

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

RVL CONTRACTORS, INC.

and

Case nos. 6-CA-35033  
6-CA-35142  
6-CA-35194  
6-CA-35195

MID-ATLANTIC REGIONAL COUNCIL  
OF CARPENTERS/WEST VIRGINIA  
DISTRICT a/w UNITED BROTHERHOOD  
OF CARPENTERS AND JOINERS OF  
AMERICA

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For the General Counsel

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For the Charging Party

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For the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Morgantown, West Virginia on November 29, 2006. Mid-Atlantic Regional Council of Carpenters/West Virginia a/w United Brotherhood of Carpenters and Joiners of America (herein Union) filed the charge in Case No. 6-CA-35033 on January 25, 2006. It filed the original charge in Case No. 6-CA-35142 on April 25, 2006 and thereafter filed amended charges in this case on June 1, 2006 and August 28, 2006. The Union filed the charge in Case No. 6-CA-35194 on June 1, 2006. It filed the charge in Case No. 6-CA-35195 on May 1, 2006. The Region issued an Order Consolidating Case, Consolidated Complaint and Notice of Hearing on September 29, 2006. The Complaint alleges that RVL Contractors, Inc. (herein RVL or Respondent) engaged in certain conduct in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an Answer in which it admitted that it was an employer within the meaning of Section 2(2), (6) and (7) of the Act, but did not admit the labor organization status of the Union. The Answer also raised a number of affirmative defenses. Respondent, though properly served, chose not to attend the hearing on these consolidated cases. The Board has long held that the party raising affirmative defenses bears the burden of proving them. *Supervalu, Inc.*, 347 NLRB No. 37, slip. Op. at 12 (2006); *Midwestern Personnel Services, Inc.*, 346 NLRB No. 37, slip op. at 8 (2006); *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1066 (2001); *Eugene Iovine, Inc.*, 328 NLRB 294, 295,

fn. 2 (1999); *Manno Electric*, 321 NLRB 278, 280 (1996). As Respondent did not participate in the hearing, no proof was adduced in support of the affirmative defenses and I find that they are without merit.

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the memorandum of law filed by General Counsel, I make the following

Findings of Fact

10 I. Jurisdiction

The Respondent, a Virginia corporation, with an office and place of business in Richmond, Virginia and as pertinent, a jobsite in Morgantown, West Virginia, engages in the business of drywall installation in the construction industry. During the 12 month period ending  
 15 December 31, 2005, in the conduct of its business derived gross revenues in excess of \$1,000,000 and performed services valued in excess of \$50,000 in states other than the Commonwealth of Virginia. Respondent admits and I find that it is now and had been at all material times an employer within the meaning of Section 2(2), (6) and (7) of the Act. Based on evidence set out below, I find that the Union is a labor organization within the meaning of  
 20 Section 2(5) of the Act.

Leroy Stanley is Director of Organizing for the Union in 44 counties of West Virginia. He has four full-time organizers working with him in this capacity. He is also second in command for the Carpenters Union in West Virginia. Stanley also engages in contract administration for the  
 25 Union. Members of the Union vote in internal Union elections and attend Union meetings. At these meetings, members are informed about jobs, projects and any work available for them in the area. They are also informed about contract negotiations and the status of grievances and related matters. The Union actively represents its employees in contract negotiations, contract administration and the handling of grievances.

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II. Alleged Unfair Labor Practices

The Complaint alleges that the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section  
 35 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

|    |                                |                |
|----|--------------------------------|----------------|
| 40 | Oscar Reyes                    | President      |
|    | George Vargas                  | Vice President |
|    | David Vargas                   | Superintendent |
|    | Javier (Herman, Harvey) Vargas | Foreman        |

The Complaint alleges that Respondent, by George Vargas, at Respondent's Morgantown, West Virginia jobsite, interrogated employees about their Union affiliations and sympathies on or about December 28, 2005, January 3, 2006, April 19, 2006 and May 19, 2006.  
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The Complaint further alleges that on or about May 24, 2006, Respondent permanently laid off its employees Christopher Latta and Bryan Frey and since this date has failed and refused to employ these individuals. It alleges that Respondent engaged in this conduct because the named employees formed, joined or assisted the Union and engaged in concerted  
 50 activities, and to discourage employees from engaging in these activities. By the conduct complained of, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the

Act. General Counsel submitted the testimony of several witnesses to prove her case. Each of these witnesses appeared entirely credible and I accept their testimony as fact.

A. Evidence Adduced Relating to the Unfair Labor Practice Violations

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1. Testimony of Gary Reed

10 Gary Reed is employed as the chief estimator for the Morgantown division of Easley & Rivers, Inc. Easley & Rivers engages in interior construction and employs carpenters, laborers, drywall finishers and plasterers. Reed has worked for the company for 20 years, the last nine of which have been as an estimator. Prior to being an estimator, Reed worked as carpenter and foreman for the company. He testified that Respondent was awarded the contract to provide interior drywall on a student housing project for West Virginia University. Easley & Rivers had unsuccessfully bid for this work. The project was the construction of a four story student  
15 housing facility in Morgantown. Construction began in late 2005.

20 Reed testified that Respondent did not have enough personnel to meet the contractual completion date. Thus, in the first week of June, 2006, the general contractor for the job, Whiting and Turner, hired Easley & Rivers to come in and supply personnel so the job could be finished on time. Easley & Rivers supplied about ten carpenters and fifteen to seventeen drywall finishers to the project. This company's participation in the project lasted about four weeks. With respect to installing drywall, Reed testified that the number of sheets of drywall that can be installed by an employee varies by the type of room in which the drywall is being hung. In hallways and large rooms a large number of sheets can be hung in a day. In baths, closets and smaller rooms, because of the need to cut the drywall and fit it, a lesser number can be hung.  
25 He estimated that a pair of good drywall hangers could hang over fifty sheets a day in hallways. In smaller rooms like bathrooms, the pair could only hang about 15 to 20 and in a dorm room, about 30 to 35.

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2. Testimony of Joseph Harmon

35 Joseph Harmon has been employed as an organizer by the Union for about four and a half years. Prior to that, he was employed by Easley & Rivers. During his employment with that company, he worked in all phases of construction, including building scaffolding, hanging drywall and metal stud framing. While an organizer, he has worked for several contractors hanging drywall and building scaffolding. In late 2005, he was instructed by Leroy Stanley to try to organize RVL's employees on the Morgantown project. On December 28, 2005, he went to the jobsite. He described the site as a being about a half a block in size with a fence surrounding it and two entry gates. At this point in time, RVL was metal stud framing the  
40 building. Seeking a job with RVL in order to organize its employees, Harmon entered the site and asked who to see. He was directed to George Vargas. Harmon spoke to Vargas and told him he had 11 years of experience in construction. Vargas told him to get his hard hat and report back to him.

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Harmon testified that on this day, the Union was videotaping the project. As instructed, Harmon got his hard hat and reported to Vargas. Vargas then asked Harmon if he were with the Union. Harmon had not mentioned anything about the Union in his first encounter with Vargas nor had he had any contact with the Union members videotaping the job. In response to Vargas's question, Harmon answered no. Vargas was at this time standing with his brother Dave Vargas. George Vargas then asked Harmon, "Did the Union send you?" Harmon responded, "No. Do I have to be a Union member to have a job here." Vargas then said, "Never mind. We are not a Union company." Harmon replied, "Okay. I just need a job." The men then

walked towards the RVL office trailer and Vargas stated that he did not understand why the Union was giving him such a tough time. Harmon commented that he did not know anything about it.

5 Vargas then asked about Harmon's work experience. Harmon told him he had 11 years of experience in all phases of construction. Vargas then asked how long Harmon had been out of work and Harmon told him a month. Vargas then asked Harmon if he were "wired." Harmon answered that he was not. Vargas again stated that he did not understand why the Union was giving him such a tough time and added, "I give the general contractor a price just like everyone  
10 else and we're going to do it whether the Union likes it or not." Harmon responded by saying, "I don't care. I just need a job." Vargas then gave Harmon a job application which Harmon filled out. Vargas then asked for Harmon's social security card which Harmon did not have with him. Harmon said he would get it and return, and then left the site. Before he left, Vargas told him  
15 that they had to get the concrete poured for the second floor of the project, then they would be hiring. Vargas said he had brought eight of his employees to the job from Richmond and planned on hiring local workers if he could find qualified workers. He added that he would definitely be hiring in about two weeks.

20 Harmon returned to the site the next week to give Vargas a copy of his birth certificate. Vargas was off site at the time and Harmon left the certificate in the RVL office trailer. Harmon then left and returned a week later. He spoke with Vargas. Harmon characterized his conversation with Vargas as "short." Harmon asked if Vargas had received the birth certificate and Vargas said yes. Harmon asked when he could expect to be hired and Vargas responded that "he didn't know when he was going to do any hiring at all, that things were very slow and he  
25 didn't think he would need anybody." The conversation ended and Harmon left. He never heard from RVL again and was not hired.

I find that Vargas's interrogation of Harmon to be a violation of Section 8(a)(1) of the Act. Requiring job applicants to disclose their union membership or activities is a violation of the Act. *Facchina Construction Co., Inc.*, 343 NLRB 886 (2004)(Violation of Section 8(a)(1) where  
30 employer questioned job applicants about their union membership); *Zarcon, Inc.*, 340 NLRB 1222 (2003).

### 35 3. Testimony of Christopher Latta

Christopher Latta is a carpenter and at the time of hearing was employed by Volpac Construction, a Pittsburgh contractor, on a hospital construction job in Morgantown. He had been working on that job for about a month and a half as of the hearing date. On this job, he had performed interior work including metal stud framing, hanging drywall, ceilings, doors, cabinets and counters. Prior to January 2006, Latta had worked for a Michigan company installing polymer precast panels and instructing others on how to install them at jobsites throughout the United States. He did this work for about five years. Prior to that, he had worked in construction while attending high school. Latta is a member of the Union, having joined it in  
40 May 2006. In January 2006, Latta was unemployed and sought a job with RVL on its WVU project in Morgantown. Though not a Union member yet, he had been told by a Union organizer about the RVL project. Latta testified that in January 2006, RVL was doing metal stud framing on the project and that he had experience doing this type work.  
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In early January, 2006, Latta went to the site and contacted the general contractor for the project. He asked who was in charge of hiring for Respondent and was directed to the RVL trailer. He went there, but found no one in it. He returned to the general contractor's trailer and someone there called George Vargas. Vargas said he would be at his trailer in about fifteen  
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minutes so Latta returned to that trailer. About an hour and a half later, George Vargas showed up with his brother Dave. Dave Vargas asked about Latta's work experience and Latta gave him a resume and told him of his work with the polymer panels. Vargas indicated to Latta that he did not believe Latta had enough experience with metal stud framing to work for them. Latta testified that they were impressed with his supervisory skills and told him they would like to try him out as a laborer supervisor. George Vargas then asked if Latta had ever worked for a union company. Latta answered that he had not. Vargas then asked if he were with the Union and Latta replied that he was not with any union. Vargas then asked for Latta's driver's license and he showed it to him. Vargas then said he would be calling Latta in about two weeks as they would be needing someone to clean up the jobsite at that time. Latta then left.

