplicability for

unconstitutionality before the Constitutional Court (Case No. 7182-19), regarding Santiago Court of Appeal's interpretation of Articles 357 and 358 of the Labour Code.

19. On 12 August 2019, Transporte Aéreo S.A. filed an appeal for unification of jurisprudence with the Supreme Court against the aforementioned judgment of the Santiago Court of Appeals (labour case No. 22277-2019).

20. On 3 March 2020, the Constitutional Court issued a ruling rejecting the injunction filed by Transporte Aéreo S.A., without analysing the substantive arguments presented by the company, as the action allegedly suffered from formal defects that made it impossible for to succeed.

21. On 27 April 2020, the Supreme Court ruled on the appeal for unification of jurisprudence, declaring the appeal filed by Transporte Aéreo S.A. inadmissible on the grounds that the factual situation that gave rise to the contested judgment is not comparable to that which gave rise to the judgment invoked as a contrast.

22. On 26 May 2020, the 1st Labour Court of Santiago declared final and enforceable the replacement judgment of the Court of Appeals of Santiago of 2 July 2019.

23. In this way, the Chilean courts upheld the union, confirming that the end of the strike - on 25 April 2018 - was legal and that the company's latest offer was in force at the time it was signed by the union, so that it constitutes the collective agreement in force between the parties between 1 April 2018 and 31 March 2021.

b) Summary of the specific instance request

24. On 26 March 2019, the union filed a specific instance request, in which it identifies alleged violations of the Guidelines by LATAM, which would refer to **alleged anti-union practices by the company, which would have hindered the 2018 collective bargaining** between the union and Transporte Aéreo S.A. The practices mentioned in the union's submissions are the following:

    1. **Dismissal of 70 union members.** The union points out that, on 16 March 2018, during collective bargaining, the company dismissed 70 crew members hired on a fixed-term basis, who were union members, without prior reasonable notice, citing problems with the arrival of two recently purchased aircraft. However, the submitter states that, the following day (17 March), the company issued public notices seeking cabin crew members and on 29 announced the arrival of two new aircraft with the same characteristics. These events allegedly caused unease within the union and affected the collective bargaining process, as well as causing some workers to resign from the union for fear of reprisals from the company.

    2. **Failure to provide adequate information on the extension of working hours in the collective bargaining process.** It is stated that in a presentation made by the company's scheduling manager, within her analysis of the sequence of worked days, it was shown that it would be feasible to achieve a reduced work schedule.

However, in the following days, that presentation was modified on the grounds that there was an error, justifying -with that update- a supposed need for the company to further maximise workers' productivity.

3. **Failure to provide information as suggested by the Chilean Safety Association (ACHS), following the application of the ISTAS 21 questionnaire.** This questionnaire is a psychosocial risk assessment tool which makes it possible to identify and measure those factors derived from the organisation of work that constitute a risk to health. This assessment is compulsory, and the health authority had to initiate a health investigation to force LATAM to apply it to cabin and control crew members. Following the results, the submitter indicates that the ACHS suggested reducing the working day and increasing the breaks associated with the sequence of days worked. However, the union states that it does not have the suggestion in writing and that the company has refused to provide such information.

4. **Failure to provide information, in a timely manner, on the company's financial situation and profit and loss statements**, so that such data could not be considered in the collective agreement draft proposed by the union, on 14 February 2018. Following the sending of a letter to the manager on 15 February 2018, the requested information was delivered on 16 February 2018.

5. **The company's campaign to encourage striking workers to withdraw, aiming to break the union and exclude it from the negotiating process.** In this process, the company allegedly explicitly refused to meet with the union negotiating committee, focusing instead on promoting the individual reinstatement of workers.

6. **Non-payment of salaries, social security and health contributions of the union leadership**, as its members did not opt for individual reinstatement and the company considered that they were still on strike, despite having accepted the last offer and having declared the end of the strike.

