

**Ybarra Construction Company and D&P Drywall, Inc., a Single Employer and District Council 22, International Union of Painters and Allied Trades, AFL-CIO, CLC. Case 7-CA-44842**

September 29, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On June 16, 2004, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions, and to adopt the recommended Order as modified.<sup>3</sup>

<sup>1</sup> The General Counsel filed a motion to strike the Respondent's exceptions on the ground that they fail to comply with Sec. 102.46 (b)-(c) of the Board's Rules and Regulations in that they do not identify the part of the judge's decision to which objection is made, do not designate page citations to the record, and do not specify the questions involved or present argument in support thereof. We find that the Respondent's exceptions sufficiently identify the portions of the judge's decision the Respondent claims are erroneous. See, e.g., *Chariot Marine Fabricators*, 335 NLRB 339 fn. 1 (2001). Accordingly, we deny the General Counsel's motion to strike the exceptions.

The Respondent did not except to the judge's findings: (1) that it violated Sec. 8(a)(1) by telling its employee Allen Kirk that there was no work available; and (2) that it constructively discharged Kirk on or about January 29, 2002.

Member Meisburg notes that the judge, in finding the above 8(a)(1) violation, also found that the Respondent thereby constructively discharged Kirk. Member Meisburg agrees with the judge's finding in its entirety. Member Meisburg, therefore, finds it unnecessary to pass on the judge's finding that the discharge violated Sec. 8(a)(3) of the Act, because this additional finding would be essentially cumulative with no material effect on the remedy.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discriminating against Kirk because he engaged in protected, concerted activity. In reaching this conclusion, we rely exclusively on Kirk's enlisting the Union for assistance with his claims for overtime and benefits—both of which were provided for by the collective-bargaining agreement in effect between the Respondent and the Union—and the Respondent's actions in response thereto. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984) (action by an individual to enforce a provision of an existing collective-bargaining agreement is

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Ybarra Construction Company, Detroit, Michigan, and D&P Drywall, Inc., Dearborn, Michigan, a single employer, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Allen Kirk whole for any loss of earnings and other benefits suffered as a result of the December 20, 2001 reduction in his hourly wage, the diminution in hours prior to his constructive discharge, and any loss of earnings and other benefits suffered as a result of his constructive discharge, plus interest, in the manner set forth in the remedy section of the decision.”

2. Substitute the following for paragraph 2(d).

“(d) Within 14 days after service by the Region, post at its facilities in Detroit and Dearborn, Michigan, copies of the attached notice marked “Appendix.”<sup>35</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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, and mailed by the Respondent, at its own expense, to all individuals employed by the Respondent at its Newberry Homes and Ser Casa Academy projects from December 20, 2001, to the completion of each employee's work at that jobsite, at the employee's last known address. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

concerted activity and protected by Sec. 7 of the Act). It is undisputed that the Respondent knew of the protected, concerted activity prior to December 20, 2001, and we find, in agreement with the judge, that the Respondent took the actions described in the judge's decision in response to those activities.

The judge inadvertently misstated that the collective-bargaining agreement between the Respondent and the Union was in effect beginning June 1, 1998. The contract term did not begin until March 14, 2000. The judge also inadvertently misstated that Tom McVicar, Kirk's drywall instructor, reviewed paystubs indicating that Kirk had earned \$18.18 per hour. Those stubs indicated that Kirk had earned \$17 per hour. These inadvertent errors do not affect our decision.

<sup>3</sup> In the remedy section of his decision, the judge inadvertently omitted a make-whole provision for Kirk's losses arising from (1) the reduction in hourly wage prior to the constructive discharge, and (2) the diminution of hours prior to the constructive discharge. We modify the Order accordingly.

to all current and former employees employed since December 20, 2001.”

3. Substitute the attached notice for that of the administrative law judge.

#### 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.

WE WILL NOT discharge, withhold work from, demote, reduce the wages or benefits of, or otherwise discriminate against any of you for supporting District Council 22, International Union of Painters and Allied Trades, AFL-CIO, CLC, or any other union.

WE WILL NOT tell you that you could be discharged or have work withheld for engaging in union or other protected concerted activity.