About a week later, Latta went to the Union hall and spoke with organizer Mike Jenkins. Latta told Jenkins about his visit to RVL's job. Latta went to the hall to see about other job opportunities. Jenkins was unable to help him at that time. Shortly thereafter, his former Michigan employer called and rehired him, sending him to Florida to install polymer panels. This job lasted a month. Latta then returned to Morgantown at the end of February, 2006. In April, 2006, having not heard from RVL, he returned to their project to seek work. He met with George Vargas and asked if there was work for him. Vargas said no. Vargas then asked Latta why he had helped the Union bring NLRB charges against him. Latta did not know what Vargas was talking about and told Vargas that he did not know why the Union would bring up his name. Latta told Vargas that he was not a member of the Union or any other union. Vargas then commented that he did not know why the Union would bring up Latta's name and Latta agreed. Latta then asked for a job application, and George Vargas told him to come back in a couple of hours and see Dave Vargas, who handled hiring. At this time, Latta did not observe any Union activity on the job site.

Latta left and returned later that day. He met again with George Vargas who apologized to Latta, saying that he had spoken with his Richmond headquarters and discovered that he had mistakenly accused Latta of being the subject of the NLRB charge. Vargas then told him that he had to be careful about what he said because the Union was giving him a hard time. Latta testified that he said, "Is that right?" Vargas then gave Latta a job application and told him to fill it out and come back. Latta complied and returned with the application a couple of days later.

Latta could not find either George or Dave Vargas, but was directed by other employees on the site to another Vargas brother, Javier Vargas. He gave the application to Javier Vargas and was told that RVL would be needing people shortly. Latta left and did not hear from RVL. In early May 2006, Latta received a phone call from Union organizer Mike Jenkins. Jenkins told him that he was working at RVL and his partner had just quit. He offered Latta the chance to replace his partner. Latta said he would come to work the next morning. Latta picked up Jenkins the next morning and they reported to the site early to see about getting Latta hired. Jenkins and Latta then met with Dave Vargas. Jenkins explained to Vargas that his partner had quit the day before and he needed a partner for work that day. Latta testified that Dave Vargas said, "I can't make that decision. I got to call somebody to see what we can do." Vargas then sent Jenkins to work and told Latta to stay until he got an answer. About fifteen minutes later, Vargas summoned Latta into the RVL trailer. He then hired Latta and sent him to work with Jenkins. The two men then hung drywall in a dorm room under construction.

On the next day, May 9, 2006, Latta again worked with Jenkins hanging drywall in dorm bathrooms. At quitting time the two men went to the RVL trailer to sign out. Jenkins was told by Dave Vargas that the Union would be videotaping at the job site the next day. Vargas then instructed Jenkins that he would not be allowed to do any organizing on RVL time. Jenkins then

asked about organizing on breaks and at lunch. Dave Vargas said that would be okay. Jenkins and Latta then walked out of the trailer. Dave Vargas then yelled for Jenkins to come back. Vargas asked Jenkins how many sheets of drywall they had hung that day. Jenkins replied that he had not kept count. Vargas then said that his brother Javier had told him that Latta and Jenkins had only hung 25 sheets that day. Jenkins replied that he and Latta were doing the best that they could. Latta testified that it is difficult and time consuming to hang drywall in bathrooms because of the pipes and receptacles. Latta testified that when he was hired, no one told him how many sheets of drywall he was to hang a day. Latta believed that he and Jenkins were working as quickly and efficiently as they could.

During the days that Latta worked with Jenkins, the Union was maintaining an informational picket line around the site. On his third day of working for RVL, Latta observed Union officers Leroy Stanley and Joe Murphy talking with Dave Vargas. Vargas and the Union officers came to where Latta and Jenkins were working and Stanley appointed Jenkins as union steward for all Union members working on the jobsite. Latta testified that in the days that followed, George and Javier Vargas came to observe his work more often than they had at the beginning. Latta testified that the two Vargas brothers were critical of his work. They did not, however, comment on the number of sheets the two workers hung on a daily basis.

On May 10, 2006, as Latta and Jenkins were leaving work for the day, George Vargas yelled at Jenkins to come see him. Jenkins went into the RVL trailer and came out about five minutes later. He told Latta that he had been fired. When Latta got home that day, he called a friend of his, Bryan Frey and asked Frey if he wanted to work with him on the jobsite. Frey indicated that he would and the next morning the two men went to the jobsite early. Latta spoke with Dave Vargas, telling him about Frey. Vargas said he would see what he could do and sent Latta to work. Latta began working that day with a RVL employee who Latta considered very inexperienced. He testified that the man showed up for work in shorts which are not allowed on jobs. The man had to change clothes before he was allowed to work. The man also did not have the tools necessary to hang drywall. Latta supplied him tools. When they began working, Latta installed two sheets of drywall and found that the other worker had yet to hang one. During the morning Latta complained to Dave Vargas about the other employee's lack of experience and Vargas said he would do something about it. About fifteen minutes later, Frey came to work with him. RVL assigned the man who had been working with Latta to laborer duties, sweeping and picking up trash. Latta testified that Frey was experienced and the two men worked well together. According to Latta, Frey had more experience with drywall than he did. On Frey's first day, Latta and Frey installed drywall in bathrooms.

The following day, Thursday May 18, 2006, Frey and Latta came to the jobsite and saw Union representatives Mike Jenkins and Joe Murphy. The Union representatives told Latta and Frey that they were establishing an ULP picket line that day. Latta and Frey did not report to work that morning, instead they participated in the picketing. None of RVL's other employees participated in the picketing. Some employees of other contractors also joined in the picketing. The picket line stayed up for five days. During this time work continued at the jobsite though at a reduced pace. Latta and Frey stayed on the line for its duration. When the picket line was withdrawn, Latta and Frey went back to work. They were about an hour late as they had planned on picketing that day and had not been told the picketing was ending. They reported to the RVL trailer and met with George Vargas. Vargas asked Latta why he had lied about being in the Union. Latta responded that he had not lied because he was not a member of the Union when they had spoken previously in January, 2006. As noted earlier, Latta joined the Union in the first part of May 2006. Vargas then said he did not have any work for them that day and to come back the next day.

They reported to work the next day, Friday May 19, 2006, and were given work. George Vargas commented to the men that he would put them to work and see how long they lasted. They worked the next two days and on the second of those days, Sunday May 21, 2006, Latta went to the RVL trailer at lunch. Latta was seeking permission he and Frey to take off Tuesday and Wednesday of the next week. He spoke with George Vargas who told him it would be no problem. Just before quitting time that day Vargas came to where Latta and Frey were working. He told them to take the next Monday off as well. He added he was going to try out some new employees. He added that they should call in Wednesday evening to see if there was any work for Thursday. Instead of following this instruction, the two employees went to work on Wednesday morning, May 23, 2006.

They went to the RVL trailer and met George Vargas. Vargas said he did not have any work for them. Latta then asked whether they were laid off or whether there was going to be more work for them. Vargas told them they were laid off, stating that he had too many men and had nothing for them to do. They asked for their checks and got them about an hour later. Latta was never recalled to the RVL jobsite.

As was the case with the interrogation of Harmon, I find Vargas's interrogations of Latta on more than one occasion, about his union membership and/or sympathies, are violations of Section 8(a)(1) of the Act. *Facchina Construction Co., Inc., supra*. I also find Vargas's questioning of Latta about his involvement with charges filed by the Union with the Board to constitute a violation of Section 8(a)(1) of the Act.

#### 4. Testimony of Bryan Frey

Bryan Frey, as of the date of hearing, worked for Easley & Rivers on an off and on basis. As of May 2006, Frey had three years experience in the Union's apprenticeship program. He is a member of the Union. He is the fourth generation of union carpenters in his family, following in the footsteps of his great grandfather, grandfather and father. In addition to working for Easley & Rivers, Frey has also worked for other area contractors.

At the time Latta asked him to work with him at RVL, Frey was unemployed. On his first morning at RVL, after Latta had been sent to work, Latta spoke to Dave Vargas. Vargas told him to stay on site as he might be able to put him to work. Vargas then asked about his experience in installing drywall. Frey answered that he had three years experience. Frey testified that Vargas did not ask him about the Union, though Frey assumed that Vargas knew he was a Union member. He bases this assumption on the fact that he showed up with Latta, who had been brought by Jenkins, whose identity as a Union organizer was known to the Vargas brothers. Vargas then asked him how many drywall sheets he could install in a day. Frey answered that he could hang thirty or forty sheets with a good partner. Vargas then told him to get his tools and report to Javier Vargas on the fourth floor of the building. Frey did as he had been instructed, but was unable to find Javier Vargas. Dave Vargas came to him and reassigned him to work with Latta on the second floor. He then joined Latta hanging drywall in bathrooms. He characterized the hanging of drywall in bathrooms as slow and tedious because of the many cuts that have to be made.

His testimony about his experience and that of Latta's on the picket line mirrors Latta's testimony. He also corroborated Latta's testimony about the two men's further contact with the Vargas brothers until they were laid off. Frey testified that he and Latta were completing about two to three bathrooms a day whereas another two man teams of RVL employees doing the same work were only able to complete one or two bathrooms in the same timeframe. Frey has not been recalled to work for RVL since his layoff.

B. Payroll Record Evidence Adduced.

As GC Ex. 2(a) through (f), General Counsel put into evidence the certified payroll records submitted weekly by Respondent to the Employment Standards Administration, Wage and Hour Division, U.S. Department of Labor. The period covered by these records is the week ending May 14, 2006 through the week ending June 18, 2006. These records display, among other information, the name of every employee who was employed by RVL at the West Virginia University student housing construction site. The payroll records then display the job classification of each employee, the dates and number of hours worked per day during each week that the employee was employed and the employee's rate of pay.<sup>1</sup>

In addition to the certified payroll records, General Counsel submitted as GC Ex. 3, a chart summarizing some of the information on these payroll records. This summary lists the employees from the payroll records chronologically by the date the employee first started working for RVL at the Morgantown, job site.<sup>2</sup>

If the two exhibits are cross-referenced, it is clear that RVL hired a large number of carpenters during and after the period that RVL laid off Christopher Latta and Bryan Frey, both of whom were classified as carpenters by RVL. Latta and Frey were instructed to take the day off from work on May 22, 2006, and the two employees requested and were granted days off on May 23 and 24, 2006. Early in the morning of May 24, 2006, Latta and Frey attempted to return to work, but were told by George Vargas that they were laid off because RVL was overmanned.

The certified payroll records indicate that the following employees began working at the Morgantown job site for RVL on May 22, 2006: Pedro Lemus, Javier Moguel, Melvin Fuentes, Jose M. Luna Castro, Anselmo Solis, Louis Jauregui Madriz, Artis Lewis, Earl Clark, Jr., and Brandon Polga Burgos. This is confirmed by observing that none of the above-listed employees are included on the certified payroll prior to the week ending May 28, 2006, and are shown to have worked beginning May 22, 2006. Thus, these employees are not listed on the payroll records for the period ending May 14, 2006 or May 21, 2006. All of these employees are classified as carpenters and were being paid the same rate of pay as Latta and Frey. Similarly, according to the certified payroll records, Edgar Velasquez began working on May 23, 2006 and Jose Orosco began working on May 24, 2006. Again, Velasquez and Orosco were classified as carpenters and paid at the same rate as Latta and Frey.