7. **Unequal treatment with respect to other unions.** It is indicated that during 2018, both the LanExpress Cabin Crew Union and the Sinlatam Union were on legal strike in their collective bargaining processes. Both unions decided to end the legal strike by accepting the company's "last offer", formulated under the terms of article 346 of the Labour Code. In the case of the LanExpress, this possibility was denied by the company, leaving the "last offer" valid only for individual reinstatement. In contrast, for the Sinlatam union, the signing of said collective agreement was allowed.

8. **Non-delivery of funding for training for union leaders, according to the 2011 agreement.** The submitter indicates that the company has not respected this previously committed benefit,

arguing that the union leadership remained on strike, according to the company.

9. **Statement by the company expressing its intention to create a low-cost airline.** This was documented in a letter of intent sent by LATAM to the General Directorate of Civil Aeronautics (DGAC) in March 2018 and in a publication in the El Mercurio newspaper on 14 April 2018.

10. **Involvement of the Director of Labour**, in office in 2018, who acted as mediator in the collective bargaining. This official would not have the union's trust, as he provided services to LATAM, prior to taking up his public position.

25. The submitter identifies alleged breaches by the company of the following chapters of the Guidelines:

1. Chapter III. Disclosure.
2. Chapter IV. Human Rights.
3. Chapter V. Employment and Industrial Relations.
4. Chapter VII. Combating Bribery, Bribe Solicitation and Extortion.

26. The expected outcome by the submitter through the NCP procedure is as follows:

1. LATAM to adhere to the Guidelines.
2. Promote dialogue between the company and the union to seek agreements to repair relations between the parties and contribute to improving collective bargaining processes.
3. That LATAM, as a multinational company, recognises the need to implement improvements in the areas of the Guidelines invoked by the union.

c) Summary of the company's response

27. On 31 May 2019, **LATAM replied that it had not breached the Guidelines or the legislation in force and that it would not participate in the proceedings before the NCP,** given that many of the disputed issues were still being discussed in the courts and in monthly meetings with the union. This response was supplemented by communication from the company to the NCP dated 28 November 2023.

28. In relation to the **validity of the "last offer"**, at the time of the union's acceptance of the offer, the company said:

1. The vast majority of the workers affiliated to the union have individually returned to work within the legal timeframe, that is, on 25 April 2018. In addition, on 25 April 2018, after 23:00 hours, the company received an email from the union, in which it stated that it would accept the latest offer - dated 23 March 2018 - which had previously been rejected by the union members' assembly in a secret ballot before a Certifying Officer.

2. In view of the fact that this way of ending the strike is not regulated in the current collective bargaining process, in force since April 2017, it decided to request a pronouncement from the Labour Directorate on the matter, in order to avoid any illegality. Thus, on 27 April 2018, the Labour Directorate replied in Ordinary N°2044, that the last offer (dated 23 March 2018) was not in force on 25 April 2018, and, therefore, the union could not accept it and was still on strike.

3. **As a result, only four workers** (three union directors and one union member on medical leave) **would still be on strike after 25 April 2018, as the rest would have been individually reinstated.**

29. With regard to the claim for **failure to deliver timely information** on the financial situation and income statements, the company states that it **delivered the information within the 30-day legal period** provided for in art. 316 of the Labour Code **as of the thirtieth day of the request** (16 February 2018).

30. With regard to the **non-payment of wages, social security and health to the four union workers** (including the three members of the board), the company states that this was because they were still on strike, which is why the employment relationship had been suspended by law. It adds that after the final judgement in the case RIT O-2753-2018, followed before the First Labour Court became enforceable, Transporte Aéreo S.A. **paid these workers their full wages, retroactively, not owing any amount for such concept**, at present.

31. With regard to whether the union workers were covered by a **collective agreement or individual contracts**, the company points out that **the workers would have been reinstated under the terms of the last offer of 23 March 2018, as established by article 357 of the Labour Code**.