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

WE WILL, within 14 days from the date of this Order, offer Allen Kirk full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Allen Kirk whole for any loss of earnings and other benefits resulting from his reduction in hourly wage, diminution in hours, and discharge, less any net interim earnings, plus interest.

YBARRA CONSTRUCTION COMPANY AND D&P  
DRYWALL, INC.

*Ingrid L. Kock and Michael P. Silverstein, Esqs.*, for the General Counsel.

*Patrick M. Carmoy Jr., Esq.*, of Saline, Michigan, for the Respondent.

*William Kessler*, of Hazel Park, Michigan, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on January 20–21, 2004. The original charge was filed February 15, 2002, an amended charge was filed April 29, 2002, and the complaint issued May 3, 2002.<sup>1</sup>

The complaint alleges that the Respondents, Ybarra Construction Company and D&P Drywall, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by telling employee Allen Kirk (Kirk) on or about December 24, several days after he filed a prevailing wage complaint against the Respondents and enlisted the support of the Union in advancing his claim, that there was no work for him. The complaint also alleged that the Respondents violated Section 8(a)(3) and (1) by discriminating against Kirk by: (1) demoting Kirk to the position of first-year apprentice on or about December 20; (2) assigning him to performing fire-taping duties only from about December 20 until January 18; (3) reducing his hourly wage rate on or about December 20; (4) reducing his number of hours worked on or about December 20; and (5) discharging him on or about January 18.<sup>2</sup> The Respondents filed an answer admitting the jurisdictional aspects of the complaint and denying that they violated the Act.

At the hearing, the parties were afforded a full opportunity to call and examine witnesses, present oral and written evidence, argue orally on the record and file posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

The Respondents, with common ownership, officers, directors, management, personnel, offices, and places of business in Detroit and Dearborn, Michigan, are construction industry subcontractors involved in the installation of drywall, metal studs, ceiling tiles, and insulation. They each derive, on an annual basis, gross revenues valued in excess of \$500,000, and each purchases and receives at its offices and various Michigan project locations goods in excess of \$50,000 directly from points outside of Michigan. The Respondents admit, and I find, that they constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As such, they are hereinafter referred to collectively as the Respondent. I further find that District Council 22, International Union of

<sup>1</sup> All dates are from August 2001 to February 2002 unless otherwise indicated.

<sup>2</sup> The General Counsel’s motion to conform the pleadings to the proof at the conclusion of the trial was granted. The amendment specifically amended par. 10 of the complaint to add a reference, “with regard to wages, fringe benefits, overtime and other conditions of employment,” following “claims.” In addition, the General Counsel moved generally to amend the dates in the complaint to reflect the proof, including the date of discharge, January 18, 2002, to reflect evidence that “the discharge was a slow process by increments and reduction in hours.” Tr. 328–329.

Painters and Allied Trades, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

The Respondent is a construction industry subcontractor involved in the installation of drywall, metal studs, ceiling tiles, and insulation. Ann M. Ybarra (Ybarra) is owner and president of the Respondents. Randy J. Isgro (Isgro) was a project manager for the Respondent. Ybarra and Isgro were, at all relevant times, supervisors within the meaning of Section 2(13) of the Act. Kirk was an employee of the Respondent from 1997 through January 2002. During the period of June 1, 1998, to May 31, 2003, the Respondent and the Union were signatories to a collective-bargaining agreement (CBA). The CBA specified three types of employees—apprentices, journeymen, and foremen. New employees are classified as apprentices and are required to undergo classroom training and field training for four periods of at least 18 months. Upon successful completion of testing, the CBA provides for a fifth period for testing and eventual graduation to the position of journeyman. The CBA provides applicable wages and benefits payable to apprentices as a percentage of the journeymen rate, as follows: 50 percent during the first period (first 3 months); 60 percent during the second period (second 3 months); 70 percent during the third period (next 6 months); 80 percent during the fourth period (next 6 months); and 85 percent during the fifth period (until certificate of graduation is granted).

This controversy arose out of a dispute over Kirk's employee's wages and benefits during the period of September to January. Kirk started his employment with the Respondent as a general laborer in 1997. There was no union agreement in effect at that time and the Respondent did not have any formal classifications. However, Kirk's duties were similar to those of a taper.<sup>3</sup> Kirk's duties subsequently expanded to include the installation of drywall, metal studs, ceiling tiles, and doors. He also did fire taping, which simply involves applying tape to seal drywall in unfinished areas such as garages. Kirk worked for the Respondent as a taper for approximately 3 years until he was injured in an automobile accident in early 2000. As a result, he was out of work for 11 months that year.

### B. The Newberry Homes Project

Upon his return in 2001, Kirk was assigned to the Respondent's Newberry Homes project in Detroit. At that location, Kirk hung and finished drywall, performed repairs, and textured ceilings. He was paid at the rate of \$16 per hour in January 2001, and \$17 per hour by July 2001.<sup>4</sup> At some point in 2001, Kirk was appointed an assistant superintendent. However, aside from entitling him to carry keys to assist in opening project homes in the morning, the new classification did not

carry any additional responsibilities with it, as he continued to hang and finish drywall.<sup>5</sup>

During the summer, two inspectors from the Department of Labor visited the Newberry Homes project. The inspectors asked Kirk and another employee of the Ybarra Construction Company, Brian Warner, whether they were being paid prevailing wages, overtime, and benefits. Within a few days, Kirk raised the prevailing wage issue with Isgro. Kirk asked Isgro whether Newberry Homes was a Federal Government project and, therefore, a prevailing wage job. Isgro told Kirk that Newberry Homes was not a Federal Government project nor subject to prevailing wage requirements. Approximately 1 month later, Kirk revisited the issue of prevailing wage rates with Isgro and Ybarra. Isgro and Ybarra reassured him that the Newberry Homes project was not a Federal Government project and that he was paid above the basic wage rate.<sup>6</sup>

In September, Isgro began to monitor the time that Kirk left his house for work in the morning. Isgro determined that he was arriving late to the project site and suspended him on September 19. After meeting to discuss the matter with Kirk, 1 or 2 days later, Isgro permitted him to resume working. After returning to the project, Kirk continued to perform finishing work under the classification of assistant superintendent.<sup>7</sup>

### C. Kirk's Enlistment of the Union's Support

Subsequently, during the fall of 2001, Kirk learned that the Respondent failed to make contributions toward his medical insurance. As a result, around November 27, Kirk consulted with William Kessler, the Union's business agent, regarding the prevailing wage, his failure to receive benefits and overtime pay. Within a few weeks, Kirk provided the Union with copies of his paycheck stubs. After examining the stubs, Kessler informed Kirk of his belief that the Respondents had deprived

<sup>5</sup> The issue of whether Kirk did, in fact, perform managerial duties, was irrelevant in the final analysis, as the Respondent subsequently conceded that Kirk had the title of assistant superintendent *and* was an apprentice subject to the CBA. Nevertheless, the Respondent contends that Kirk's testimony in that regard revealed certain inconsistencies. For example, he denied using a credit card to purchase materials for the project, while the Respondent produced receipts of such purchases. However, I found credible Kirk's explanation that he was given a credit card in order to purchase materials for his use on the project—not the project in general—since they were relatively minor purchases ranging from \$25.36 to \$282.12. Tr. 59–60, 163, 225; R. Exh. 3.

<sup>6</sup> Neither Ybarra nor Isgro rebutted Kirk's testimony that he inquired about the applicability of prevailing wages during the summer of 2001. Tr. 27–30.

<sup>7</sup> Isgro testified that Kirk was terminated for "theft of company hours." Tr. 161. However, Isgro and Ybarra conceded that it was the Respondent's policy to issue a written notice of disciplinary action in such an instance, yet there was no such record in Kirk's personnel file. Tr. 180, 249. As such, the credible evidence supports Kirk's assertion that he was neither terminated nor demoted at that time. Tr. 61. Instead, it appears that his separation from the job was in the nature of a brief suspension. Furthermore, Ybarra testified that she told the general contractor's agent in or around December or January that Kirk was an assistant superintendent on the Newberry Homes project. Tr. 256. According to Isgro, the Newberry project lasted through December. Tr. 168–169.

<sup>3</sup> A taper is defined at art. XIII, sec. 3 of the CBA as "[a] finisher of drywall, wallboard or sheetrock." It involves a process of combining two pieces of drywall into one by applying tape, corner beads, and a mud-like material, and then sanding those materials into a finished condition ready for painting.

