

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

**AMERICAN FEDERATION
OF TEACHERS NEW MEXICO, AFL-CIO**

and

Case 28-CA-064412

ANDREW T. LOTRICH, an Individual

**AMERICAN FEDERATION OF TEACHERS
NEW MEXICO, AFL-CIO, AND AMERICAN
FEDERATION OF TEACHERS, JOINT EMPLOYERS**

and

Case 28-CA-074397

JAMES D. BEATY, an Individual

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S CROSS-EXCEPTIONS**

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Table of Contents

I.	INTRODUCTION	1
II.	RESPONDENT’S CROSS-EXCEPTIONS ARE WITHOUT MERIT.....	3
	A. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by unlawfully giving employees the impression their Union activities were being monitored..	3
	B. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by interrogating employees about Lotrich’s actions during a Union meeting.....	5
	C. The ALJ correctly found that Respondent unlawfully threatened Lotrich with unspecified reprisals if it was found that he had pursued a no-confidence vote during a Union meeting.....	8
	D. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule that prohibited employees from calling a no-confidence vote during Union meetings.....	9
	E. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by promulgating an overly broad and discriminatory rule in the collective-bargaining agreement it has with the Union that prohibits employees from expressing their concerns about management.	10
	F. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by threatening Lotrich by telling him he did not need to be vocal at the bargaining table and to watch what he said at the table.....	13
	G. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule by telling Lotrich he did not need to be vocal at the bargaining table and to watch what he said at the table.....	17
	H. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by telling Lotrich that the contract negotiation session he missed went really well without him and the parties got a lot accomplished.	18
	I. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by denying Lotrich his request for Union representation and that Lotrich did not waive his request for this representation.	19
	J. The ALJ correctly found that Lotrich did not engage in post-discharge activity that would prevent him from being subject to reinstatement by Respondent.	23
III.	CONCLUSION.....	26

Table of Authorities

<i>Action Auto Stores</i> , 298 NLRB 875 (1990)	18
<i>American Freightways</i> , 124 NLRB 146 (1959).....	7
<i>Ampersand Publishing, LLC d/b/a Santa Barbara News-Press</i> , 357 NLRB No. 51 (2011)	27
<i>Bausch & Lomb Optical Company</i> , 108 NLRB 1555 (1954)	27
<i>Beach Lane Management</i> , 357 NLRB No. 30 (2011).....	27
<i>Broadway</i> , 267 NLRB 385 (1983).....	4
<i>California Gas Transport</i> , 347 NLRB 1314 (2006)	18
<i>Cooper Tire & Rubber Co.</i> , 299 NLRB 942 (1990)	18
<i>C-Town</i> , 281 NLRB 458 (1986)	26
<i>Double D. Construction Group, Inc.</i> , 339 NLRB 303 (2003)	5, 17
<i>DTM Corporation</i> , 2010 WL 3285373	12
<i>Electro-Voice, Inc.</i> , 320 NLRB 1094 (1996).....	4
<i>Empire State Weeklies, Inc.</i> , 354 NLRB 815 (2009)	17
<i>Fresh & Easy Neighborhood Market, Inc.</i> , 356 NLRB No. 90 (2011).....	5
<i>Golden Day Schools</i> , 236 NLRB 1292 (1978).....	27
<i>Hawaii Tribune-Herald</i> , 356 NLRB No. 63 (2011)	26
<i>Industrial Wire Products, Inc.</i> , 317 NLRB 190 (1995)	19
<i>J.W. Microelectronics Corp.</i> , 259 NLRB 327 (1981).....	26
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998).....	10
<i>Lucky Stores, Inc.</i> , 1994 WL 1865880.....	12
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	10
<i>McClain & Co.</i> , 358 NLRB No. 118 (2012).....	7

<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	13
<i>National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers</i> , 346 U.S. 464 (1953).....	27
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975).....	22
<i>O’Daniel Oldsmobile, Inc.</i> , 179 NLRB 398 (1969).....	26
<i>Olney IGA Foodliner</i> , 286 NLRB 741 (1987)	16, 21
<i>Praxair Distribution, Inc.</i> , 357 NLRB slip op at 15-16 (2011)	19
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945)	10
<i>Rish Equipment Company, Inc.</i> , 257 NLRB 808 (1981).....	20
<i>Rossmore House</i> , 269 NLRB 1176 (1984)	7
<i>Sage Dining Service</i> , 312 NLRB 845 (1993).....	16
<i>Seton Co.</i> , 332 NLRB 979 (2000).....	4, 8
<i>SKD Jonesville Division, L.P.</i> , 340 NLRB 101 (2003).....	17
<i>St. John’s Hospital and Health Center</i> , 264 NLRB 990 (1982)	27
<i>St. Margaret Mercy Healthcare Centers</i> , 350 NLRB 203 (2007)	18
<i>Tawas Industries, Inc.</i> , 321 NLRB 269 (1996).....	12, 13, 14
<i>Tres Estrellas de Oro</i> , 329 NLRB 50 (1999).....	4
<i>Trover Clinic</i> , 280 NLRB 6 (1986).....	16
<i>Union National Bank</i> , 276 NLRB 84 (1985)	16
<i>United Coupon Corporation</i> , 1993 WL 1609512	28
<i>United States Steel Corp. v. NLRB</i> , 682 F.2d 98 (3 rd Cir. 1982)	5
<i>Universal Fuels</i> , 298 NLRB 254 (1990).....	13
<i>Washoe Medical Center</i> , 348 NLRB 361 (2006).....	24

