

Fact Sheet

JUAN LINARES – POLITICAL PRISONER

February 2011

Juan Linares, President of the Oversight and Justice Council of the National Union of Mine and Metal Workers (SNTMMSRM), was arrested on December 3, 2008 and has been imprisoned without bond since that date in the Reclusorio Norte, a large prison in Mexico City.

All of the charges against Linares stem from the transfer of the assets of a Trust, created by the Union in 1988, to the Union.

1. History of the Trust

In the late 1980s, the Mexican Government under President Carlos Salinas privatized a number of state-owned enterprises, including mines. A number of mining properties were sold to companies owned by Germán Larrea. As part of the negotiation over the privatization with the SNTMMSRM, Larrea agreed to set aside 5% of the shares of the companies he acquired to benefit the workers of these companies.

On November 14, 1988, a Trust was established by the Union with Multibanco Comermex (now Scotiabank) as Trustee, for the benefit of Union members who were employees of MEXCOBRE, MEXASUL, IMMSA, Minerales Metálicos del Norte, S.A., Zinc de México, S.A. de C.V. (hoy denominada Mexicana del Arco, S.A. de C.V.) y Carbonífera de Nueva Rosita, S.A. de C.V.

The trust agreement created a Technical Committee (made up of Armando Fausto Ortega and Rafael A. Villar Calvo, representatives of Industria Minera México, S.A.) that was supposed to establish criteria for distributing the Trust assets to workers according to “Share Distribution Plans,” “Incentive Plans for Remaining in the Company,” “Productivity Incentive Plans,” or “Plans for the Acquisition, Repair or Construction of Housing.” In fact, the Technical Committee never established any of these criteria.

On August 24, 1990, the First Commercial Court in Mexico City issued an order approving an agreement under which MEXCANANEA, which had won control of the assets of the bankrupt MEXCOBRE, agreed to pay 5% of the shares (then valued at US\$19.5 million) to the workers.

On August 28, MEXCANANEA, in a request signed by Germán Larrea, asked the court to clarify that the terms of its offer were in fact to pay the shares to the Union, not to the workers. Accordingly, in an order issued on August 30, 1990, the Court clarified the terms of the agreement as follows:

“c). The preferential position of MEXICANA DE CANANEA, S.A. DE C.V., offers to deliver a share of up to five percent of its capital stock, as the bidder specifies in its written offer presented to this court last August 20 in subsection a) of point 1 (page 5) and annex 3-F, in favor of the National Union of Mine and Metal Workers of the Mexican Republic, as beneficiary of the trust constituted the fourteenth of November of nineteen eighty-eight with MULTIBANCO COMERMEX, S.N.C., which eventually can be considered equivalent 19.5 million dollars which would remain for the benefit of this union” (emphasis added).

For nearly 15 years the Union pursued both litigation and industrial action against the Larrea companies (MEXCOBRE, MEXCANANEA, MM and IMMSA) to force them to pay the promised shares into the Trust. Finally on October 22, 2004, the parties reached an agreement with the participation of the Labor Secretary. Under this agreement, the Larrea companies paid the equivalent value of the shares, approximately US\$55 million, into the Trust.

On October 26, 2004, the Trust was modified as follows:

“6.- With the liquid assets in dollars or pesos, which constitute the assets of the Trust, the Trustee shall proceed in the manner, time and amounts indicated by the Technical Committee [now made up of three persons appointed by the Union], to distribute these among the members of the Settlor Union who meet the eligibility requirements defined by it, as well as to apply these to the payment of costs, honoraria and other expenses paid by the Settlor, which are intended to modify this present Trust Agreement, as well as for the defense of the rights of the workers.”

On February 22, 2005, the members of the Technical Committee (José Ángel Rocha Pérez, Héctor Félix Estrella, and Juan Linares Montufar) made the decision to ask the Trustee to terminate the Trust and transfer its assets to a bank account of the Union. Accordingly, the Trust Agreement was terminated by an agreement signed by the parties on March 4, 2005.