<sup>4</sup> The Respondent did not dispute this assertion. Tr. 27; GC Exh. 4.

Kirk of wages and fringe benefits.<sup>8</sup> On December 14, Kesslak contacted Ybarra, informed her about deficiencies in Kirk's wages and benefits and discussed his labor classification.<sup>9</sup> Ybarra admitted to Kesslak that the Respondent was low on funds. Her initial response to Kesslak's communication was to deliver a handwritten note to Kirk directing him to report to the Union's apprentice school. Ybarra followed up with a letter that was enclosed with Kirk's December 20 paycheck.<sup>10</sup>

This letter is meant to inform you that there has been an error on the part of Ybarra Construction Company's accounting department. It has been brought to my attention that since your position changed from assistant superintendent to apprentice in the painter's union, your rate of pay did not reflect this change. Effective immediately your rate of pay will change to reflect union scale. As an assistant superintendent your rate of pay was \$17.00 per hour and according to the signatory union your rate of pay should be \$11.35 per hour.<sup>11</sup>

Also, it is my understanding you have not enrolled into the apprenticeship educational program. It is necessary for you to do so as soon as possible, per union regulations. You were provided with the necessary information.

If you have any questions please feel free to contact me.

The letter, which was obviously the result of Ybarra's conversation with Kesslak, misrepresented several facts. First, there had been no error by the Respondent's accounting department—one even exists.<sup>12</sup> The classification of Kirk as an assistant superintendent, a management position, rather than as an apprentice or journeyman, was a management decision by Ybarra and Isgro, and not the result of a clerical error or computer malfunction. Second, no one brought it to Ybarra's "attention" that there had been a change in Kirk's status within the Union. Kesslak communicated with Ybarra regarding wages and benefits owed to Kirk in accordance with the CBA. Third, neither Kesslak nor

anyone else connected with the Union, told Ybarra that Kirk should be compensated at the rate of a first-year apprentice.

#### *D. Kirk's Prevailing Wage Complaint*

Coincidentally, on December 20, Jennifer Kirk, Kirk's wife, with the assistance of the Union, completed a prevailing wage complaint.<sup>13</sup> It alleged, in pertinent part, that Kirk worked as a drywall finisher for the Respondent on the Newberry project. However, it also described an assortment of other activities that he performed on that project: "mud, taped, sanding, firetaped, texture sprays, drywall, framing, repairs. Tools: mud knives, drill, mixing drill, mud pan, sanding pole, sand sponges, key hole saw. Hammer—straight knives, ladder, stilts." It further stated that he had been paid \$16 per hour since January and \$17 per hour since July, was not receiving fringe benefits, and worked a total of 1,225-1/2 hours at the Newberry project. Kirk signed the complaint and it was faxed to Jerilyn Clancy, the general contractor's agent, on December 21.

On December 21, Clancy sent a certified letter to Ybarra enclosing a copy of Kirk's prevailing wage complaint.<sup>14</sup> The letter stated:

With reference to the captioned project, attached is a copy of a wage complaint (3 pages) we received from Allen Kirk. Please provide this office with copies of Mr. Kirk's time cards and pay stubs for the time he worked at the Newberry Homes project. Also, proof of any benefits paid on Mr. Kirk's behalf must be submitted to us (copies of union reports, copies of invoices, copies of cancelled checks, etc.).

Mr. Kirk indicates his job classification is that of an apprentice. It will be necessary for you to provide certification of his registration with the U.S. Department of Labor—Bureau of Apprenticeship and Training. If Mr. Kirk was not registered with B.A.T. at the time he worked at the Newberry project, his pay must be re-calculated at the journeyman's rate (regardless of skill) and restitution will have to be made. Also, it will be necessary for you to amend all the weekly certified payrolls as Mr. Kirk is listed only on week no. 29 for 4 hours.

We must have your response to the above within 45 days from the date of this letter. This deadline is being extended because of the Christmas holidays. If you have any questions, please give me a call at (231) 228-5505.

