

**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 REPLY BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Reply Brief to Respondent's Response to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Margaret G. Brakebusch Law (ALJ) in the captioned case.

I. INTRODUCTION

In its Response Brief, Respondent makes numerous disingenuous assertions about the General Counsel's representations contained in its Brief-in-Support of Exceptions.¹ Contrary to Respondent's assertions, the facts and arguments set forth in the General Counsel's Brief are supported by the record.

¹ RB __ refers to Respondent's Response Brief to General Counsel's Exceptions followed by the page number. GCX__" refers to Exhibits presented in evidence by General Counsel and RX refers to Exhibits presented in evidence by Respondent. Transcript references are (Tr.__:__) showing the transcript page and line, if applicable. ALJD__ refers to JD-(ATL)-25-12 issued by the ALJ on September 25, 2012, followed by the page number.

II. ARGUMENT

A. Respondent Mischaracterizes the Evidence and General Counsel's Arguments that the No-Confidence Vote Was a Motivating Factor in Respondent Subjecting Lotrich to a Behavioral Management Plan and Section 8(a)(1) statements.

In its Response Brief to the General Counsel's Brief-in-Support of Exceptions, Respondent takes issue with the General Counsel's argument that the no confidence vote made issue by Lotrich at a Union meeting was linked to Respondent later subjecting him to a behavioral management plan and several statements found to be violations of Section 8(a)(1) by the ALJ. (RB at 3) First, Respondent asserts there is no dispute that Lotrich was not disciplined or threatened with discipline regarding his motion for no confidence. (RAB at 1) This is categorically incorrect. The ALJ found Respondent made a number of unlawful threatening statements to Lotrich after he made his motion at a Union meeting. (ALJD 4:20-8:17) In fact, the ALJ found Respondent, through Vice President Kathy Chavez, the person associated with the no-confidence motion, interrogated and threatened Lotrich with unspecified reprisals for engaging in that Union activity and went so far as to threaten she would "get even" with him. (ALJD 6:34-36; 8:1-16) Additionally, the behavior plan was not made an issue with Lotrich until shortly *after* he engaged in the Union activity. (Tr. 154-155, 272-273) Lotrich had never previously been a party to any behavior plan by Respondent. (GCX 22, 50; Tr. 154-155, 269-270) Respondent incorrectly states there is no dispute that it engaged in any unlawful conduct that was linked to Lotrich's Union activity.

Respondent next argues that in making arguments regarding Respondent's response to Lotrich's Union meeting no confidence motion, the General Counsel disingenuously ignored evidence that Lotrich sexually harassed several co-workers who had brought complaints to Respondent President Christine Trujillo. Respondent argues that Trujillo made certain

unlawful Section 8(a)(1) statements attributed to her because she was trying to help Lotrich address the abusive conduct alleged against him. It is Respondent who is being disingenuous. Respondent offered no evidence at hearing showing that Trujillo ever informed Lotrich of her Samaritan intentions or that she even mentioned to him that his conduct at issue at the time she was speaking with him. If the alleged abusive activity was as serious as Respondent argues in its brief, there is no evidence Respondent took any action in response to any of the employee complaints it allegedly received. Respondent admittedly did not even bother to document these complaints or bring them to the hearing. (Tr. 715-717) Even more questionable is Respondent argument that Trujillo's comments were made to address Lotrich's alleged behavior problems coupled with its acknowledgement that Lotrich had already met each goal listed in his Behavior Management Plan. Adding to its lack of credibility, Respondent admits this plan completion but does so in reliance on referencing a quotation that is not included on any record document. (RB at 7, RX 22)

In support of its arguments, Respondent cites *Carleton College v. NLRB*, 230 F.3d 1075 (8th Cir. 2000). That cited case is distinguishable from the conduct at issue here. In *Carleton College*, the Eighth Circuit found that the Board had failed to consider the employer's interest in fostering and maintaining mutual respect among employees and that as such salty language from the employer to employees may be excusable. Respondent tries to tie Lotrich alleged conduct with its right to make the "don't be so Andy" and "don't be so vocal at the bargaining table" comments that were made to him by Trujillo. What Respondent fails to acknowledge is that Lotrich engaged in Union activity when he made his no confidence motion at a Union meeting and that Respondent's statements to him to stop or tone that conduct down unlawfully prohibited him from engaging in protected Section 7 activity. Respondent's citation to *Carleton College* and related cases is not applicable here.

None of the arguments Respondent tries to make regarding Lotrich's alleged conduct discount the Section 8(a)(1) statements made to him or the fact that Respondent waited until May 2011, months later, to address its alleged concerns with his conduct by having him create a behavior performance plan. Particularly questionable is that Respondent backdated the plan to reflect that the discussion took place prior to his engaging in the no confidence motion Union activity. The elements of the Behavior Management Plan were not in effect when the alleged Section 8(a)(1) statement were made to Lotrich by Trujillo. Respondent's argument that the General Counsel failed to establish a link between the no confidence motion that Lotrich made at a Union meeting and his Behavior Management Plan and the Section 8(a)(1) conduct directed at him has no merit.