The accusation made against the members of the Technical Committee by Elias Morales and other former Union members is that the termination of the Trust and the transfer of its assets to the Union violated the rights of individual Union members who were the intended beneficiaries of the Trust.

There are several problems with this accusation:

- A. There is no evidence that the transfer of Trust assets held by the Trustee Scotiabank was unlawful. The Trust document clearly establishes that the Trust was created for the benefit of the Union, not the individual members. This specific issue was raised by the Larrea companies and was specifically clarified by the ruling of the First Commercial Court on August 30, 1990. Moreover, the National Bank and Stock Commission (CNBV), which regulates securities, in a Technical Opinion issued March 10, 2006, specifically stated that the termination of the Trust Agreement did not violate Section 113b.
- B. The Union's autonomy with respect to its assets is guaranteed by ILO Convention 87 on Freedom of Association.
- C. The assertion that the members of the Technical Committee violated Section 113b depends on the conclusion that because the funds were deposited in a bank account the improper use of these funds constitutes bank fraud.
- D. Elias Morales and the other former SNTMMSRM members who brought the charges lack standing because they cannot prove that they are beneficiaries of the trust and cannot demonstrate that they have been harmed.
- E. The Union in fact did distribute some \$21 million of the assets to members before this litigation began, as established in the audit

conducted for the International Metalworkers Federation by the Swiss firm Horwath Berney Audit S.A.¹

2. The Charges

In response to allegations by Elias Morales and other former Union members presented on January 20, 2006, Federal prosecutors filed charges, all based on the same criminal investigation (UEIDFF/FINM02/64/2006), in Federal court and two state courts (Sonora and San Luis Potosí). The state court charges alleged fraudulent administration; the federal charges alleged violations of Article 113b of the Federal Law of Credit Institutions, which reads:

“Whoever in an unlawful manner uses, obtains, transfers or, in any other manner disposes of resources or shares of the clients of credit institutions, shall have applied a penalty of three to ten years in prison and a fine of 500 to thirty thousand days of salary.”

A. Status of State Charges

-The Sonora state court charges against Linares were appealed before the Third District Judge (Amparo No. 497/2006) , and the appeal was upheld by the First Collegiate Tribunal for Criminal Administrative Matters in Hermosillo on June 13, 2007. The Collegiate Tribunal held that there was *no illegal conduct because the Trust had not been established for the benefit of the individual union members.*

.- The San Luis Potosí state charges against Linares were removed to the 18th Criminal Court of the Federal District (Case No. 79/2007). On December 14, 2008, the Court *ordered his release on the grounds that no evidence of a crime had been presented.* The Public Ministry appealed, and the Second Chamber of the TSDF confirmed the judge’s release order on 8 May 2009. On 6 August 2009 the Public Ministry investigating agent proposed dropping the charges, and this proposal was approved by the Coordination of Agents of the Public Ministry on 17 August 2009. *The Public Ministry determined that, “the complainants were not beneficiaries of the Trust, that there was no injury to the Trust; that the assets of the Trust*

¹ <http://www.imfmetal.org/index.cfm?c=16593&ol=2>

belonged to the Union and that the Union's disposition of these assets was an exercise of its autonomy as defined by ILO Convention 87, which Mexico has ratified; that there is no complaint nor injury to any protected right; that the trust was legally extinguished." Accordingly, the case was closed on September 1, 2009.

- Independently, Linares filed a motion for dismissal of the charges in the 18th Criminal Court of the Federal District on the grounds of double jeopardy. The Court granted this motion on October 11, 2010. In its opinion, the Court stated that Linares "was fully authorized to represent the workers affiliated to the Union in all matters having to do with the Trust 109654526 (formerly 9645-2), including making a complaint to the Fiduciary Institution regarding mismanagement of trust assets, which did not occur given that *not a single irregularity was seen resulting from the legal act extinguishing the Trust 109654526 (formerly 9645-2).*"

Thus, all of the charges filed against Linares in state courts have been thrown out by the courts.

B. Status of Federal Charges

An arrest warrant on the Federal charges was issued by the First District Judge for Criminal Procedures (Case No. 140/2008) on September 3, 2008. The Technical Opinion of the National Bank and Stock Commission (CNBV), exonerating Linares, was – illegally - not included in the case file.

