

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION BRADLEY AIR TRAFFIC CONTROL TOWER WINDSOR LOCKS, CONNECTICUT Respondent and MARK T. CARLSON Charging Party and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION Intervenor	Case No. BN-CA-02-0242

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 23, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: March 24, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 24, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
BRADLEY AIR TRAFFIC CONTROL TOWER
WINDSOR LOCKS, CONNECTICUT

Respondent

and
CA-02-0242

Case No. BN-

MARK T. CARLSON

Charging Party

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION

Intervenor

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-23
WASHINGTON, D.C.

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION BRADLEY AIR TRAFFIC CONTROL TOWER WINDSOR LOCKS, CONNECTICUT <p style="text-align: right;">Respondent</p> and MARK T. CARLSON <p style="text-align: right;">Charging Party</p> and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION <p style="text-align: right;">Intervenor</p>	Case No. BN-CA-02-0242

Charles M. de Chateauvieux, Esquire
Kathie McDonald, Esquire
For the Respondent

Tracy E. Levine, Esquire
For the Intervenor

Alfred S. Gordon, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on January 29, 2002, by Mark T. Carlson, an individual, against the U.S. Department of Transportation, Federal Aviation Administration, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut (the Respondent). On July 29, 2002, the Regional Director of the Boston Region, Federal Labor Relations Authority issued a Complaint and Notice of Hearing alleging that the Respondent committed an

unfair labor practice in violation of §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to select Steven Roberts and Richard Talbot, Jr., both of whom are members of a bargaining unit of the Respondent's employees, as On-the-Job Training Instructors (OJTI's) because they had resigned from the National Air Traffic Controllers' Association (Union/Intervenor), had stopped paying dues to the Union and had opposed the local Union leadership.

The Union subsequently submitted a motion to intervene which was granted. A hearing was held before the undersigned Administrative Law Judge on November 21, 2002 in Hartford, Connecticut at which time all parties, including the Union Intervenor, were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent, General Counsel and the Intervenor filed timely briefs.

This Decision is based upon consideration of the evidence, post-hearing briefs, and the demeanor of witnesses. I make the following findings of fact, conclusions of law, and recommendations.

Positions of the Parties

The General Counsel

The General Counsel maintains that, by resigning from the Union, expressing anti-union sentiment and initiating unfair labor practice charges against the Union, Roberts and Talbot engaged in protected activity as defined by §7102 of the Statute. In February 2001, the Respondent failed to appoint Roberts and Talbot as, respectively, the primary and secondary OJTI's for Albert Ferranti. This action by the Respondent was motivated by Roberts' and Talbot's protected activity. The General Counsel further maintains that the Respondent's rationale for taking the challenged action is pretextual.

The Respondent

The Respondent maintains that Ferranti's training team was chosen for legitimate reasons having nothing to do with the applicants' positions with regard to the Union or its leadership. Furthermore, their status with regard to the Union was never discussed. Roberts was not chosen as the primary OJTI because his personality was deemed to be incompatible with that of Ferranti who was a nervous individual. Talbot was not chosen because his work schedule

would interfere with his availability to act as even a secondary OJTI. As a further indication of the lack of an improper motive for the failure to select Roberts, the Respondent refers to Roberts' prior recommendation by the Respondent and the Union for a prestigious airspace study group. The selection of Bob Monroe as the primary OJTI was further justified by the fact that he had not been given an opportunity to train in many years.

The Union's position is similar to that of the Respondent. The Union also emphasizes the fact that it had no part in the selection of Ferranti's training team. Furthermore, Bruce Means, the senior Union representative at Respondent's facility, was justified in suggesting that Roberts would not have been an appropriate choice for a primary OJTI because he had resigned from such a position in 1994 near the end of the training cycle.

Findings of Fact

At all times pertinent to this case, Bruce Means has been the local facility representative (the equivalent of president) of Local Y90 of the Union. Local Y90 is the subdivision of the Union representing a bargaining unit which includes approximately 28 Air Traffic Controllers (ATC's) employed by the Respondent.¹ The testimony of various witnesses indicates that there has been a considerable amount of dissension among bargaining unit members. That dissension has been manifested by such actions as resignations from the Union (and a corresponding cessation of the payment of dues) as well as opposition to Union policies and to Means himself. A number of bargaining unit employees have come to work wearing shirts with "NUBS" (apparently standing for "nonunion brothers") imprinted on them. Among the most blatant expressions of anti-union sentiment were by Roberts who, besides wearing the "NUBS" shirt, had the license plate on his automobile changed to read "RATCA 1" (a disparaging reference to the Union whose name is abbreviated as "NATCA") and who, for a time, had "RATCA" cut into his hair. In addition to those expressions of discontent, both Roberts and Talbot have filed a number of unfair labor practice charges against the Union and the Respondent.