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I. INTRODUCTION

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief in response to Respondent's cross-exceptions to the decision of Administrative Law Judge Margaret G. Brakebusch (the ALJ) in JD (ATL)-25-12 dated September 25, 2012 (ALJD).¹ The ALJ found, and the record supports, that American Federation of Teachers, New Mexico (Respondent) violated Section 8(a)(1) of the Act by a) unlawfully giving employees the impression their activities on behalf of International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (Union) were being monitored, b) interrogating employees about an employee's actions during a Union meeting, c) threatening an employee

¹ All dates herein are 2009, unless otherwise noted. American Federation of Teachers, New Mexico will be referred to as "Respondent." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the Acting General Counsel's and Respondent's Exhibits will be referred to as (GCX.), and (RX.), respectively, with the appropriate exhibit number.

with unspecified reprisals if it was found out that the employee had pursued a no-confidence vote during a Union meeting, d) orally promulgating an overly broad and discriminatory rule that prohibited employees from calling a no-confidence vote during Union meetings, e) promulgating and maintaining an overly broad and discriminatory rule in the collective-bargaining agreement with the Union that prohibited employees from expressing their concerns about Respondent, f) threatening an employee by telling the employee he did not need to be vocal at the bargaining table and to watch what he said at the table, g) orally promulgating an overly broad and discriminatory rule by telling an employee he did not need to be vocal at the bargaining table and to watch what he said at the table, h) telling an employee that the contract negotiation session he missed went really well without him and the parties got a lot accomplished, and i) denying employee Andy Lotrich (Lotrich) his request for Union representation for a meeting he reasonably believed could lead to discipline. In addition, the ALJ found that Respondent had failed to establish that Lotrich had engaged in post-discharge conduct to the extent it would preclude Respondent from having to reinstate him to his former position.

The defenses raised by Respondent have no merit to sufficiently overcome the Section 8(a)(1) violations found by the ALJ. Respondent's exceptions provide no basis for the Board to overrule the ALJ's findings. The Acting General Counsel urges the Board to reject Respondent's invitation to ignore Board law and adopt the ALJ's findings that Respondent violated the Act as alleged, except as argued in the General Counsel's Exceptions. For these reasons, the Board should affirm the unfair labor practice findings made by the ALJ.

II. RESPONDENT'S CROSS-EXCEPTIONS ARE WITHOUT MERIT

A. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by unlawfully giving employees the impression their Union activities were being monitored.

Respondent contends in its Exceptions 1-2 that the ALJ erred by finding that Respondent violated Section 8(a)(1) of the Act by unlawfully giving employees the impression their Union activities were being monitored. On April 18, 2011, employees held a Union meeting shortly after President Trujillo informed them during a staff meeting that she may have to resign in order to avoid employee layoffs. (Tr. 140-141, 447-448) During that meeting, Lotrich made a motion to take a no confidence vote in Respondent Vice President Kathy Chavez (Chavez). (Tr. 142) A few days after the Union meeting, Chavez called Lotrich into her office for a meeting with Respondent President Christine Trujillo (Trujillo) and Union Steward Joe Hill (Hill). (Tr. 147) Chavez began the meeting by stating she had heard a rumor that the staff held a vote of no confidence. (Tr. 148)

Respondent argues that in making her decision, the ALJ merely assumed that Lotrich was engaging in protected Section 7 activities and that this assumption was not true and that the ALJ failed to take into account the totality of the circumstances. (Resp. Brief at 15) Respondent goes on to assert that Union Steward Hill, one of the employees present at the meeting with Lotrich, testified he did not believe Respondent had placed Union meetings under surveillance. (Resp. Brief at 15) Lost in Respondent's argument is that it is not dispositive that a particular employee had the impression their Union activities were being monitored but whether it would be reasonable for an employee to assume from the circumstances that Respondent gave this impression from what Respondent was saying to that employee.

An employer's statement to an employee about protected activities violates the Act by creating an impression of surveillance if it would be reasonable for the employee to assume that the employer had placed their protected activities under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). The Board has found such statements can amount to unlawful surveillance and create the impression of surveillance. *Seton Co.*, 332 NLRB 979, 981 (2000).

What is clear is that Chavez informed Lotrich she knew what had taken place in a recent Union meeting and that she knew he played a role in that meeting. Respondent does not deny these critical facts. Rather, Respondent tries to argue that Lotrich was not engaged in protected activity. This is simply not true. During a Union meeting Lotrich made a motion that would result in employees collectively supporting a management representative losing their job as a means to potentially save and/or protect their own jobs with Respondent. President Trujillo had only just suggested this path for herself at the staff meeting held on April 18, 2011. (Tr. 141)

Under these circumstances, Respondent has undeniably violated Section 8(a)(1) of the Act by informing Lotrich that it was aware of his actions at this closed door Union meeting. Such statements by Respondent would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3rd Cir. 1982); *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90, fn. 2 (2011), citing *Double D. Construction Group, Inc.*, 339 NLRB 303, 304 (2003)). Based on the foregoing, the General Counsel submits that Respondent's exceptions have no merit and the ALJ correctly found that

Respondent, through Chavez, has violated Section 8(a)(1) of the Act by unlawfully giving employees the impression their Union activities were being monitored. (ALJD 7: 16-20)

B. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by interrogating employees about Lotrich's actions during a Union meeting.