B. Respondent Mischaracterizes the Evidence Regarding Statements Made by Trujillo to Lotrich Regarding a Bargaining Session He Missed.

In its Response Brief, Respondent contends that the General Counsel completely relies on Lotrich's testimony regarding Trujillo telling Lotrich that his absence at a bargaining session was the reason the parties got so much accomplished. (RB at 15) Respondent denies that Trujillo ever made such a statement. (RB at 15) Contrary to Respondent's assertions, the record reflects that she admitted making this statement to him. At hearing, when asked by the General Counsel if she recalled making the comment to Lotrich along the lines "that there was a lot accomplished at the bargaining table, at a bargaining session that he missed", Trujillo responded "Yes, I do." (Tr. 730) Accordingly, Lotrich's testimony is corroborated and Respondent's contention to the contrary has no merit.

C. Respondent is Not Correct that the General Counsel Exceptions Regarding Lotrich's Layoff are Wholly Unsupported.

Respondent argues that the General Counsel presented no evidence to support its exceptions that Respondent subjected Lotrich to layoff in violation of Section 8(a)(3) of the Act. (RB at 16) Respondent's argument is wholly without merit. Respondent goes into detail in its brief that Lotrich was subject to layoff by Respondent due to organizational restructuring by Respondent. (RB at 16-18) This asserted reason is pretext to Respondent wanting to take action against Lotrich because he engaged in Union activity and, as argued by the General Counsel in its Exceptions Brief, the evidence supports such a finding. During the meeting on August 17, 2011, when Respondent informed Lotrich he would be laid off effective September 17, 2011, he requested transfer to an open State Affiliate Organizer Position (SAPO). (GCX 30 at 11) Trujillo's response was to deny his request. (GCX 30 at 12) When Lotrich asked on what grounds, Trujillo told him because he had been laid off. (GCX 30 at 12)

Respondent argues in its brief that the General Counsel relying on Lotrich's testimony regarding the August 17, 2011 meeting equated to citing false testimony because Lotrich's recitation of the meeting did not comport with the transcript of an audio recording of the meeting. Respondent is incorrect. Lotrich's testimony is consistent with this transcript. Respondent, in citing to the transcript in its brief, presents an incomplete picture by omitting potentially critical testimony at various points from its version of the conversation. For example, Respondent leaves out testimony that Lotrich asked Trujillo *what grounds his transfer request was being denied* and Trujillo telling him because he was laid off. (RB at 21; GCX 30 at 12) Also left out of Respondent's version is Trujillo telling Lotrich that *his transfer request was not a process Respondent was going to take and that he could grieve it if*

he wanted. (GCX 30 at 13) Respondent conveniently leaves these portions of the conversation out of its brief citation because they tie into conversation that followed from Lotrich that his layoff was not effective for 30 days and that he was still an active employee. Respondent argues the General Counsel falsely asserts that Trujillo simply responded to the request with “denied” but the evidence supports that is exactly what she did. (GCX 30 at 12)

Respondent also asserts in its brief that the General Counsel’s shifting defense argument was improperly asserted. Respondent argues that it took different positions on the denied transfer because the positions were taken at different times. This rationalization is without merit. As discussed, Respondent initially told Lotrich he could not take the SAPO position because he had been laid off. (GCX 30 at 12) Respondent then asserts in its Answer to the Consolidated Complaint that Lotrich was not transferred because he was not qualified for the position. At hearing, Respondent changed its position again and argued that Lotrich was not considered for the position because he had been terminated. When an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.” *Sound One Corp.*, 317 NLRB 854, 858 (1995). That Respondent changed its position three times regarding its reasons for the transfer decision establishes that its real motivation was to rid itself of someone who engaged in Union activities it did not like.

In its brief, Respondent also focuses on arguments regarding whether employee transfers were required under the collective-bargaining agreement. Respondent argues that the General Counsel somehow presents a bad faith reading of the contract language by arguing it required Lotrich’s transfer. Respondent’s argument misses the mark. The General Counsel is not arguing there was any mandatory requirement under the contract that Respondent transfer Lotrich to the open SAPO position. Rather, the General Counsel urges

that Respondent has failed to transfer Lotrich to the open position because he engaged in Union activity in violation of Section 8(a)(3) of the Act.

Even though Lotrich was qualified for the SAPO position and applied for it, the evidence establishes that he was not given any consideration for the position, and Respondent refused to reconsider its layoff decision. The Board will infer an unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive". *J.S. Troup Elec.*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003). Respondent argues the General Counsel failed to present evidence showing Respondent displayed any favoritism towards other employees. In making this argument, Respondent failed to show other employees had made similar transfer requests as Lotrich. Coupled with the evidence of threats, including a very strong one regarding retaliation, the evidence is clear that Respondent violated Section 8(a)(3) of the Act by refusing to consider Lotrich for the requested transfer to an open bargaining unit position and refusing to reconsider its decision to subject him to layoff because he engaged in prior Union activity.

D. Respondent Incorrectly Asserts General Counsel Failed to Present Evidence Showing Lotrich was Suspended and Discharged in violation of Section 8(a)(3) of the Act.

