

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

US FOODS, INC.

and

**Cases 28-CA-156203
28-CA-160985**

**GENERAL TEAMSTERS (EXCLUDING MAILERS),
STATE OF ARIZONA, LOCAL UNION NO. 104,
an affiliate of INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

GENERAL COUNSEL’S REPLY BRIEF

Counsel for the General Counsel (General Counsel) submits the following Reply Brief. For the reasons described below, the matters Respondent asserts in its Answering Brief are without merit, and the Board should grant the General Counsel’s Exceptions.

I. RESPONDENT VIOLATED THE ACT BY THREATENING ITS EMPLOYEES

On October 5, 2015 – the day after Union members voted to go on strike – supervisor Michael Tavenner demanded to speak with employee Jason Peterson about the impending strike. Twice, Peterson declined to discuss the issue, but Tavenner insisted. (ALJD 7:46-51). Tavenner said, “If this continues about people not showing up to work or striking, that people will—I don’t want anybody to lose their jobs.” Tavenner added, “Well, I don’t want to lose my job either.” (ALJD 8:4-6).

To dissuade the Board from finding a violation, Respondent argues that the allegation is without merit because the General Counsel was frustrated by Peterson’s testimony. (Answering Brief, p. 21). The General Counsel elicited additional details from Peterson during his testimony, which went unrebutted, to demonstrate for the Board that Tavenner’s statements violated the Act.

Respondent's note that "the testimony merely shows that Tavenner was concerned about his job and that of his coworkers" is only misdirection. (Answer Brief, p.21-22). The Board does not consider the "concern" or kindness of an employer's expressions in determining whether those expressions constitute a threat under the Act. The Board only considers whether the statement reasonably tends to restrain, coerce, or interfere with employees' Section 7 rights. *Reeves Bros., Inc.*, 320 NLRB 1082 (1996). By impermissibly linking employees' strike participation with job loss, Tavenner's statements violated Section 8(a)(1). *Baddour, Inc.*, 303 NLRB 275 (1991).

II. RESPONDENT VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO HIRE OR CONSIDER FOR HIRE ELLIOTT GARRETT

A. Respondent Unlawfully Refused to Hire Garrett Under *FES*

Refusal to hire allegations are evaluated under *FES*, 331 NLRB 9 (2000), *supp'd* 333 NLRB 66 (2001). The General Counsel must show the following: (1) Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the position, or that the employer had not adhered uniformly to such requirements, or the requirements were pretextual or applied pretextually; and (3) that antiunion animus contributed to the decision not to hire the applicants.

The General Counsel clearly established a *prima facie* case. First, at the time Garrett submitted his application and was denied employment, Respondent was hiring individuals for warehouse department positions. Second, Garrett had the experience and training relevant to the position for which he applied, order selector. Third, Respondent's antiunion animus contributed to its decision not to hire Garrett. On that latter factor, the ALJ found that Respondent violated Section 8(a)(1) when supervisor Padilla informed employees that Respondent refused to hire

Garrett - or allow two employees to transfer - because “they were Union.” (ALJD 9:11-14)

Respondent’s Answering Brief echoes the ALJ’s mistaken finding: because Respondent’s HR coordinator Julie Gatson lawfully rejected Elliott Garrett’s application on the initial screening, then all of Respondent’s subsequent conduct regarding Garrett’s application was lawful. (ALJD 9:32-41; Answering Brief, p. 12). This finding is belied by the evidence in the record.

First, Respondent never deemed Garrett to be ineligible for rehire because he was discharged for attendance. (ALJD 3:8-13, 9:29-30). Indeed, Respondent would have informed Garrett of his ineligibility in his termination letter, which Respondent never did. (GCX 16).

Second, Garrett was not automatically disqualified from all hiring opportunities simply because Gatson rejected his application. Gatson’s May 28 e-mail to Garrett “encourage[d]” Garrett to “keep [his] profile updated” in order to “enable the system to notify [him] proactively of possible employment opportunities [...]” (GCX 26).

Third, supervisor Albert Padilla overrode Gatson’s rejection and requested that she forward Garrett’s application to him. After Gatson sent Garrett’s application to Padilla, Respondent refused to hire Garrett because of his union activities.

Furthermore, Respondent’s contention that the General Counsel is pursuing a novel theory in that Respondent is required to resuscitate the application of known Union supporters, despite those applicants’ disqualifications, is nonsensical. (Answering Brief, p .13). General Counsel merely proved, through the application of Octave Gwin, that Respondent makes regular exceptions to its own hiring policies when it desperately wants to hire - and hires - an applicant who had been previously rejected by HR Coordinator Gatson. (ALJD 6:10-13; GCX 13).

B. Respondent refused to consider Garrett for hire under *FES*

The refusal-to-consider for hire test under *FES* has two prongs: 1) Respondent excluded the applicant from a hiring process, and 2) did so because of union animus. The evidence supporting the refusal-to-hire violation also supports the finding of a refusal-to-consider for hire violation.