During the meeting discussed in Section A above, and after informing them that she knew a no confidence vote had been made by Lotrich during that meeting, Vice President Kathy Chavez asked Lotrich and Hill questions regarding what happened during the prior Union meeting. (Tr. 146-149) Likewise, a few days after this meeting with Lotrich and Hill, Chavez specifically asked employee Tiffany Fiser what had taken place during the same meeting. (Tr. 611) Chavez does not dispute these facts. (Tr. 612) To this end, the ALJ found that the undisputed record established that Respondent, through Chavez, unlawfully interrogated Lotrich and Fiser by questioning them about what took place during the Union meeting. (ALJD 7:43-44) Respondent asserts in its Exceptions 3-4 that the ALJ erred in making this finding. (Resp. Brief at 11-13) Respondent's exceptions are without merit.

Respondent argues that Chavez questioned Lotrich about what took place during the Union meeting in order to obtain information pertaining to a breach of the collective-bargaining agreement, namely Section 8.1 and its prohibition that employees were not allowed to engage in internal political activity that was associated with Respondent. As will be discussed more fully in Section E below, Respondent bases this interrogation on the enforcement of an unlawful overly-broad and discriminatory workplace rule that prohibits employees from engaging in Section 7 activities. Such a basis does not excuse Respondent from subjecting employees to coercive questioning of their Union activities. Notably, Chavez admits that she failed to make any mention of or reference to the contract during her meeting with Lotrich. (Tr. 628-629)

Respondent also argues that Lotrich was not engaged in protected activity when he called for the no-confidence vote from employees during the Union meeting. (Resp. Brief at 13) Respondent contends that Lotrich was not acting for the mutual aid and protection of his fellow employees and was not acting concertedly and that Lotrich's conduct was limited to soliciting employees to support a managerial change, conduct that Respondent argues is not protected. Respondent does not accurately assess Lotrich's conduct during the Union meeting. Lotrich was soliciting support from employees for group action that would potentially result in a management representative losing her job as opposed to unit employees being subject to such action. This is the essence of protected concerted activity and Lotrich's actions in soliciting employees to act concertedly for this purpose is action taken for their own mutual aid and protection and is exactly the type of conduct protected by Section 7. As such, this activity is not an attempt to change management structure as much as it is solicited group action during a Union meeting to preserve their jobs. President Trujillo herself had just proposed taking such action herself in the prior staff meeting as a means to preserve unit employee jobs. Regardless, contrary to Respondent's assertions, Lotrich's conduct was protected activity.

Equally important, as cited by Respondent in its brief, "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act". *American Freightways*, 124 NLRB 146, 147 (1959). The question is whether the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed them under Section 7 of the Act. *Rossmore House*, 269 NLRB 1176 (1984). Respondent argues that Lotrich was not in a coercive environment when he was questioned by Chavez. Respondent, for example, argues

that Lotrich had Union representation during the meeting and was free to leave at any time.
(Resp. Brief at 12)

Respondent fails to mention, however, that significant coercive statements were made by Chavez to Lotrich during her meeting with him. In addition to questioning Lotrich about what he did during the prior Union meeting, Chavez also created the impression that his Union activities were being monitored (Section A above) and subjected him to a rather strong threat of unspecified reprisals when she told him she was going to get even with him for initiating a motion of no confidence with employees during the Union meeting (Section C below). Interrogations accompanied by contemporaneous unfair labor practices strongly support a finding that questioning was unlawfully coercive. See *McClain & Co.*, 358 NLRB No. 118 (2012); *Seton Co.*, 332 NLRB 979, 982 (2000). Even so, it is inherently coercive to subject an employee to questions about why he engaged in certain Union activity and doing so under the circumstances presented here is unlawful interrogation.

Respondent also argues that employee Tiffany Fiser was not subject to any coercive questioning by Chavez. (Resp. Brief at 12) Respondent argues that she consensually agreed to answer Chavez' questions about what Lotrich had done during the prior Union meeting after learning that Chavez already knew what had taken place. (Resp. Brief at 12) Although Chavez gave Fiser the impression that union meeting activities were being monitored (See Section A above), this, in and of itself, does not excuse Respondent from asking her to reveal the details about the Union activities engaged in by another employee. Lotrich was engaged in protected Union activities and, as such, Respondent questioning Fiser about his activity during a Union meeting was coercive and unlawful under the circumstances. Based on the foregoing, the General Counsel submits that Respondent's exceptions have no merit and the

ALJ correctly found that Respondent has violated Section 8(a)(1) of the Act by interrogating employees Andy Lotrich and Tiffany Fiser about Lotrich's actions during a Union meeting.

C. The ALJ correctly found that Respondent unlawfully threatened Lotrich with unspecified reprisals if it was found that he had pursued a no-confidence vote during a Union meeting.

During the meeting discussed in Section A above, Chavez told Lotrich and Hill that she would "nip the matter in the bud" and would "get even" with Lotrich if she found that he had pursued the no confidence vote during the Union meeting. (Tr. 451) Respondent asserts in its Exceptions 5-7 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by threatened employee Lotrich with unspecified reprisals with her statement to him. Respondent did not expressly address these exceptions in its brief but did argue that Chavez routinely made the "nip in the bud" comments at work to connote that she was actively dealing with the concerns of others. (Resp. Brief at 10) Respondent's argument has no merit.