The evidence strongly suggests that Roberts' and Talbot's opposition to the Union leadership and policies was common knowledge among Respondent's employees including its supervisors. Among those was Carl Ciaffaglione, an

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The collective bargaining agreement is negotiated on a national level by the Union and the Federal Aviation Administration (FAA) (Jt. Ex. 1).

operations supervisor to whom certain ATC's report. Roberts' feelings could hardly have been more obvious. Furthermore, Ciaffaglione and Roberts would meet socially on a weekly basis during which Roberts would sometimes express his dissatisfaction with the Union leadership.² While Talbot was less dramatic in expressing his sentiments, Ciaffaglione testified that he had been aware of a general "falling out" among Union members and that Talbot had been involved. Ciaffaglione testified that, because of conversations at the workplace, "you can pretty much tell if someone is not in the Union." Ugo Benettieri, the operations manager to whom Ciaffaglione reported, testified that there was dissension between Union members and nonmembers, but he did not know who was in each faction.

The qualification and assignment of ATC's to serve as OJTI's is governed by the collective bargaining agreement and by FAA Order 3120.4J which is entitled "Air Traffic Technical Training" (Jt. Ex. 2). Stated briefly, FAA Order 3120.4J provides for the appointment of primary and secondary OJTI's for prospective ATC's (commonly known as "developmentals") after they have completed their formal training at the FAA Academy in Oklahoma City. In order to become a OJTI an employee must have had at least six months of experience as well as the recommendation of his/her immediate supervisor and the approval of a panel of at least two members. Article 68 of the collective bargaining agreement provides for ten percent premium pay for time spent by a OJTI in conducting training while the developmental is directly involved in the separation and control of live traffic; there is no premium pay for debriefings. Article 68, Section 6 requires a Union representative to be a member of the panel which recommends OJTI candidates. However, the agreement acknowledges that the actual selection of OJTI's remains the function of the Respondent.

The issues in this case arose out of the appointment of a training team for developmental employee Albert Ferranti who, like Roberts and Talbot, reported to Ciaffaglione. Each training team consists of a primary and secondary OJTI as well as the supervisor. While the primary is expected to conduct about seventy percent of the training, the actual distribution of training activities could vary due to the schedules of the trainers with relation to the developmental's schedule. It is undisputed that Ciaffaglione had the authority to appoint the OJTI's for

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It is significant to note that Ciaffaglione, while not a member of the bargaining unit, was an associate member of the Union.

Ferranti without consulting the Union or obtaining the approval of his own superiors. It is also undisputed that the OJTI's assigned to a developmental may be changed from time to time.

Ferranti was scheduled to begin his on-the-job training in February 2002.³ In anticipation of Ferranti's arrival Ciaffaglione had separate conversations with Roberts and Talbot during which Roberts expressed interest in becoming the primary and Talbot the secondary trainer for Ferranti.⁴ Both Roberts and Talbot had already been qualified as OJTI's; Ciaffaglione testified that he considered Roberts to be "the best controller in the room." He also testified that he considered Roberts to be a good OJTI.⁵

Although the evidence is not absolutely clear as to subsequent events, it is undisputed that Ciaffaglione did not specifically promise either Roberts or Talbot that they would be appointed as the OJTI's for Ferranti. However, the substantial weight of the evidence is to the effect that Roberts, Talbot and Ferranti were led to believe that Roberts and Talbot would in fact be appointed. I have made this finding of fact for a number of reasons. First, Ciaffaglione testified that only Roberts and Talbot volunteered although a number of other qualified ATC's had told him that they would serve if no one else would. Ciaffaglione was not used to this sort of situation and was surprised that there were not more applicants. It appears likely that Ciaffaglione would have chosen qualified volunteers over others who were reluctant to serve. Secondly, both Roberts and Talbot testified that Ciaffaglione told them separately that "we have decided to go in a different direction" and appoint Bob Monroe and Brian Mitchell as the primary and secondary OJTI's

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The initial Plan for Training for Ferranti, with Monroe and Mitchell as instructors, is dated January 25, 2002, and was effective as of January 15, 2002 (Jt. Ex. 4A).

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While there is conflict in the testimony as to whether Roberts and Talbot applied for the positions or Ciaffaglione sought them out, the issue is not critical to this decision.

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Proficiency as an ATC is not the only criterion for qualification as an OJTI. According to FAA Order 3120.4J the panel which evaluates candidates is required to consider personal attributes including, as a minimum, human relation skills, communication skills, motivation and attitude, objectivity and credibility.

respectively.⁶ The comment as to a different direction suggests that Ciaffaglione had changed his mind. Talbot also testified that Ciaffaglione was pleased when he volunteered and remarked that no one else had come forward. Finally, shortly before Ferranti went to radar school, he told Roberts that he would see him in a couple of weeks and that he was looking forward to working with him. The clear thrust of this evidence is that Ciaffaglione created the impression that Roberts and Talbot would be appointed to Ferranti's training team. Neither the Respondent nor the Union presented evidence to the contrary.

The evidence also leads me to conclude that Ciaffaglione changed his mind in response to pressure from Means. Ciaffaglione testified that, before making his selections, he told Means that he thought that more people would have volunteered to be OJTI's. It is natural to assume that, in the context of that conversation, he would have informed Means that Roberts and Talbot had volunteered. Ciaffaglione stated that he did not remember whether Means commented on whether Roberts was an appropriate choice. However, Means himself testified that he had heard that Ciaffaglione was leaning towards selecting Roberts. Means told Ciaffaglione that Roberts should not be a primary OJTI for anyone because in 1994 Roberts had resigned as the OJTI for Rick Loewen. Means testified that he did not recall whether he had suggested a suitable candidate for primary OJTI but conceded that he might have done so. Means acknowledged that Monroe was a member of the Union at the time of his selection and was vice president of the Union at the time of the hearing; Roberts was not a member. Ciaffaglione testified that Means told him that Monroe had not been an OJTI for a long time. According to Roberts, Ciaffaglione expressed the same rationale to justify Monroe's selection over him. This can hardly be deemed coincidental.

In spite of questionable lapses of memory, the above testimony supports the proposition that Ciaffaglione was prepared to select Roberts and Talbot as primary and secondary trainers for Ferranti. He changed his mind after speaking to Means and selected Monroe and Mitchell. At the time of this decision Ciaffaglione knew that Roberts and Talbot were actively opposed to the Union leadership and to Means in particular. It may be assumed that Ciaffaglione

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It is unclear whether Ciaffaglione meant "we" as a figure of speech or as an indication that this was a collaborative decision. In any event, Ciaffaglione testified that he had spoken with Benettieri before making the selection so as to keep him informed.

knew that Monroe supported the Union. Although there is no evidence as to Mitchell's status or sentiments with regard to the Union, Ciaffaglione's entire selection process was tainted by his willingness to accede to Means' suggestions in spite of his knowledge of Means' questionable motivation concerning Roberts.⁷

The stated rationale for rejecting Roberts and Talbot is unconvincing. All of the parties have conceded that changes occasionally occur in the assignment of OJTI's. Roberts credibly testified that he resigned from Loewen's training team because he felt that he had taught him all that he could. Talbot's periodic unavailability because of his shift schedule seems insufficient to justify his disqualification for the position of a secondary trainer, especially since he had already developed a rapport with Ferranti.⁸ As stated above, Ciaffaglione was ready to select both Roberts and Talbot with full knowledge of the allegedly disqualifying factors including Robert's purported personality problems.⁹ He changed his mind upon the urging of Means who, as acknowledged by all of the parties, should have had no part in the selection process. There is no evidence to show that Means told Ciaffaglione that Roberts

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Benettieri testified that, at around the time of the selection of Ferranti's trainers, Means told him that he did not want people in the anti-union faction training bargaining unit members. While it might have been prudent for Benettieri to have informed Ciaffaglione of that conversation, there is no evidence that he did so. In any event, Means' statement explains why the Union did not object to Roberts' selection for a long-term special assignment, whether or not at premium pay. It can logically be assumed that the Union did not object to that assignment since it would not have given Roberts the opportunity to "contaminate" developmentals with his anti-union sentiments.