32. On the **claim of unequal treatment between trade unions, the company states that the cases are different and not comparable.** In the case of the submitter, the last offer had already been rejected and was therefore not in force when it was subsequently accepted. In contrast, in the case of the Sinlatam union, an agreement would have been reached reach between the two parties, as Sinlatam accepted the collective agreement under the terms offered by the company at the time.

33. With regard to the **claim of lack of information** in the collective bargaining process, specifically, **on the presentation of the sequence of days worked**, the company claims that **such analysis of the presentation would be only estimates and an example**, showing in a referential way the impacts and costs that would occur by lowering the flight sequences from their legal maximum of 10 continuous days of work followed by 4 continuous days of rest. The company stresses that it never would have claimed that it would be possible to fly a sequence of 6 continuous working days followed by 4 continuous rest days, as the union claims

34. With regard to the **ISTAS 21 questionnaire**, the company mentions that **these results have been published in accordance with legal regulations** and, at the date of the response to this instance, they are at a stage of analysis of the recommendations, together with company representatives, the Health and Safety Joint Committee, and the directors of both unions (Sindicato de Tripulantes de Cabina and Sinlatam).

35. With regard to the **financing of training for union leaders**, the company points out that since the union was still on strike, it would be understood that the employment relationship of the workers who had not been individually reinstated would continue to be suspended, preventing the granting of that benefit to the union leader who had requested it at the time. The company adds that these training sessions **were resumed once the striking union leaders returned to work**.

36. Regarding the **dismissals and the purchase of aircraft**, the company indicates that **it would have been compelled to comply with the expiration of the fixed-term contracts due to temporary and exceptional circumstances,** and not as act of intimidation related to the collective bargaining process. In addition, the company states that fixed-term employees would not have job protection during the collective bargaining process, allowing the employer to terminate their contracts upon expiration, in accordance with article 309 of the Labour Code. Finally, he adds that this situation has been brought to the attention of the Courts of Justice, in the case of the complaint of anti-union practices RIT S-36-2018 before the 1st Labour Court of Santiago, which issued a judgement on 11 February 2019, final and enforceable at the time of the response to this instance, rejecting the complaint of anti-union practices, stating that the company's decision had been duly justified.

37. With regard to the **possibility of creating a low-cost airline**, the company explains that, due to the highly volatile and competitive environment, it was necessary to realistically assess and plan for the **future of its domestic business in Chile**. Among the options analyse was the creation of a new commercial airline to better responde to the entry of new low-cost operators. All this analysis would seek to **support LATAM's viability** and avoid having to face critical situations of impossibility to pay its debts.

38. With regard to the **claim of lack of trust in the Director of Labour's role as mediator**, the company points out that **it did not observe any irregular conduct by the Director of Labour** in the collective bargaining process and that he **had left the company's services long before he was appointed Director of Labour**. Moreover, these facts would not be attributable to the company.

39. Finally, in its communication of 28 November 2023, the company stated that since 2018, the year in which the events described occurred, LATAM has had multiple collective negotiations with the various trade union organisations that exist in the group, including two collective negotiations with the submitter, in 2020 and 2023, which ended satisfactorily for the parties. It also points out that LATAM is a voluntary signatory of the United Nations Global Compact and that it is a leading company in talent development, attractive as a place to work and with an organisational health positioned in the first quartile internationally for more than four years.

IV. NCP evaluation of the specific instance

a) Preliminary issues

40. The preliminary question is whether the NCP is competent to hear the case.

41. To determine this, two requirements: must be verified (1) the requested company must be a multinational enterprise, and (2) the events must have occurred in Chilean territory or, if they occurred in a foreign country without an NCP, the multinational enterprise must be Chilean.

42. Regarding the first requirement, the requested company (LATAM) is multinational in nature because it has entities in different countries and can coordinate its activities in all of them. Therefore, the first requirement is met.

