



**Issue Date: 23 February 2011**

**CASE NO.: 2008-STA-00011**

**IN THE MATTER OF**

**BARRETT RIESS**  
**Complainant**

**v.**

**NUCOR CORPORATION**  
**VULCRAFT-TEXAS**  
**Respondent**

**DECISION AND ORDER ON REMAND**

On November 3, 2010, the Board remanded this case to the undersigned to further explain his findings concerning **(1)** the detail and significance of the safety concerns raised by Riess; **(2)** Riess' discharge within a week of his protected activity not being related to his protected activity but to intervening events; **(3)** the non-pretexual reasons advance by Landrum for his decision to terminate Riess; **(4)** the credibility or lack of credibility of Riess, Landrum, Stephen Semands, McArthur Walker, and Sue Larue. In framing these issues the Board at page 3 of its decision stated that for Riess to be successful he had to establish by a preponderance of evidence on four essential elements which include Riess' engagement in protected activity; Respondent's awareness of that activity; Respondent's adverse action against Riess (i.e. his discharge on January 15, 2007); and Riess' protected activity as a contributing factor in his discharge. If Riess fails to prove any of these elements his entire claims fails. If however, he is able to prove all elements and show at least a mixed motive (legitimate and prohibited reasons) for his discharge, Respondent can escape liability by proving with clear and convincing evidence that it would have discharged Riess in the absence of any protected activity.

In this case there was no direct evidence of illegal motive in Riess' termination. However, Riess points to the close temporary proximity between the protected activity and the adverse action (two days); his long tenure with Respondent, a lack of disciplinary problems and allegedly the intertwining of safety complaints with his dismissal to establish causation. Riess also relied upon pretext to prove illegal retaliation, (i.e., a lack of documentation, vague or subjective reasons about personality issues conflicts with other managers, supervisors or managers) The fact that Riess alleged deficiencies were evident apparently to Landrum before January 9, 2007, when Landrum first considered Riess termination and Respondent's failure to terminate other managers in the past thereby making Riess' termination an anomaly.

In this case the Board, at page 8 of its Remand Order, found the record contained substantial evidence supporting the undersigned's finding that Riess engaged in protected activities; Respondent was aware of these activities and subjected him to adverse action, (i.e., termination and directed the undersigned to make findings of fact regarding causation and pretext). The Board, however, directed the undersigned to make specific finding of fact regarding causation and pretext. Before doing as the Board directed and commencing an analysis of the record, the undersigned will address the issue of witness (Dr. Semands, Walker, Larue, Cheatam, Zwingman, Landrum and Riess) credibility.

Based upon my observation of Dr. Semands, Walker, Larue, Cheatam, Zwingman and Landrum demeanor at the hearing and considering their testimony the undersigned credits the testimony of these witnesses, all of whom the undersigned finds testified in a straight forward and sincere manner as opposed to Riess whose demeanor, I find was insincere and pretentious. Further and more importantly, I find the testimony of (Dr. Semands, Walker, Larue, Cheatam, Zwingman, Landrum and Riess) was generally consistent, corroborative, and logical as opposed to Riess whose attempt to portray himself as a model employee and manager was far from the truth and whose testimony was inconsistent with the general record and unsupported by any other witness.

For example, Riess who have the undersigned believe that he had a spotless record with Respondent until January 9, 2007, had confronted Landrum with the fact that Word had allegedly allowed two trailers to be hauled without updated annual inspection stickers, and refused to correct the situation. According to Riess, Word submitted his resignation, when Riess insisted upon safety rule reinforcement. According, to Riess he continued to confront Landrum with this safety issue on January 10, and 11, 2007, only to be allegedly told by Landrum it was ok if safety violations occurred occasionally and to leave Word alone and not post his job.

Thus, Riess would have the undersigned believe that Landrum was not serious about safety compliance. However, this accusation fails in the face of other uncontradicted testimony that Landrum was committed to safety and in fact encouraged employees at monthly inspections meetings with the safety coordinator to raise any safety concerns they had. (Tr. 305-07); Walker and Cheatam confirmed Landrum's commitment to safety. In fact when Landrum hired Riess for the position of traffic department manager, the first requirement Landrum listed was a commitment to safety which one would expect from a person such as Landrum who had a reputation for safety. (CX-16; Tr. 612-13). Indeed, even according to Riess, Employer had safety as its most important policy. (Tr. 51-54).

Why then would Landrum abandon such a position and ignore safety issues by telling Riess to leave Word alone and not post his (Word's) job and then tell Riess he needed to look for another job because he was too strict with Word regarding safety issues. Landrum had no reason to terminate Riess over a lack of safety inspection, when Landrum encouraged employees to approach him about safety issues at monthly safety meetings. There clearly was no economic reason to run unsafe trailers when the total cost of the trailer repair was only \$246.21. Respondent had no history of allowing uninspected trailers to travel over the road. Further, Respondent had a surplus of trailers (88) and only 14 trucks which was more than it needed to do its business.

Contrary to Landrum who listen to and was respected by his fellow employees and supervisors, Riess was a poor manager who neither listened to nor developed the confidence of others. Riess knew this from Dr. Semands and Landrum who on more than one occasion reminded him of his consistent failure to listen to and value employee suggestions and their work efforts. In fact, on critical management areas of being able to listen to others and to consider their input in making decisions so as to develop their trust and confidence, Riess had one of the lowest scores ever recorded by Dr. Semands; which concerned both Landrum and Dr. Semands before any of Riess' protected activity (Tr. 386-87; 439) and despite Riess' claim of being a good supervisor, showed Landrum did not view him as such. (Tr. 30, 178, 378, 380, 385-87, 439). Respondent did not follow progressive discipline with Riess because Respondent did not apply progressive discipline to any manager. Riess knew he was not on good terms with Landrum as early as April, 2006 and even expressed his concern to Zwingman in November 2006, (Tr. 64, 376, 574-76).

While temporal proximity between Riess' protected activity and his discharge combined with his tenure and Nucor's failure to discharge other managers, may suggest protected activities played some role in his discharge, I find when one looks beyond the surface that as of January 15, 2007, Landrum had more than sufficient or legitimate grounds for Riess' discharge. (i.e., a personality or management deficiency) wherein Riess refused to listen to employees and their concerns, which caused two employees to resign (Walker and Word) and another valued employee, Larue, to almost resign because of Riess' abusive treatment of her when she asked and Riess gave her time off to attend a funeral only to be yelled at and berated for not being a team player when she took several hours to do so. There was nothing vague or subjective in Riess' actions. He simply ignored the input or contribution of other employees when allowing them to take time off or when making major corporate decisions such as the purchase of a fleet of trucks.

On January 10, 2007, Landrum learned for the first time of Larue's treatment from Word. He also learned from Word, as confirmed by Larue, that Word was leaving Vulcraft because of Riess' nitpicking and overbearing attitude. As for example, when he called him from vacation to prepare a routine purchase requisition. On January 9, 2007, Riess admitted to Landrum that Word was quitting because he was unable to work with Riess because Riess was hard headed and would not listen to input from others. Concerning Walker's retirement, Walker told Landrum that he initially wanted to retire at age 65 but decided to leave early because he could not deal with Riess any longer because of Riess treatment of him. For example, he charged him vacation time for taking several hours off for personal business while at the same time calling him back to the plant for menial things. On January 9, 2007, Landrum also learned from employees that Riess had instructed them not to answer Landrum questions. Riess had in fact told Landrum that drivers supported his decision to buy Peterbilt when in fact they had not.

The fact that Word did not list Riess as one the reasons for leaving employer was easily explained by his desire not to burn any bridges, should he need Employer's help in seeking future employment. The fact that Landrum did not document his employee interviews, nor apply progressive discipline when terminating Riess, was also easily explained by the fact that Respondent did not apply progressive discipline to any manager, but rather attempted and used counseling to achieve better performance. Such that it did not have to terminate any manager,

except Riess, who failed to accept advice either from Landrum or Dr. Semands. Records of employee interviews moreover were not necessary when Landrum could and obviously did call witnesses to confirm his actions.

For the reasons set forth below, I find that Riess failed to show his protected activities were a contributing factor in his discharge. Rather, I find that the credible evidence shows that Riess was terminated on January 15, 2007, because he was a poor manager who refused to listen to employee concerns regarding working conditions and told Word and other employees not to be candid with Landrum especially on their lack of support for the purchase of Peterbilt rather than Kenworth trucks. On January 10, 2007, Landrum confirmed that Word was resigning because of Riess' nitpicking, overbearing attitude and learned from Word about Riess' instructions on not being candid with Landrum (Tr. 245-46; 309-10, 314). While Riess claimed Word was going to resign regardless of Riess treatment, to go into business for himself. Word had invested heavily in a side business because Word anticipated not being able to work with Riess in the long term. (Tr. 245-46, 541, 650). Riess' handwritten note of January 9, 2007, detailing the reasons Word gave him for resigning, makes no mention of safety issues but rather describes Riess as pushing too much. (Tr. 69, 147-49). Before terminating Riess, Landrum talked with Dr. Semands and learned that it would take a long time for Riess to change his management style because it stemmed from intractable personality traits of being tough minded, self-centered and thus unlikely to be seen as emotionally supportive. (Tr. 405-07, 433).

Considering the foregoing testimony the undersigned finds no credible basis to believe that Riess' discharge had anything to do with protective activity, (i.e., the raising of safety issues with Landrum and to the extent Riess attempts to implicate Landrum with a practice of non-safety enforcement specifically discredits such). Rather, the undersigns credits other legitimate reasons advanced by Landrum for Riess' discharge as listed on pages 8 and 9 of the initial Recommended Decision and Order and again recommends dismissal of the instant complaint as non-merituous.

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).