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The Plan for Training dated August 31, 2002 (at which Roberts was present as the primary OJTI along with Robert Richardson as the secondary), includes as an objective that, "Al's watch schedule will be changed to the same schedule, as much as possible, as the primary and secondary instructor's [sic] schedule." (Jt. Ex. 4I.) Apparently the difference in watch schedules did not pose an insurmountable problem at that time. The fact that Roberts was subsequently appointed as the primary OJTI for Ferranti is only relevant with regard to the calculation of backpay.

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Ciaffaglione also stated that he wanted to avoid the appearance of favoritism toward Roberts.

and Talbot should not be allowed to train bargaining unit members. However, Ciaffaglione's knowledge of their anti-union positions should have alerted him to a potential problem when Means injected himself into a selection process in which he had no legitimate role.

Discussion and Analysis

Each of the parties has correctly cited *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) as establishing the order of proof in a discrimination case. According to *Letterkenny*, the General Counsel, in order to establish a *prima facie* case, must show that the employees in question were engaged in protected activity and that such activity was the motivating factor in the adverse action taken by the Respondent. The Respondent may rebut the General Counsel's case by showing that it had a nondiscriminatory basis for its action and that the action would have occurred in the absence of protected activity. See *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000). It then falls to the General Counsel to show that the Respondent's stated reasons are pretextual.

It is undisputed that Roberts' and Talbot's resignations from the Union and their other expressions of opposition are protected under §7102 of the Statute. As shown above, I have determined that the weight of the evidence is to the effect that such protected activity motivated the Respondent to deny them the selection as OJTI's for Ferranti. This finding of fact does not rest on a determination that the Respondent was allied with the Union leadership, but rather that the Respondent, through Ciaffaglione, acceded to the efforts of the Union, through Means, to prevent their selection. The Respondent took such action while charged with the knowledge that Means' motives were suspect to say the least.

The Respondent and the Union have presented a number of legitimate reasons which might have justified the selection of Monroe and Mitchell under other circumstances. However, those reasons cannot serve to justify the Respondent's action in this case in view of the evidence which strongly suggests that Monroe and Mitchell were selected only after Means had prevailed upon Ciaffaglione to change his mind. Consequently, the Respondent has failed to meet the second prong of the test established in *Warner Robins, supra*. Simply stated, Roberts and Talbot would have been selected had it not been for the intervention of Means who was motivated by their protected activity. Means' motivation is not attributable to the Respondent, but the Respondent is bound by Ciaffaglione's actual or constructive knowledge of that motivation at the time he acquiesced to pressure from the Union in selecting the OJTI's.

In view of the foregoing, I find that the Respondent committed an unfair labor practice in violation of §7116(a)

(1) and (2) of the Statute by failing to select Steven Roberts and Richard Talbot as On-the-Job-Training Instructors for Albert Ferranti. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Authority's Rules and Regulations and §7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Transportation, Federal Aviation Administration, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut, shall:

1. Cease and desist from:

(a) Discriminating against bargaining unit employees Steven Roberts and Richard Talbot, or any other bargaining unit employees, by not selecting them for the position of On-the-Job Training Instructors because of their status as non-dues paying members of the National Air Traffic Controllers Association, AFL-CIO, or because of their opposition to Union leadership, or because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Make whole bargaining unit employees Steven Roberts and Richard Talbot for any loss of pay and/or benefits which they have suffered as a result of the failure of the Respondent to select them as On-the-Job Training Instructors for developmental employee Albert Ferranti. Such payments will be made in accordance with the Back Pay Act, 5 U.S.C. §5596, as amended, and will include the payment of interest.

(b) Post at the Bradley Air Traffic Control Tower, Windsor Locks, Connecticut, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Air Traffic Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Regional Office, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, March 24, 2003.

PAUL B. LANG
Administrative Law

Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Transportation, Federal Aviation Administration, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against bargaining unit employees Steven Roberts and Richard Talbot, or any other bargaining unit employees, by not selecting them for the position of On-the-Job Training Instructors because of their status as non-dues paying members of the National Air Traffic Controllers Association, AFL-CIO, or because of their opposition to Union leadership, or because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute.

WE WILL make whole bargaining unit employees Steven Roberts and Richard Talbot for any loss of pay and/or benefits which they have suffered as a result of the failure of the Respondent to select them as On-the-Job Training Instructors for developmental employee Albert Ferranti. Such payments will be made in accordance with the Back Pay Act, 5 U.S.C. §5596, as amended, and will include the payment of interest.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Respondent/Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617)424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-02-0242, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 24, 2003
WASHINGTON, DC