The payroll records further show that Rene Luna Aquillon, Jose Luis Soto, Oscar Alvis and Hector Amaya began working for RVL as carpenters, paid at the same hourly rate as Latta and Frey, on May 17, 2006. None were listed on the payroll records prior to that date. In the next few weeks, the payroll records indicate that the following employees began working for RVL, classified as carpenters and paid at the same hourly rate as Latta and Frey: May 31, 2006, John Weekly and Jose Asencio; June 1, 2006, Bruce Davis and Darrell Kees; June 5, 2006,

<sup>1</sup> The certified payroll records also provide other information, such as taxes withheld, benefit contributions, net wages, and so forth. However, this additional information is not relevant to the instant matter.

<sup>2</sup> The other information about each employee shown on this summary, such as experience, the reason for termination, and so forth, relates to information contained in the employees' personnel files. These files were not entered into evidence and this additional information is not relevant to the instant matter. Thus the only relevant information in G.C. Ex 3 is the name of the employee and the starting date of each employee's employment with RVL.

Jessica Alvarado, Gary Strobe, Guillermo Yanez and Hector Yanez; and, June 12, 2006, Jose A Reynoso. None of these employees are shown in the payroll records to have worked for RVL prior to the dates listed above.

5 Thus, the certified payroll records in G.C. Ex 2 disclose that RVL hired a total of 24  
carpenters to work for RVL hanging drywall at the involved job site between May 22, 2006, the  
day Latta and Frey were instructed not to come in to work, and June 12, 2006. At the same time  
that Latta and Frey were informed that they were being laid off because RVL had too many  
workers, RVL was hiring carpenters, and continued to hire carpenters during the weeks that  
10 followed the layoffs. However, RVL laid off and never recalled Latta and Frey.

Moreover the testimony of Gary Reed makes RVL's stated reason even more suspect.  
According to Reed's credible and un rebutted testimony, the general contractor on the involved  
project contacted Easley & Rivers in early June, 2006, and asked the company to supplement  
15 RVL's workforce to hang drywall. As noted earlier, Reed testified that the reason given to Easley  
& Rivers for this request was that the general contractor was concerned that RVL did not have a  
sufficient number of employees to complete the job on time. Reed testified that Easley & Rivers  
supplied numerous drywall hangers at this job site from early June through early July, 2006.

#### 20 C. Findings and Conclusions.

The General Counsel has the initial burden of establishing that Union or other protected  
activity was a motivating factor in Respondent's action alleged to constitute discrimination in  
violation of Section 8(a)(3) of the Act. The elements commonly required to support such a  
25 showing of discriminatory motivation are union activity, employer knowledge, timing, and  
employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to  
the Respondent to prove its affirmative defense that the alleged discriminatory conduct would  
have taken place even in the absence of the protected activity. *Wright Line, a Division of Wright  
Line, Inc.*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989  
30 (1982; approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

General Counsel has met her burden in this proceeding. Respondent's statements to  
Harmon and Latta clearly establish its animus toward the Union as do its interrogations of these  
job applicants which I have found unlawful above. The Respondent had clear knowledge of  
35 Latta's and Frey's Union sympathies and protected activities as it observed them participate in  
Union ULP picketing for five days immediately preceding their permanent layoff. No other RVL  
employee participated in the picketing though employees of other contractors on the site did join  
in the picketing. As noted the timing of the layoff is clearly in favor of a finding of discriminatory  
motivation. The layoff took place just days after the picketing.

40 Moreover, I believe the testimony of Gary Reed set out above and the payroll records  
prove that the Respondent's stated reason for the layoff of Latta and Frey was clearly a pretext.  
George Vargas told the two men they were being laid off because RVL was overmanned.  
However, in reality, RVL did not have enough employees at the time of the discriminatory layoff.  
45 It is well established that unconvincing reasons for an employer's action may support a finding  
of discrimination. *Greensboro News & Record*, 290 NLRB 219, 224 (1988); *McCain Foods, Inc.*,  
236 NLRB 447, 453 (1978). Thus, if the stated reason given by an employer is unconvincing,  
invalid or untrue, the very fact of its assertion may be viewed as tending to support a conclusion  
that an allegation of unlawful motivation is true. *San Benito, Health Foundation*, 318 NLRB 299,  
50 305 (1995).

In the instant case, the payroll records clearly prove that RVL's stated reason for the

layoffs of Latta and Frey, that it was overmanned, was untrue. These records demonstrate that RVL was hiring both before, at the time of, and after the two employees were laid off. Accordingly, the payroll records show that RVL's stated reason was a pretext and the two employees' union activities, and RVL's demonstrated animus, lead only to a conclusion that they were laid off because of their protected activities. Respondent did not appear at the hearing and offered no evidence with respect to its burden to persuade that it would have taken the same action even in the absence of the protected conduct. Accordingly, I find that the layoffs were discriminatorily motivated and constitute a violation of Section 8(a)(3) and (1) of the Act.

#### Conclusions of Law

1. Respondent, RVL Contractors, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating job applicants about their union membership, affiliations, sympathies and activities.
4. Respondent violated Section 8(a)(1) and (3) of the Act by discriminating against employees because of their union activities by laying them off and failing and refusing to recall them to their former jobs.
5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent is ordered to post a Notice To Employees at its facility in Richmond, Virginia and, as the construction project in Morgantown, West Virginia is complete and Respondent has ceased operations at that location, Respondent is ordered to duplicate and mail the Notices to all individuals who were employed by RVL Contractors, Inc., at that location beginning on or after January 1, 2006.

Respondent is further ordered to offer employment to Christopher Latta and Bryan Frey in the event that Respondent has any future projects within a 100 mile radius of Morgantown, West Virginia. Additionally, Respondent is ordered to make Christopher Latta and Bryan Frey whole for any lost earnings and other benefits suffered as a result of the discrimination against them, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, Respondent is ordered to remove from its files any reference to the unlawful permanent layoff of Christopher Latta and Bryan Frey, and notify them in writing that this has been done and that their layoffs will not be used against them in any way in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the

following recommended<sup>3</sup>

## ORDER

5           The Respondent, RVL Contractors, Inc., of Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- 10           (a) Coercively interrogating job applicants about their union membership, affiliations, sympathies and activities.
- (b) Discriminating against employees because of their union activities by laying them off and failing and refusing to recall them to their former jobs.
- 15           (c) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- 20           (a) Make Christopher Latta and Bryan Frey whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.
- (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of Christopher Latta and Bryan Frey and, within 3 days thereafter, notify them in writing that this has been done and that their layoffs will not be used against them in any way in the future.
- 25           (c) Offer employment to Christopher Latta and Bryan Frey in the event that Respondent has any future projects within a 100-mile radius of Morgantown, West Virginia.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 30           (e) Within 14 days after service by the Region, post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region Six, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that
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45           <sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50           <sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notices are not altered, defaced, or covered by any other material. Within 14 days after service of this Order, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Morgantown, West Virginia location on and after January 1, 2006.

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- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. , February 23, 2007.

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Wallace H. Nations  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT lay off and fail and refuse to recall our employees on the basis of their union affiliation or activities.

WE WILL NOT ask you about your support or membership in MID-ATLANTIC REGIONAL COUNCIL OF CARPENTERS/WEST VIRGINIA DISTRICT a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay Christopher Latta and Bryan Frey for the wages and other benefits, including interest, they lost because we laid them off.

WE WILL offer Christopher Latta and Bryan Frey employment to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, in the event we have future projects within a 100-mile radius of Morgantown, West Virginia.

WE WILL remove from our records evidence of the layoffs of Christopher and Bryan Latta and notify them in writing that this has been done and that these layoffs will not be used against them in any way in the future.

RVL CONTRACTORS, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1000 Liberty Avenue, Federal Building, Room 1501

Pittsburgh, Pennsylvania 15222-4173

Hours: 8:30 a.m. to 5 p.m.

412-395-4400.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

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. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.

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