First, the term "nip in the bud" has certain coercive connotations in labor relations as it is used to describe an employer's attempts to stop employee union activity or attempts to engage in union organizing activities in its tracks. An employer representative making such a statement, particularly one who is employed with a labor organization that is an active participant in labor relations, should make clear exactly what this expression means, particularly when said in discussion related to the employment conduct of one Respondent's employees. Second, even if this was a saying Chavez typically made in the workplace, it was followed in this particular situation by clarification that she was going to "get even" with Lotrich if she found out he was engaged in certain activity during a Union meeting. Although this threat is pretty clear, repeatedly making threats of reprisals does not make it somehow less coercive. Based on the foregoing, the General Counsel submits that Respondent's exceptions have no merit and the ALJ correctly found that Respondent, through Chavez, has

violated Section 8(a)(1) of the Act by threatening Lotrich with unspecified reprisals for engaging in Union activities.

D. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule that prohibited employees from calling a no-confidence vote during Union meetings.

During the same meeting discussed in Section A above, Chavez told Lotrich that he had no right to call for a vote of no confidence in her during the Union meeting he attended. (Tr. 148-149, 261) Respondent asserts in its Exceptions 8-9 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule that prohibited employees from calling a no-confidence vote during Union meetings. Respondent offered no specific discussion of these exceptions in its brief, and these exceptions have no merit.

The Supreme Court has held that employees have the right to engage in activity for their own mutual aid without employer interference. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). Absent such a justification, a rule prohibiting employee solicitation which is not by its terms limited to working time violates Section 8(a)(1) because the rule explicitly prohibits employee activity that the Board has found to be protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 654-655 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Chavez clearly told Lotrich that he could not engage in certain Union activity on his own time or otherwise while at work and provided Lotrich no circumstance, special or otherwise, as to why such a rule was necessary. The ALJ correctly found that such a directive from Respondent, by Chavez, resulted in the promulgation of an overly-broad and discriminatory rule that violated Section 8(a)(1) of the Act because it unlawfully restricted and chilled Lotrich's ability to engage in protected Section 7 activity at

work. (ALJD 9:10-13) Based on the foregoing, General Counsel submits the ALJ correctly found that Respondent has violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule that prohibited employees from calling a no-confidence vote during Union meetings.

E. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by promulgating an overly broad and discriminatory rule in the collective-bargaining agreement it has with the Union that prohibits employees from expressing their concerns about management.

Respondent asserts in its Exception 10 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by promulgating an overly broad and discriminatory rule in the collective-bargaining agreement it has with the Union that prohibited employees from expressing their concerns about Respondent. Included in the most recent collective-bargaining agreement in place between Respondent and the Union is language in “Article VIII – Political Freedom” that provides the following:

8.1: AFT-NM employees shall not engage, not be asked to engage, in the internal politics of the AFT-NM or its local affiliates of the AFT. This shall include, but not limited to, the lobbying of AFT-NM Executive Council members on any items that are likely to come before them to be voted on including personnel matters.

(RX 31, p. 17)

Respondent argues this provision was meant to prohibit employees from getting involved in the internal political affairs of Respondent and using their positions as a means to unfairly impact Respondent’s reputation amongst its locals. Respondent argues that the ALJ’s holding prevents it from being able to prohibit conduct that is not protected and having a rule that prohibits such conduct is not found by the Board to violate Section 8(a)(1). (Resp. Brief at 4-8) General Counsel submits that Respondent seriously undercuts the standard by which promulgated rules are evaluated and further submits that the ALJ correctly found that the

provision promulgated and maintained by Respondent in the collective-bargaining agreement was in violation of Section 8(a)(1) of the Act.

The Board has held that it is unlawful for an employer to maintain in its collective-bargaining agreement with a union an overly-broad and discriminatory and that prohibits employees from engaging in Section 7 activity. *Tawas Industries, Inc.*, 321 NLRB 269, 276-277 (1996); *DTM Corporation*, 2010 WL 3285373; *Lucky Stores, Inc.*, 1994 WL 1865880. Respondent goes to lengths in its brief describing its interpretation of the language and providing examples of the type of internal political conduct the language was intended to prohibit. (Resp. Brief at 4-8) The examples cited by Respondent, however, are not inclusive of the potential internal politics employees may engage.

If Respondent had intentions for implementing a provision that prohibited employees from using their positions as a means to influence, for example, internal union elections held by Respondent, it should have not used such overly-broad language to describe these intentions and made them clearer. The language of the provision fails to clearly define “internal politics” or ensure employees that they still had the right to engage in protected activity regarding their terms and conditions of employment. The use of the term “internal politics of AFT NM” can easily encompass employee activity that is associated with their acting together to express concerns regarding the terms and conditions of employment being implemented by Respondent. A rule that prohibits employees from engaging in such conduct or any other lawful Section 7 activity, without exception or clear definition, is clearly overly broad and discriminatory and unlawful under Section 8(a)(1) of the Act.

Respondent also asserts that the provision has nothing to do with internal Union matters and even cites testimony from one employee who attested what he believed was the

meaning of the language. (Resp. Brief at 4) This argument has no merit. It is not whether the rule has an actual affect of prohibiting employees from engaging in Union or other protected Section 7 activity, but whether the rule, by its language, prohibits employees from engaging in this protected activity. The rule at issue here, as promulgated by Respondent, is overly-broad by its language because it is written in a way that encompasses this protected activity.

In its brief Respondent also argues that in negotiating Section 8.1 in the contract, the Union waived the rights of bargaining unit employees to engage in Section 7 rights. (Resp. Brief at 7-8) Respondent goes to great lengths in its brief to argue that the National Labor Relations Board has held that Section 7 rights are subject to waiver through collective-bargaining. Respondent acknowledges that under Board law, such a waiver must be “clear and unmistakable” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) but glosses over this critical component in its brief. The provision makes no mention of employee Section 7 rights and provides no clear definition of what constitutes “internal politics of AFT NM”. It is precisely for these reasons the language of the provision is not a clear and unmistakable waiver of rights to engage in protected Section 7 activity. Thus, contrary to Respondent’s contentions, the waiver doctrine is not applicable here. *Universal Fuels*, 298 NLRB 254 (1990).

Lastly, Respondent argues in its brief that the ALJ and the General Counsel’s reliance on the Board’s case in *Tawas Industries*, 321 NLRB 269 (1996) is misplaced as it pertains to the propriety of the provision. (Resp. Brief at 8) Contrary to Respondent’s arguments, the cited case is on point to the issue presented here. The Board in *Tawas* found that the contract in effect between the union and the employer included a provision that prohibited solicitation and distribution regardless of the kind of material or the time of distribution. 321 NLRB at

277. The Board in *Tawas* found such a provision to be overly-broad and unlawful. *Id.* at 277. The facts here are similar to those presented in *Tawas* in that the contract includes a provision that by its natural meaning would include situations that would prohibit employees from engaging in Section 7 activity. As previously discussed, the general reference to “internal politics” makes the promulgated rule overly-broad and discriminatory. Respondent argues the provision provides an example of what is considered internal politics of Respondent but one cited example does not overcome the overall lack of clarification of such a broad term.

As correctly found by the ALJ, Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overly-broad and discriminatory policy that unlawfully restricted employee Section 7 activity. Accordingly, the credible record evidence supports the ALJ’s findings, and the Board should affirm her conclusions that Respondent has violated Section 8(a)(1) of the Act by having such a provision in its contract.

F. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by threatening Lotrich by telling him he did not need to be vocal at the bargaining table and to watch what he said at the table.

Respondent asserts in its Exceptions 11-12 that the ALJ erred in finding that Respondent, through President Trujillo, violated Section 8(a)(1) of the Act by threatening Lotrich by telling him he did not need to be vocal at the bargaining table and to watch what he said at the table. (Resp. Brief at 16-19) In May and June 2011, the Union was bargaining for a contract with Respondent, and Lotrich, as an employee, was on the Union’s bargaining committee. (Tr. 159) Just prior to a bargaining session that convened sometime in June 2011, Trujillo pulled Lotrich aside and told him, “Andy, you don’t need to be the vocal one at the table; watch what you say.” (Tr. 159-160)

Respondent argues in its brief that Trujillo made these comments to Lotrich as means to help him with his past behavior problems and that making the “don’t be vocal” and “watch what you say” comments to him were merely telling him to tone down his poor behavior. In doing so Respondent appears to be mirroring the ALJ’s discussion and analysis from a prior conversation Lotrich had with Trujillo before a training session where Trujillo told Lotrich “not to talk like Andy” because of concerns as to how Lotrich would handle himself during the session. (ALJD 13: 25-28) This argument by Respondent for the “don’t be vocal” statement by Trujillo does not hold water as Respondent attempts to piggy-back the facts and circumstances associated with a completely different conversation with those later made by Trujillo prior to the bargaining session. In doing so Respondent only confuses what is reflected in the record and is, at most, a self-serving endeavor by Respondent to engage in revisionist history.

Trujillo never mentioned, suggested, or even hinted to Lotrich during their conversation prior to the bargaining session that she was making her comments to him because of any behavioral conduct that was attributed to him earlier in the year. In fact, Trujillo never mentioned to Lotrich that his conduct was even at issue when she spoke to him. Respondent cannot point to her doing so during this conversation because the fact is there is nothing in the record to reflect that she did. What facts we do have is that at the time Trujillo’s comments were made to Lotrich, Respondent and the Union were engaged in negotiations for a new collective-bargaining agreement and that Trujillo’s comments came at the heels of strong threats, interrogation, and the promulgation of overly-broad and discriminatory rules regarding Union activity that were directed at Lotrich by Vice President Chavez during the prior month (See prior Sections A, B, C and D above). As found by the

ALJ, and contrary to the “trying to help Lotrich campaign” Respondent attempts to argue, Trujillo comments to Lotrich to not be so vocal and to watch what he said prior to his intent to engage in Union activities constituted a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act. *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987) (threats possibly intended as “friendly advice” found violative); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) (“keep a low profile” and “be quiet about it”); *Union National Bank*, 276 NLRB 84, 88 (1985) (“watch yourself”).

Respondent also argues in its brief that the record evidence showed that Lotrich did not find any of Trujillo’s statements to be threatening and that as a result it was unreasonable for the ALJ to find that Lotrich found Trujillo’s comments to be retaliatory or unlawful. (Resp. Brief at 19) As discussed previously in this brief, such an argument is not dispositive as to whether the statements rise to the level of a Section 8(a)(1) violation. A statement is an unlawful threat under Section 8(a)(1), when it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a) In evaluating such statements, the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *Sage Dining Service*, 312 NLRB 845, 846 (1993); *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009); *Double D Construction Group*, 339 NLRB 303 (2003) (“test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction”). As such, this standard does not fall on whether the individual employee was actually coerced but rather whether the remarks reasonably tended to be restrain, coerce or interfere with employees who wish to engage in union or other protected activities. Here, Trujillo’s statement to Lotrich

clearly would be found by reasonable employees to restrain, coerce or interfere with their rights to engage in Section 7 activity.

Lastly, Respondent makes a feeble attempt in its brief to argue that Lotrich changes his testimony during the hearing regarding the threat that was made to him by Trujillo. Again, Respondent attempts to crossover testimony between two separate incidents, one involving statements Trujillo made prior to a training session conducted by Respondent's National Representative Jennifer Caseman and statements Trujillo made to Lotrich prior to his attending a bargaining session in June 2011. Lotrich was clear with his testimony that Trujillo told him before the bargaining session not to be so vocal at the bargaining table and to watch what he said. (Tr. 159-160) The crossover of testimony regarding two different conversations did not and does not result in any change of testimony by Lotrich regarding the conversation he had shortly before the bargaining session.

As correctly found by the ALJ, Trujillo's "don't be so vocal" statement is a clear threat of unspecified reprisals for his engaging in protected activities. *SKD Jonesville Division, L.P.*, 340 NLRB at 101, 102 (2003); *Cooper Tire & Rubber Co.*, 299 NLRB 942, 957 (1990); *Action Auto Stores*, 298 NLRB 875, 902 (1990). Such statements are designed to discourage employees from engaging in their Section 7 rights and violate Section 8(a)(1) of the Act. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007); *California Gas Transport*, 347 NLRB 1314, 1315 (2006). Based on the foregoing, General Counsel submits the ALJ correctly found that Respondent, through Trujillo, has violated Section 8(a)(1) of the Act by threatening Lotrich by telling him he did not need to be vocal at the bargaining table and to watch what he said at the table.

G. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule by telling Lotrich he did not need to be vocal at the bargaining table and to watch what he said at the table.

Respondent asserts in its Exception 13 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad and discriminatory rule by telling employee Andy Lotrich he did not need to be vocal at the bargaining table and to watch what he said at the table. The statements at issue are the same ones addressed in Section F above. Respondent did not expressly address this exception in its brief but if the arguments it made in Section F are considered, they are not sufficient to warrant a different result from the ALJ's finding.

The "don't be so vocal" and "watch what you say" instruction by Trujillo created restrictions on Lotrich's ability to freely engage in Section 7 activity at the bargaining table without any special circumstance warranting the restriction. Such an overly-broad rule from Trujillo clearly restricts Lotrich regarding what he is allowed to discuss with other employees or with the Union. *Praxair Distribution, Inc.*, 357 NLRB slip op at 15-16 (2011); *Industrial Wire Products, Inc.*, 317 NLRB 190 (1995). As a result, Lotrich's activities as a negotiator for the Union on its bargaining committee for his bargaining unit's contract were restricted due to the threatening caution clearly communicated to him by Trujillo immediately prior to the session. (Tr. 159-160) As properly found by the ALJ, Respondent, through Trujillo, has violated Section 8(a)(1) of the Act by orally promulgating such an overly-broad and discriminatory rule prohibiting Lotrich's ability to lawfully engage in Section 7 activity.

H. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by telling Lotrich that the contract negotiation session he missed went really well without him and the parties got a lot accomplished.

Respondent asserts in its Exceptions 14-15 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by telling Lotrich that the contract negotiation session he missed went really well without him and the parties got a lot accomplished. (Resp. Brief at p. 17) In about late June or early July 2011, Lotrich was called out-of-town for work and was unable to attend one of the Union bargaining sessions with Respondent. (Tr. 160-161) The following morning, Lotrich gave Trujillo an update on the work he performed when the conversation turned to the previous night's bargaining session for the Union contract. (Tr. 160-161) Trujillo stated, "Andy, you know what. Last night's negotiations went really, really well. It was nice not having you in the room. We got a lot accomplished." (Tr. 160-161)

Respondent asserts in its brief that the ALJ misconstrued Trujillo's comments and that she merely answered Lotrich's questions about what happened the night before for the session he missed. (Resp. Brief at 17) Respondent's characterization of Trujillo's comments conveniently leaves out the fact that she demeaned his participation in these Union activities with her comments and that the parties accomplished a lot because he was not present at the meeting. Such a statement to an employee who is engaged in Union activities is coercive and inculcates in the employee a feeling of futility to engage in Union activities. *Rish Equipment Company, Inc.*, 257 NLRB 808, 814 (1981).

Respondent also claims that Trujillo never made the comment and that Trujillo only told Lotrich the parties had a good night at the bargaining table the night before. (Resp. Brief at 17) Respondent raises issue with the conversation starting out as a routine conversation and then turning with Trujillo allegedly making the coercive statements regarding Lotrich

being absent from the bargaining session. (Resp. Brief at 18) There is no special standard for which threats can be found to have been made by Respondent. Unlawful coercive threats can be made at anytime and during all kinds of conversations. Here, Respondent violated Section 8(a)(1) of the Act by telling an employee their engaging in Union activities hampered success at the bargaining table and the collective-bargaining process. The fact that there may have been some friendly banter or chit chat prior to the statement does not make the coercive comments less threatening under Section 8(a)(1) of the Act. Even statements that include threats laded with friendly advice are still found to violate Section 8(a)(1) of the Act. *Olney IGA Foodliner*, 286 NLRB at 748.

As Lotrich testified, he understood Trujillo's comment to mean that it would be best if he no longer attended bargaining sessions, and, accordingly, he ceased serving on the Union negotiating committee or otherwise attending bargaining sessions. (Tr. 281-282) The General Counsel submits the ALJ correctly found that Respondent has violated Section 8(a)(1) of the Act by telling Lotrich that the contract negotiation session he missed went really well without him and the parties got a lot accomplished.

I. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by denying Lotrich his request for Union representation and that Lotrich did not waive his request for this representation.

Respondent asserts in its Exceptions 16-18 that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by denying Lotrich his request for Union representation during a meeting and that Lotrich had not waived his request for this representation. On August 19, 2011, Lotrich received an e-mail from Trujillo at 2:05 p.m., stating that she needed to meet with him at 4:00 p.m. that afternoon at the Albuquerque offices and that he should bring a Union representative. (GCX 33; Tr. 207) Lotrich arrived at

the meeting and informed Trujillo that Union Steward Joe Hill was in Gallup and that there was no way of contacting him. (Tr. 209). Lotrich also told Trujillo that another representative, Union President Ernest “Red” Dow, was also not available. (Tr. 209) Although Lotrich stated he was not waiving his right to representation, Trujillo told Lotrich they had to meet and proceeded to conduct the meeting. (Tr. 209) At the meeting, Lotrich being subjected to protracted questions and comments about the nature of the receipts he was seeking trip reimbursement, the circumstances surrounding how they were calculated and turned in, and the parties’ perceptions of the legitimacy of the receipts. (Tr. 211-212.)

As the ALJ correctly found, Lotrich had a right under *Weingarten* to a Union representative for the August 19, 2011 meeting. He requested such representation for a meeting which he reasonably believed could result in discipline but he was directed by Trujillo to continue with the meeting, despite a representative not being immediately available. The ALJ correctly found, under these facts, that Respondent violated 8(a)(1) of the Act by denying Lotrich’s *Weingarten* rights and his rights to a Union representation. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-258 (1975).

Respondent argues in its brief that the ALJ ignored Trujillo’s efforts to contact Union Steward Hill prior to the meeting but that no one could get a hold of Hill and that Lotrich knew Hill was in Gallup when he made his request. (Resp. Brief at p. 19) Respondent makes a disingenuous argument with such an assertion. Specifically, Respondent leaves out the context surrounding Trujillo’s efforts and there being a lack of need to meet with Lotrich at all costs on that date when no Union representative was available.

Additionally, although it makes no such mention of this in its brief, Respondent also knew when it made the August 19, 2011 meeting arrangements for Friday afternoon that Hill

was working on the other side of the State of New Mexico in Gallup. Management is the one who makes work assignments for Respondent staff and would know what work assignments were made to its employees. Trujillo, when questioned on the stand, was unable to come up with a cogent single reason that the August 19, 2011 meeting with Lotrich was so urgent that it absolutely had to be convened at 4 p.m. on a summer Friday afternoon at a time he was on leave status and no Union representative was available. (Tr. 747-748) Trujillo's only explanation was that Respondent National Legal Counsel Sam Lieberman in Washington, DC wanted the meeting convened for "timeliness" reasons. (Tr. 746-748). Respondent offered no elaboration of this asserted reason. Respondent also knew Hill had been Lotrich's representative in the prior meetings and was already familiar with Lotrich's work situation.

Respondent also argues in its brief that Lotrich had other options available for representation. (Resp. Brief at 20) Respondent claims that employee John Ingram was available and that Lotrich decided not to utilize Ingram's representation. There is simply nothing in the record to support such a claim by Respondent. To the contrary, the record reflects that Lotrich made his request for representation and informed Trujillo that although the Union Steward Hill and Union President Dow were not available, he was not waiving his right to representation. There is no evidence that Respondent contacted Ingram or had Ingram at the meeting to represent Lotrich.

Additionally, Respondent suggests that it could not delay the meeting because to do so would have placed Respondent in jeopardy, considering Lotrich's dishonesty and theft. (Resp. Brief at 22) These are strong words considering Lotrich was being accused of theft by submitting a receipt for reimbursement that Respondent did not even pay. More importantly, this is a nonsensical argument and weak attempt by Respondent to hide behind its lack of

reason to wait for a Union steward who had previously represented Lotrich and was on his way back to Albuquerque from Gallup so that he could represent him.

When an employee makes a request, the employer must either grant the request, give the employee the option of going forward with the interview unrepresented, discontinue the interview, or reject the request and end the interview. *Washoe Medical Center*, 348 NLRB 361, fn. 5 (2006). Here, Respondent did not afford Lotrich the reasonable time necessary to have Steward Hill attend the meeting and there is no evidence Respondent advised Lotrich that the Respondent would not proceed with the interview unless he was willing to go forward unrepresented by the Union. Under these facts, and as properly found by the ALJ, Respondent's conduct constituted an interference with, a restraint on, and coercion against the exercise of employee's Section 7 rights, in violation of Section 8(a)(1) of the Act.

Respondent also tries to argue in its brief that the August 19, 2011 meeting was not an investigatory one. (Resp. Brief at 20) This meeting was clearly investigatory which Lotrich reasonably believed that discipline could result. The fact that a pre-typed suspension letter was handed to him at the beginning of the meeting does not negate the fact that an extremely detailed and interactive investigation ensued and that it was an investigatory meeting, plain and simple. In its brief, Respondent tries to argue, in unpersuasive fashion, from both sides of the fence on this issue. Specifically, Respondent argues that the August 19, 2011 meeting was just a disciplinary one for the purposes of informing Lotrich of a disciplinary decision that had been made while in another vein informed Lotrich that he would need Union representation for the meeting. Likewise, Respondent claims no questions were asked Lotrich during the meeting. Such a representation is far from the truth. Meeting discussion included protracted questions from Respondent and comments about the nature of the receipts, the

circumstances surrounding how they were calculated and turned in, and the parties' perceptions of the legitimacy of the receipts. (Tr. 211-212.) Respondent's own minutes for that meeting reflect these questions were asked and discussed. (RX. 3) Respondent's argument has no merit.