C. Respondent's Alleged Legitimate Motive is Pretextual

Respondent's reasons for not hiring Garrett are pretextual. Respondent hired Gwin after HR Coordinator Gatson initially rejected him, and Gwin's application was resuscitated solely because a low-level supervisor asked. Conversely, Respondent provided no examples where a supervisor resuscitated an application but Respondent still refused to consider it, except Garrett. In fact, both Gwin and Garrett were initially rejected for the same reason: "Does Not Meet Basic Qualifications". (ALJD 6:9-15). Once Padilla requested Garrett be reconsidered, Respondent had no excuse for refusing to pull his application. In fact, Garrett was more qualified than Gwin, and Padilla was a higher-ranking manager who was closely involved in hiring. Thus, evidence of disparate treatment exists, defeating Respondent's proffered excuse.¹

It is evident Garrett's previous discharge was not a "but-for" barrier to being considered for hire. "[A]n employer cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation, such as an asserted hiring policy that was not actually relied on." *Aim Royal*, 358 NLRB No. 91 (2012). *Aim Royal*, like Respondent here, "failed to introduce any documentary evidence to substantiate the existence of a *formal* policy" excluding previously discharged applicants from consideration. *Id.* (emphasis added). None of the letters Respondent sent to Garrett about his discharge said he was ineligible for rehire.

¹ Respondent's reliance on applicant Garrett Sheppard is not a comparator because his application was never resuscitated by a supervisor of Respondent.

The only example of this purported policy involved a Garrett Sheppard, who applied in 2014. Sheppard was previously terminated by Respondent's Missouri facility. (ALJD 5:48-52). Gatson did not automatically reject Sheppard, but instead emailed Maria Smith, the HR Manager in Missouri. Smith replied that Sheppard "was a no call no show, so we would not rehire him." (ALJD 5:51-2). Gatson rejected Sheppard's application. This is surely evidence of the subjective opinion of a manager from Missouri, one which Gatson deferred to. It is not, however, evidence of a formal policy making previously discharged employees ineligible for rehire.

To the degree that Gatson's assertions and a single email constitute a policy, application of the policy was pretextual. "Where an employer departs from such a policy in a sufficient number of instances, however, it cannot carry its rebuttal burden by relying on the policy." *Jesco, Inc.*, 347 NLRB 903, 906 (2006). Respondent's citation of the ALJ in *Aim Royal* is misplaced; in that case the Board reversed the ALJ, found Respondent's reasons pretextual, and found Respondent unlawfully refused to hire or consider all 10 alleged discriminatees. 358 NLRB No. 91. The evidence clearly proved Respondent does not rely on Gatson's initial rejection when supervisors have overridden those rejections at least four times per year. Accordingly, Respondent failed to carry its burden.

III. RESPONDENT'S UNILATERAL CHANGE VIOLATED SECTION 8(a)(4) BECAUSE THE UNION FILED AN UNFAIR LABOR PRACTICE CHARGE

The ALJ found Respondent violated Section 8(a)(5) of the Act when it unilaterally changed how "union stewards [are allowed to] participate in grievance meetings after clocking in for their scheduled shifts." The ALJ further found that Respondent imposed this change 11 days after the Union filed the charge in Case 28-CA-156203, to which Respondent admitted receiving. (ALJD 10:7-11; GCX 1(a), 1(b), 1(r)).

Respondent argues that timing alone cannot establish knowledge. (Answering Brief, p. 19). But Respondent cannot deny that service of charge constitutes knowledge, which the Board has recognized. *Yukon Mfg. Co.*, 310 NLRB 324, 336 (1993) (immediacy of layoff after service of charge “such a strong factor” that it proved a *prima facie* case). Moreover, Respondent cannot deny that timing, in and of itself, can prove animus in the absence of other evidence. *Kag-West, LLC*, 362 NLRB No. 121 (2015), slip op. at 3, fn. 5.

Here, the General Counsel established both Respondent’s knowledge of the unfair labor practice charge and Respondent’s animus, the latter being Respondent imposing the change 11 days after the Union’s filing of the charge. Accordingly, Respondent’s unilateral change violated Section 8(a)(4).

IV. CONCLUSION

Based upon the foregoing and the record as a whole, the General Counsel requests the Board find Respondent violated Section 8(a)(1) by Michael Tavenner’s coercive threat that employees could lose their jobs if they struck; Section 8(a)(3) by refusing to hire and refusing to consider-for-hire Elliott Garrett due to his Union activities and sympathies; and Section 8(a)(4) by unilaterally changing how Union stewards are allowed to attend (and receive payment) for grievance meetings, in retaliation for the Union filing its charge in Case 28-CA-156203.

Dated at Phoenix, Arizona, this 5th day of May 2016.

Respectfully submitted,

/s/ Kristin E. White

Kristin E. White
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
Telephone: (602) 640-2145
Facsimile (602)-640-2178
Email: Kristin.white@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in US FOODS, INC., Cases 28-CA-156203, et al., was served by E-Gov, E-Filing, and E-Mail, on this 5th day of May 2016, on the following:

Via E-Gov, E-Filing:

Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE – Room 5011
Washington, DC 20570

Via Electronic Mail:

Joseph S. Turner, Attorney at Law
Samuel Schwartz-Fenwick, Attorney at Law
Karla E. Sanchez, Attorney at Law
Seyfarth Shaw LLP
131 South Dearborn Street, Suite 2400
Chicago, IL 60603-5577
sschwartz-fenwick@seyfarth.com
ksanchez@seyfarth.com
jturner@seyfarth.com

Joshua Graves, Business Representative
General Teamsters (Excluding Mailers),
State of Arizona, Local Union No. 104,
an affiliate of International Brotherhood
of Teamsters
1450 South 27th Avenue
Phoenix, AZ 85009-6423
josh.graves@teamsterslocal104.com

/s/ Dawn M. Moore

Dawn M. Moore
Acting Secretary to the Regional Attorney
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 388-6417
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov