Southwest Regional Council of Carpenters, Respondent

and

Kyle Hail, an Individual, Charging Party

and

Salvador Plascencia, an Individual, Charging Party

COUNSEL FOR THE GENERAL COUNSEL’S REPLY TO RESPONDENT’S ANSWERING BRIEF TO EXCEPTIONS

Submitted by:
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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the General Counsel (GC) files this Reply to Respondent’s Answering Brief to the GC’s Exceptions (Answering Brief).

1. The Charging Parties Began to Engage in Protected, Concerted Activities in March 2020

In its Answering Brief, Respondent asserts that it decided to terminate the Charging Parties before they engaged in any protected conduct. The evidence in the record proves this assertion is false.

In his decision, the ALJ concluded that Charging Party Kyle Hail engaged in the protected, concerted activity of complaining about overcrowding and the lack of social distancing at buffet lunches held at Respondent’s Las Vegas, Nevada facility. The ALJ also found that Respondent stopped holding buffet lunches at its facility after March 24, 2020.\(^1\) (ALJD 6:31-40; 9:44-46).\(^2\) As such, it logically follows that Hail engaged in his protected conduct sometime prior to March 24, 2020. Any other conclusion would render the ALJ’s findings meaningless.

Further, Hail offered unrebutted testimony that, while he was assigned to work with co-worker Douglas Lockhart, he and Lockhart repeatedly discussed their concerns about the possible long-term neurological impacts of COVID-19 infection, and Hail raised those concerns at a staff meeting. Immediately in response, Respondent’s Vice President and Chief Operating Officer, Frank Hawk, told Hail that he was wrong, that he did not know what he was talking

\(^1\) Respondent failed to file exceptions concerning these conclusions by the ALJ.
\(^2\) References to the Administrative Law Judge’s decision are noted as “ALJD” followed by the page and line number(s). References to Respondent’s Answering Brief are noted as “R Br.” followed by the appropriate page number. The transcript will be referred to as “Tr.” followed by the appropriate page number. General Counsel's and Respondent’s exhibits will be referred to as “GC Ex.” and “R Ex.” followed by the appropriate exhibit number.
about, and that he should not bring up those concerns again.\(^3\)  (Tr. 188-189; ALJD 7:25-27, 10:8). While Hail could not recall the exact date of that staff meeting, his testimony concerning this incident is especially noteworthy because Respondent’s own evidence indicates that, as of May 5, 2020, Hail was no longer assigned to work with Lockhart.  (ALJD 5:13-15; R Ex. 57 at SWRCC 000181).  As such, this conversation must have occurred before May 5, 2020.

Charging Party Salvador Plascencia also engaged in protected conduct weeks before Respondent finalized its decision to terminate him and Hail.  (ALJD 9:10-12).  As discussed in further detail below, on May 7, 2020, Plascencia asked Respondent’s Regional Manager, Michael Hawk, during a staff meeting whether Respondent would make COVID-19 testing available to its staff and explained why it was important to do so.  While Respondent did not make testing available to its staff, the Charging Parties were, nonetheless, able to access testing the following day, on May 8, 2020.

In light of these facts, the Charging Parties had clearly been engaging in protected conduct before Respondent supposedly made its initial decision to terminate the Charging Parties in April 2020, and weeks before Respondent finalized that decision on May 21, 2021.  (Tr. 496).  A full review of the record demands this conclusion, contrary to Respondent’s unsupported assertions.

2. **Respondent Had Animus Against the Charging Parties Because of Their Protected Conduct**

   In his decision, the ALJ correctly found the Charging Parties repeatedly engaged in protected, concerted activities.  (ALJD 9:10-12, 9:32-46, 10:1-8).  Every instance of their

\(^3\) Respondent filed no exceptions to the ALJ’s findings and conclusions.  Nonetheless, in its Answering Brief, Respondent invents an explanation for Frank Hawk’s conduct which appears nowhere in the record.  (R Br. 22).
protected activity was met by Respondent’s ire. Nonetheless, Respondent attempts to trivialize the Charging Parties’ protected activity and its own abusive conduct by ignoring evidence in the record and controlling Board law.

Respondent excuses its reactions to the Charging Parties’ protected activity as jokes or as protected speech. Respondent’s insistence that its conduct cannot be considered evidence of unfair labor practices is misplaced since conduct that exhibits animus, even if not itself alleged to violate the Act, may nevertheless be used to shed light on its motive for other unlawful conduct. Kanawha Stone Company, Inc., 334 NLRB 235 at fn. 2 (2001). Such is the case here. As Respondent itself acknowledges, at the beginning of the COVID-19 pandemic, “[u]ncertainty, confusion, and panic reigned.” (R Br. 6). Given that context, Respondent’s reactions to the Charging Parties’ protected conduct – ranging from dismissive hand motions and patronizing comments to outright hostility and ridicule – absolutely evidences its animosity towards the Charging Parties. For example, as discussed above, around mid-March 2020, Hail complained to supervisor Steven Dudley and manager Michael Hawk about overcrowding and the lack of social distancing at lunches held at Respondent’s Las Vegas facility. Instead of addressing Hail’s concern, Dudley and Michael Hawk were dismissive, and Michael Hawk claimed that Respondent was exempt from Nevada’s indoor capacity rules. (Tr. 159). Whether Respondent was exempt from such rules is irrelevant; what is relevant is that the Charging Parties began questioning the safety of their working conditions at the very beginning of the pandemic and, at every turn, Respondent reacted with animosity.

By May 7, 2020, Hail and Plascencia had repeatedly visited the construction site at Allegiant Stadium, a hotbed for COVID-19 infections, to meet with union members and ensure that COVID-19 safety protocols were being followed. While conducting these visits, they
learned that COVID-19 testing would take place at the Stadium for workers at the site. During a staff meeting on the morning of May 7, 2020, they shared this information with their coworkers, manager Michael Hawk, and supervisor Dudley. During that group conversation, Plascencia asked Michael Hawk whether Respondent had any plans to make testing available to its Las Vegas representatives. Michael Hawk responded if Plascencia believed he was suffering from COVID-19 symptoms, he could be tested at a medical clinic. Plascencia then reminded Michael Hawk that any of them could be carrying the virus and not have any symptoms. If that were the case, Plascencia said, any of them could unknowingly bring the virus into Respondent’s Las Vegas office or their own homes. Instead of constructively addressing its employees’ concerns, Michael Hawk only stated that Respondent had no plans to make testing available.4 (Tr. 58-59, 169-171).

The following morning, May 8, 2020, the Charging Parties were tested for COVID-19 at the Stadium. Later that day, they participated in a staff meeting, along with the other Las Vegas representatives, and supervisor Dudley. (Tr. 65, 175). During that meeting, Plascencia told the group that he and Hail had gotten COVID-19 tests that morning. Another business representative responded by asking Dudley, what happens if Plascencia’s and Hail’s tests come back positive? Dudley responded to the group that he “didn’t know what the fuck we’re going to do,” and that Respondent may have to “close the fucking” Las Vegas office. (Tr. 65-66, 175-176). Respondent’s contention, in its Answering Brief, that Dudley’s response to the employees was a “lawful prediction of the potential consequences of a positive [COVID-19] test result”

4 In its Answering Brief, Respondent asserts that Michael Hawk’s response was reasonable because it “had no more power to test its employees than” any other employer. (R Br. 14). This claim, however, is baffling given that Frank Hawk had spearheaded the effort to make testing available at the Stadium. (Tr. 441).
among its staff again misses the point. (R Br. 16). The issue is not whether Respondent would have, or should have, closed its office had its staff tested positive for COVID-19; the issue is that supervisor Dudley’s tone and reaction reveals Respondent’s contempt for the Charging Parties, their legitimate concerns about exposure to COVID-19, and their protected conduct.

3. **Respondent’s Animus Motivated its Decision to Terminate the Charging Parties**

   In its Answering Brief, Respondent cites to *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019) and various factors the Board has previously weighed when considering an employer’s unlawful motivation for taking an adverse employment action. Contrary to Respondent’s claims, many of these factors weigh in the Charging Parties’ favor.

   *a. The Charging Parties suffered disparate treatment*

   Respondent claims its decision to retain over a dozen of employees, after initially selecting them for layoff, while admitting it never even gave a second thought to the Charging Parties’ fates, is not indicative of disparate treatment. Two particular examples bear out the ridiculousness of this claim: Kevin Flickinger and Gustavo Maldonado.

   Concerning Flickinger, a business representative working in Colorado, Frank Hawk testified he knew Flickinger “wasn’t happy” working for Respondent and was “pushing back” against Respondent’s policies.⁵ Nonetheless, Frank Hawk decided to retain Flickinger because of Flickinger’s then-current medical condition. Flickinger, now recovered, is still working for Respondent and intends to continue doing so until he retires at the end of 2021. (Tr. 487).

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⁵ Frank Hawk admitted that he was the ultimate decisionmaker concerning the Charging Parties’ layoffs, as well as layoffs which were contemplated in New Mexico, Arizona, Colorado, and Utah. Respondent’s President and Chief Operating Officer, Pete Rodriguez, made the layoff decisions for Respondent’s Southern California offices. (Tr. 353, 467).
As for Maldonado, then a business representative also working in Colorado, Frank Hawk testified that Maldonado “wasn’t a good team player. He was kind of a lone wolf…he didn't cooperate well with the team, and I viewed [him] as a cancer to the team.” Respondent, however, did not fire Maldonado. Instead, Maldonado was transferred to the Carpenters Contractors Cooperation Committee (also known as the “Quad C”), a non-profit organization which conducts prevailing wage compliance investigations for public works projects. (Tr. 35, 377, 475). While Respondent claims it played no role in transferring Maldonado, Maldonado offered uncontroverted testimony that, in about May 2020, Respondent’s Executive Secretary, Dan Langford, called him and told him that he would be transferred to the Quad C. Although Maldonado had not applied to work there, following Langford’s call, he began to work for the Quad C in July 2020. (Tr. 713).

Respondent claims Flickinger and Maldonado are not appropriate examples for comparison, but it fails to explain the key distinction between them and the Charging Parties: Flickinger and Maldonado were problem employees but were, nonetheless, retained; while the Charging Parties were, allegedly, tentatively selected for termination at the very outset of the pandemic because they were problem employees, and Respondent, by its own admission, never gave that decision a second thought. According to Frank Hawk, who worked daily from the Las Vegas office from the onset of the pandemic, the decision to terminate the Charging Parties was an easy one. Again, the question remains, why? What did Frank Hawk see in Las Vegas, with

6 Respondent bases this argument on evidence that, it claims, shows its Colorado operations were not as negatively affected by COVID-19 as its Nevada operations. However, a review of that evidence – supplemental dues income collected by Respondent’s operations in various states (GC Ex. 6) - shows income from Colorado fluctuated wildly throughout 2020. Indeed, from March 2020 to April 2020, the supplemental dues income fell by nearly 50 percent, then recovered in May 2020 and then fell again for three months in a row.
his own eyes, that he did not see elsewhere? Protected, concerted activity by the Charging Parties. That is why similarly situated employees – allegedly under-performing business representatives working for Respondent – would be retained in Colorado and not in Las Vegas.

b. **Respondent’s decision to terminate the Charging Parties violated its own procedures**

In its Answering Brief, Respondent asserts its decision to terminate the Charging Parties was consistent with its internal policies and past practices. (R Br. 26). Evidence introduced by Respondent proves this assertion false. Prior to actually enacting the layoffs on June 1, 2020, Respondent had planned to distribute a layoff notice to affected employees pursuant to the federal Worker Adjustment and Retraining Notification ("WARN") Act. That notice lays out various information related to Respondent’s layoff process and clearly states that Respondent would take seniority into account when making the layoff decisions. (R Ex. 25). Nonetheless, Respondent’s decision to terminate the Charging Parties did not honor their seniority, as several representatives were hired in Las Vegas after them. (Tr. 75, 110). Indeed, Respondent apparently claims the Charging Parties had no seniority rights (R Br. 29) in spite of the language contained in the WARN notice; unrebutted testimony offered by Plascencia that Respondent used seniority as the basis for assigning work vehicles to its Las Vegas business representatives and determining their work assignments (Tr. 112-113, 120-121); and clear statements in Respondent’s employee handbook indicating that employee vacation requests are granted on the basis of seniority. (GC 3 at 9, GC 19 at 9).

Respondent maintains it “never proffered seniority as a reason” for selecting the Charging Parties for termination. (R Br. 29). That may be true, but the much more damning fact is Respondent presented no evidence it considered the Charging Parties’ seniority at all when deciding to terminate them – despite evidence clearly showing it should have done so.
c. The timing of Respondent’s decision to terminate the Charging Parties is suspect

Despite Respondent’s assertions to the contrary, the timing of its decision to terminate the Charging Parties is suspect and supports the conclusion that Respondent terminated them because of their protected conduct. As discussed above, the Charging Parties began to engage in protected activity in mid-March 2020, two months before Respondent finalized its decision to terminate them. Even if Frank Hawk’s uncorroborated testimony that he made an initial decision to terminate the Charging Parties in April 2020 is credited, that decision came after the Charging Parties began engaging in protected conduct.

Beyond the timing of Frank Hawk’s initial selection, the question of what occurred between April 2020 and May 21, 2020 remains. During that period, Frank Hawk testified that for many employees initially selected for layoff, Respondent did “everything [it] could to…try to find a place for [them].” (Tr. 438). As a result, employees like Flickinger and Maldonado were “saved” or transferred to other positions. Frank Hawk’s efforts to save employees were aided by the fact that, as he admitted, Respondent did not have to lay off any specific number of employees. (Tr. 520). In all, Respondent’s own documents clearly show that while 20 employees [including the Charging Parties] were laid off in June 2020, nearly the same number – 16 employees—were “saved” after initially being selected for lay off. (R. Ex. 27, page 2; Tr. 436). While Respondent did “everything [it] could” between April 2020 and May 21, 2020 to save employees – and succeeded in doing so for nearly 50% of the employees initially selected for layoff – Frank Hawk apparently did not give a second thought to his decision to terminate

7 This number does not include Maldonado, who according to Respondent’s “COVID 19 Reduction in Force” list, was transferred, not saved. (R. Ex. 27, page 2). Further, the total number of employees laid off is misleading in that the vast majority, 16 out of 20, came from offices in California, outside of Frank Hawk’s direction and supervision.
the Charging Parties. Why? Because at precisely the same time Respondent was doing everything it could to retain employees, the Charging Parties were repeatedly engaging in protected activities. Worse still, they were doing so in Las Vegas, Nevada, the “headquarters” for all of Respondent’s business outside of California. (Tr. 352). Further, because of the importance of the construction industry in Las Vegas, the pandemic brought Respondent attention from federal authorities, local health authorities, the Governor of Nevada, and the press. (Tr. 504). With so much focus on Las Vegas, especially during the first few months of the pandemic, it makes sense that Respondent would have little tolerance for the Charging Parties’ protected conduct – conduct which highlighted the safety concerns of Respondent’s own Las Vegas employees.8 In light of these facts, the timing of Respondent’s decision to terminate the Charging Parties, and its decision not to reconsider their fates, is highly suspect and supports the conclusion that their protected activities motivated their terminations.

4. Respondent relies on misdirection and excluded exhibits in lieu of actual evidence

Respondent’s Answering Brief relies on misdirection and evidence never admitted into the record to support its pretextual argument that it had legitimate grounds to terminate the Charging Parties. On page 6 of its Answering Brief, Respondent cites to several exhibits [Respondent Exhibits 29, 30, 32] which were not included in the record. Despite Respondent’s previous motion for judicial notice to the ALJ, these exhibits have not been entered into the record by judicial notice or any other method. As such, any reference or citation to these exhibits continues to be improper. Additionally, in its Answering Brief, Respondent twice reprints a portion of Respondent Exhibit 70, a vulgar image purportedly included in a Facebook

8 This is a likely explanation for why, of all of Respondent’s offices outside of California, Las Vegas was the only office to suffer more than one termination in June 2020. (Tr. 492).
message exchange. While Respondent makes it appear Hail distributed that image, a review of the exhibit and testimony reveals that is not the case. (Tr. 838).

Respondent’s reliance on shock, misdirection, and excluded exhibits highlights the fact that it possess no documentary evidence to support its contention that the Charging Parties were underperformers or committed any disciplinary infractions at any time during their employment. Instead, Respondent asks us to believe that it, a labor organization with tens of thousands of members and millions of dollars in annual revenue, never documents employee disciplinary issues. (R Br. 26). While that may be true, it is also a convenient method to support ad hoc, unlawful employment decisions – like its decision to terminate the Charging Parties.

Conclusion

A review of the record as a whole reveals the Charging Parties openly engaged in protected conduct starting in March 2020 and that protected conduct motivated Respondent’s decision to terminate them on June 1, 2020. Respondent’s claim that it discharged them for lawful reasons rings hollow and is only a pretext to obscure Respondent’s unlawful conduct. The GC respectfully requests that the Board conclude Respondent violated Section 8(a)(1) of the Act by terminating employees Kyle Hail and Salvador Plascencia because they engaged in protected, concerted activities.

Respectfully submitted,

/s/ Mathew Sollett

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Dated at Los Angeles, California, this 15th day of October, 2021.
STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel’s Reply to Respondent's Answering Brief to Exceptions was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on October 15, 2021.

The following parties were served with a copy of said document by electronic mail on October 15, 2021.

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