Based on the foregoing, the ALJ correctly found that Respondent has violated Section 8(a)(1) of the Act by refusing Lotrich's request for Union representation on August 19, 2011 for a meeting in which he reasonably believed discipline would result.

J. The ALJ correctly found that Lotrich did not engage in post-discharge activity that would prevent him from being subject to reinstatement by Respondent.

Respondent asserts in its Exceptions 19-20 that the ALJ erred in finding that Lotrich did not engage in post-discharge activity that would prevent him from being subject to reinstatement by Respondent. Lotrich filed corporate papers with the State of New Mexico for TEACH New Mexico, a labor organization he was hoping to start after he was terminated by Respondent. (RX 24; Tr. 348-349) In this regard, it makes sense that a terminated individual would try to find work and make a living using the type of work in which he has experience and skills. Lotrich also attempted to start a consulting business after his termination, called AL Consulting. (Tr. 350, 365, 375-379) During the existence of both entities, no income was generated and there were no clients. (Tr. 350, 365, 375-379) TEACH New Mexico and AL Consulting never even had a bank account. (Tr. 335-337, 366)

In its brief, Respondent argues that Lotrich's post-discharge conduct of forming his own labor organization and consulting firm was all designed with a clear intent to injure Respondent, and, as a result, Lotrich should be found ineligible for any remedy involving reinstatement by Respondent and payment of any backpay. (Resp. Brief at 23-24) This

argument is groundless. Lotrich, as a discharge discriminatee associated with an unfair labor practice matter, has an obligation to mitigate his backpay damages. Consistent with this obligation, Lotrich engaged in conduct for this purpose, namely performing work that he was trained to perform when he worked for Respondent. In mitigating his damages, Lotrich was not obligated to start a completely different career path, and there is no case law that dictates he is required to do so. Lotrich would not have been in the position to form his own labor organization and consulting firm if it were not for Respondent unlawfully discharging him for engaging in Union activities in violation of Section 8(a)(3) of the Act. Punishing an employee for doing what he is training or experienced to do in a workplace is an unacceptable result.

The Board evaluates post discharge conduct or disparagement under a standard of whether such conduct was so flagrant as to render the employee unfit for further service or a threat to the efficiency of the plant. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1-2 (2011); *C-Town*, 281 NLRB 458 (1986) quoting *J.W. Microelectronics Corp.*, 259 NLRB 327 (1981); *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 405 (1969). As with much what it has presented in its brief, Respondent presents a misplaced definition of what constitutes post discharge conduct. Respondent equates “competing” with conduct typically associated with post-discharge misconduct such as threats of violence or bodily harm or engaging in conduct that results in physical damage to an employer’s facility or property. *Golden Day Schools*, 236 NLRB 1292, 1297 (1978); *Beach Lane Management*, 357 NLRB No. 30, slip op. at 40 (2011). Lotrich engaged in none of this conduct.

Respondent cites in support of its argument various cases addressing institutional loyalty. Respondent, for example, cites *Bausch & Lomb Optical Company*, 108 NLRB 1555

(1954) and *St. John's Hospital and Health Center*, 264 NLRB 990 (1982). These cases are not applicable to post-discharge conduct analysis because both cases address union conduct with respect to an employer's business, not the conduct of an individual employee who has been discharged.

Respondent also cites *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) and *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, 357 NLRB No. 51 (2011). These cases address employees who engaged in public attacks on the quality of their employer's product or its operations. The employees in both cases were still employed by the employer and the attacks associated with them made no reference to any labor dispute the employees had with their employer. These cases are distinguishable from the facts presented here. Lotrich never attacked any service or product of Respondent. Rather, he engaged in the same conduct he would have engaged in had he been still employed by Respondent. If Respondent did not want Lotrich or any of its employees to leave their employ and engage in activities that would be competitive with its own, it should have their employees execute no compete agreements as a condition of employment. Respondent did not do this and as a result Lotrich is free to find and engage in work associated with his profession.

Short of violence, post-discharge conduct does not affect the reinstatement rights of an unlawfully discharged employee. *United Coupon Corporation*, 1993 WL 1609512. There is nothing involving Lotrich's post termination conduct that warrants his losing his reinstatement rights. There is nothing associated with his conduct that implicates any violence towards Respondent or Respondent employees. Lotrich has made no threats of physical harm to anyone associated with Respondent and Respondent presented no evidence

demonstrating that Lotrich would not be able to perform his job if reinstated or that it would not be able to conduct its business if he were reinstated. Even more so, Respondent provided no evidence that Lotrich would not end his consulting and labor organization work if reinstated to his former job with Respondent. As such, the ALJ properly found that Lotrich did not engage in any post-discharge misconduct that would warrant his not being eligible for reinstatement and backpay remedies from Respondent.

III. CONCLUSION

Based upon the foregoing, the General Counsel submits that the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act as set forth above and correctly found that discriminatee Andy Lotrich did not engage in post-discharge conduct to warrant his not being subject to reinstatement by Respondent. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's Cross Exceptions and to adopt the ALJ's findings and recommended order, consistent with the General Counsel's Exceptions.

Dated at Albuquerque, New Mexico, this 12th day of December 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS in AMERICAN FEDERATION OF TEACHERS, NEW MEXICO AND AMERICAN FEDERATION OF TEACHERS, AS JOINT EMPLOYERS, Cases 28-CA-064412 and 28-CA-074397, was served by E-Gov, E-Filing, and E-Mail, on this 12th day of December 2012, on the following:

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