43. As to the second requirement, the events occurred on Chilean territory. Thus, the second requirement is fulfilled and the Chilean NCP is competent to hear the case.

b) Initial assessment

44. In determining whether the issue raised merits further consideration, the NCP must establish whether the issue is bona fide and whether it relates to the Guidelines. In this context, the NCP takes account into the following criteria:

    1. The identity of the party concerned and its interest in the matter.
    2. Whether the issue raised in the request is material and justified.
    3. Whether the company's activities are linked to the issues raised in the specific instance.
    4. The relevance of concurrent legislation and procedures to the case, including court decisions.
    5. How similar or the same issues have been, or are being, addressed in other local or international processes.
    6. Whether the review of the specific instance will contribute to the purpose and effectiveness of the Guidelines.

45. In response to the specific instance notice, the company indicated that it would not participate in the NCP process, as many of the disputed issues were still being discussed in the courts and there were monthly meetings with the union. In addition, the main issues that motivated the specific instance request (validity of the last offer when signed by the union and legality of the end of the strike) were resolved (in of favour of the union) by the courts, whose rulings have been complied with by the company, at least with respect to the three union leaders affected, according to statements made by union representatives in a meeting with the NCP on 4 September 2023.

46. Accordingly, it is considered that there is no merit in giving further consideration to the issue raised.

V. Conclusion

47. In light of the above, the NCP issues this Final Statement, concluding the specific instance and making recommendations to the company in light of the circumstances and available information, including Chapter V of the 2023 Guidelines and the rulings of the courts.

a) NCP Observations and Recommendations

48. Recommendations for the company:

- Always bear in mind the right of workers to entrust unions and representative organisations of their choice to represent them in collective bargaining and to engage in constructive negotiations with such representatives, with a view to reaching agreements on terms and conditions of employment.
- Promote ongoing consultation and cooperation between the company and workers and their representatives - through legitimate processes, structures or mechanisms - on issues of common concern.
- Always bear in mind what is stated in recital 7 of the decision of the Court of Appeals of Santiago of 2 July 2019, which accepts the appeal for annulment of the union (Case Labour-Cobranza No. 2652-2018), in the sense that trade union freedom is a fundamental right, comprising the right to unionisation and union action rights, in particular, the rights to collective bargaining and collective conflict (strike). These rights are essential attributes of trade union freedom and enable organisations to fulfill their functions. This recognition is found in paragraphs 16 and 19 of Article 19 of the Political Constitution of the Republic, as well as in International Treaties (ILO Conventions 87 and 98, the American Convention on Human Rights, and its Additional Protocol on Economic, Social and Cultural Rights and the International Covenant on Economic, Social and Cultural Rights).
- Always bear in mind what is stated in the 11th recital of the aforementioned ruling, in the sense that, since the strike action is a right granted to workers (who must exercise it collectively), the union is the sole holder of this right in a case like this. Consequently, the union always has the authority to decide when to end the strike and return to work.
- Always keep in mind the importance of implementing risk-based due diligence processes according to the Guidelines (particularly Chapters IV, V and VI) and the OECD Due Diligence Guidance for Responsible Business Conduct. These processes are ongoing and consist of identifying, preventing and mitigating negative impacts - actual or potential - of the company's activities and business relationships and reporting on how they are addressed (Paragraphs 11, 12 and 13, Chapter II; paragraph 5, Chapter IV, Guidelines 2023).

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If the NCP offers its good offices or, in its Final Statement, makes recommendations to the company, this should in no way be interpreted as an assertion that the requested multinational has failed to comply with the Guidelines.

The Guidelines state that confidentiality of the proceedings shall be maintained throughout its duration. Information and opinions provided during the proceedings shall be kept confidential, unless the party concerned consents to the disclosure of such information or opinions or where non-disclosure would be contrary to the provisions of national law.

In accordance with the principle of transparency that governs the functions of the NCP, the final statements are published on the NCP's website and are translated into English and sent to the OECD Working Party on Responsible Business Conduct.

Before the Final Statement is issued, the parties are given the opportunity to comment on the draft statement, bearing in mind that the drafting of the statement is always the responsibility of the NCP, which will define the final version of the document.

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Non-official English translation[1]

[1] In case of discrepancy, the Spanish version of this Final Statement shall prevail.