Respondent argues the General Counsel largely avoids the truth that Lotrich fraudulently altered receipts he turned into Respondent for reimbursement. (RB at 26) Respondent is mistaken. The General Counsel does not dispute that Lotrich altered the receipt but argues that he did so to recover costs he incurred at the RV park that were not reflected in the rental rate he was paying. The General Counsel has been clear with this position, and Respondent not taking the time to consider the rationale for his additional expenses. Respondent argues that Lotrich had to stay at the RV park due to a "mix-up"

involving a hotel room not being booked for him. (RB at 27) This mix-up is not reflected anywhere in evidence. To the contrary, Lotrich, unlike the other organizers assigned to the project, was not reserved a hotel room in Socorro, New Mexico by Respondent personnel who have, through his career with Respondent, always done so. (Tr. 163, 171-172, 282) This is not a “mix-up” but rather evidence he was disparately treated for his Union activities.

Respondent states in its response brief that to believe Lotrich’s claim that he provided Office Secretary Liz Gravening both the original receipt and the one he prepared would require one to proscribe to a grand conspiracy. This is hyperbolic nonsense. Lotrich was clear in his testimony that he made efforts to explain what he had done with both receipts but was rebuffed by Respondent. Respondent adds in its brief that the evidence supported Gravening’s “disinterested testimony”. (RB at 27) Respondent fails to note that earlier in its brief it went into detail that Gravening had issues with Lotrich and his alleged conduct. It is disingenuous to assert her testimony was “disinterested” for other arguments it wished to make. Respondent asserts that the “disinterested” Gravening reported the incident regarding the receipt to Vice President Kathy Chavez, the person who the ALJ found to have made statements, included a threat of retaliation for engaging in the no-confidence vote activities, in violation of Section 8(a)(1) of the Act.

In its response brief, Respondent discusses its version of the events leading to Lotrich’s discharge but makes some assertions not supported by the record. For example, Respondent makes reference to Lotrich knowing he may be caught with the altered receipt and starting damage control. (RB at 28) This exaggerated statement is not supported by any evidence, and Respondent offered none establishing such intent from Lotrich. Respondent also asserts in its brief that Lotrich allegedly handed over documents to Trujillo during their August 17, 2011 meeting that detailed the additional costs he incurred using his personal

camper but argues that Trujillo denies he handed over anything to her during the meeting. The transcript of an audio recording of the meeting shows that Lotrich and Trujillo discussed some of this paperwork during the meeting. (GCX 30 at 5-6) In fact, at the meeting's conclusion, Trujillo stated "Let me put these pieces of paper so I have them", a statement that references having documents in the plural.

Respondent argues in its brief that Lotrich had trouble substantiating his claim for reimbursement for the RV park stay and advocates these troubles equated to a bad faith attempt to embezzle money from Respondent. What Respondent fails to mention is that Lotrich was put in the situation of substantiating his unusual claim by Respondent because he had to make other arrangements when hotel arrangements were not made for him. Added to this, with Lotrich being put in such a unique situation, there was no standard procedure for calculating the costs he incurred with his camper. Lotrich tried to talk to management at various times about what expenses he was incurring but he was rebuffed in his efforts. In essence, Lotrich was seeking reimbursement for costs he believed he had incurred while working for Respondent, and he tried to have a certain receipt from the RV park better reflect the additional costs he had for the stay. In the process, Respondent held him accountable to the level of a CPA and accused him of stealing just by his actions in seeking reimbursement for costs he believed he accrued on the job.

In its brief Respondent asserts that no other staff member of Respondent had ever attempted to embezzle money through the falsification of reimbursement documentation and argues that examples provided at hearing did not reflect attempts by these other employees to defraud or steal from Respondent. (RB at 35) This is simply not an accurate reflection of the evidence in the record. Employee James Beaty admitted he altered a receipt from a trip and submitted it to Respondent for reimbursement but was only suspended for the incident. (GCX

20; Tr. 106-107, 111, 433-434, 458, 708-709) Another employee, James Ingram, sought reimbursement for a trip that was not sanctioned by Respondent but was only reprimanded for his conduct. (Tr. 109, 458, 707) Another employee, Judy Johnston, upgraded her hotel room without permission on a trip. (Tr. 110-111) Respondent claims she was not reimbursed for the upgrade and was disciplined but admits she was not discharged for the incident. (RB at 35) Lotrich's situation is much less questionable. He submitted receipts that Respondent had issue with reimbursing. Respondent did not reimburse Lotrich for those claimed costs but, unlike his coworkers in similar circumstances, he was discharged. Notwithstanding Respondent's assertions to the contrary, the evidence of Lotrich's Union activities and Respondent's hostile response to them, taken with the evidence of disparate treatment, supports a finding that Respondent violated Section 8(a)(3) of the Act by suspending and discharging Lotrich.

III. CONCLUSION

Respondent's Response Brief to General Counsel's Exceptions, as discussed above, lacks merit and is not supported by the record. It is respectfully requested that the Board grant the General Counsel's exceptions and otherwise affirm the decision of the ALJ.

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

Respectfully submitted,

/s/ David T. Garza

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF 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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