Linares filed a constitutional appeal (*amparo*) against the arrest warrant with the 13th District Amparo Judge. This was denied, and was appealed to the 7th Collegiate Tribunal, which also denied the amparo on April 7, 2010² and September 30, 2010³. It should be noted that this appeal was based only on the allegations in the arrest warrant and did not include other evidence.

Linares then filed a motion to dismiss (*sobreseimiento*), arguing that the federal charges should be thrown out because they are based on the same facts concerning the Trust as the state charges that were already

² <http://www.jornada.unam.mx/2010/04/08/index.php?section=politica&article=010n2pol>

³ <http://www.jornada.unam.mx/2010/10/01/index.php?section=sociedad&article=043n1soc>

ruled on by the 18th Criminal Court of the Federal District. This was denied by the First District Judge for Criminal Procedures on May 7, 2009.

This denial was appealed to the Sixth Unitary Tribunal for Criminal Matters of the First Circuit (Appeal No. 488/2010-VI). On November 4, 2010 the Sixth Tribunal denied the appeal on the grounds that some of the federal charges relating to the disposition of the trust assets are distinguishable from the state charges of fraudulent administration.⁴ Linares's attorneys have asked the 18th Criminal Court of the Federal District for a ruling establishing that there is no material difference between the state charges already dismissed and the pending federal charges. Once this is issued they will ask the Sixth Unitary Tribunal to reconsider its ruling.

Linares also asked the court to release him on bail. Under Article 112 of the Federal law of Credit Institutions and Article 194, Section VIII of the Federal Code of Criminal Procedure, a violation of Article 113 bis is considered a serious crime (*delito grave*) and therefore not subject to bail if the amount in question exceeds 350,000 days' wages (about \$1.7 million).⁵ The arrest warrant accuses Linares of unlawful disposition of \$55 million. Linares sought to challenge this allegation, arguing that it was not substantiated with proofs and that the individuals who brought the charges could not demonstrate an interest in the entire patrimony of the Trust, but rather only their alleged share of it. The Sixth Tribunal rejected this argument on September 30, 2010, saying that *the amount can only be challenged at sentencing*.⁶

⁴ <http://mx.news.yahoo.com/s/09112010/7/mexico-niega-tribunal-unitario-apelaci-oacute.html>

⁵ This standard appears to violate the international norm that a defendant is presumed innocent until proven guilty. As the European Court of Human Rights has stated, "the gravity of the charges cannot by itself serve to justify long periods of detention on remand." Prosecutor v. Perisic, Case No. IT-04-81-T, Decision on Mr. Perisic's Motion for Provisional Release During the Court's Winter Recess, P 10 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2008), <http://www.icty.org/x/cases/perisic/tdec/en/081217.pdf> (quoting Ilijkov v. Bulgaria, 2001-IV Eur. Ct. H.R. P 81 (2001)). Rather, both domestic and international courts balance the presumption of innocence and the right to liberty against the societal interest. The European Court of Human Rights has recognized four permissible grounds for refusing provisional release - the risk that, if released, the defendant "will fail to appear at trial," "take action to prejudice the administration of justice," commit further crimes, or "cause public disorder." Smirnova v. Russia, App. Nos. 46138/99 and 48183/99, 39 Eur. H.R. Rep. 450, 461 (2004).

⁶ <http://www.jornada.unam.mx/2010/10/01/index.php?section=sociedad&article=043n1soc>

In the course of these proceedings, the judge issued 17 separate orders to Germán and Genaro Larrea (the principals of Grupo México) to appear as witnesses in the case, but the Larreas have not appeared and the judge refused to order their arrest. On account of this refusal, Linares filed charges of obstruction of justice against the judge, who finally withdrew from the case on October 20, 2010, declaring that he was felt “enmity” against Linares. The case has now been assigned to Jesús Terriquez Basulto, 12th Judge for Federal Criminal Procedures located in the Reclusorio Oriente, and the new case number is 216/2010.