Ybarra initially disagreed with Clancy's assertion that Kirk was an apprentice and took the position that he was, as of December, an assistant superintendent. This was in contrast to her letter of December 20 to Kirk telling him to report to apprentice school. However, she subsequently reversed her position and

<sup>8</sup> Kesslak also remarked that, in his opinion, the Respondent was running a double-breasted operation because Allen Kirk was issued two paychecks from D&P Drywall, Inc. to cover a portion of his salary in September and October 2001. However, Ybarra provided a plausible explanation attributing those transactions to the need of Ybarra Construction Company to borrow funds from D&P Drywall, Inc. Tr. 36, 41-42, 139-140; GC Exh. 3.

<sup>9</sup> Art. XX, sec. 1(A) of the CBA required the Respondent and the Union to attempt to settle any grievance and terminate the alleged violation. GC Exh. 8-9.

<sup>10</sup> Kesslak's testimony regarding his communications with Ybarra was straightforward and credible. Tr. 140. Ybarra, on the other hand, was not a credible witness. In this instance, for example, she took the position that she did not know about the Union's involvement in Kirk's wage claim until January. Tr. 284. However, her December 14 note and December 20 letter to Kirk are clear evidence that she had been in communication with the Union before then. Tr. 62; R. Exh. 1; GC Exh. 5.

<sup>11</sup> The starting rate of pay for a commercial drywall apprentice in the first year is actually \$11.36 per hour. GC Exh. 9.

<sup>12</sup> During a delay in the trial caused by the Respondent's failure to comply fully with the General Counsel's subpoena duces tecum for payroll records, Ybarra went to retrieve such information from the Respondent's locked and unstaffed Detroit office.

<sup>13</sup> Jennifer Kirk, a credible witness, is a high school graduate with 2 to 3 years of college and work experience as a data entry clerk for a major corporation. She handles all of the paperwork in the Kirk household and, as such, completed the three pages of the prevailing wage complaint on December 20. Copies of paycheck stubs were faxed to the general contractor's agent the following day. GC Exh. 4.

<sup>14</sup> GC Exh. 14.

acquiesced to the amount of the backpay determined in an audit conducted by the general contractor.<sup>15</sup>

On December 21, as directed by Ybarra, Kirk went to enroll in the Union's drywall apprentice school. Thomas McVicar, the drywall program coordinator interviewed Kirk and reviewed pay stubs indicating that Kirk had earned \$18.18 per hour. McVicar determined, based on Kirk's experience, that he was at least a second-year apprentice. He then had Kirk fill out a Department of Labor apprenticeship agreement form reflecting such a classification as of December 21.<sup>16</sup>

*E. Kirk's Additional Attempts to Pursue His Wage and Benefits Claim*

On December 24, Kirk was scheduled to receive the December 20 paycheck. When he did not receive it, he spoke to Isgro and was told that paychecks had not yet been issued. However, Kirk had seen other employees receive their paychecks that day. As a result, he went to the home of Ybarra and Isgro to get his paycheck. Isgro gave him his paycheck, along with Ybarra's December 20 letter. Upon reading the letter, Kirk complained about the reduction in his hourly wage rate. Isgro deferred to Ybarra, who was not home at the time. However, Kirk reached Ybarra on her cellular telephone and they agreed to meet a few days later.

Ybarra, Isgro, and the Kirks met at Ybarra's home a few days after Christmas. The Kirks explained that Kirk's wage rate was incorrectly reduced, his paycheck was short hours worked and his benefits were not paid. Ybarra told Kirk that she knew that he had filed a prevailing wage claim, but denied that his work on the Newberry project had been subject to prevailing wage requirements. She then said that the Union was "trying to pit us against each other" and asked the Kirks why they were trying to destroy her Company.<sup>17</sup>

Kirk's problems were not resolved and, on January 16, Ybarra, McVicar, Kessler, and the Kirks met at the Union's office to discuss Kirk's overtime, wage, and benefit complaints. At this meeting, Ybarra said that Kirk now earned \$11.35 per hour because he was a first-year apprentice. McVicar explained that Kirk was at least a second-year apprentice. Ybarra asked the Union to send her another apprentice, instead of Kirk, and McVicar told her that she did not need another apprentice because she already had Kirk on her payroll.<sup>18</sup> On January 17, Kessler faxed Ybarra an estimate of overtime pay that the Respondent owed Kirk. Kessler followed this fax with a confirming telephone call.<sup>19</sup>

<sup>15</sup> Ybarra's conversation with Clancy, which occurred after receipt of Clancy's December 21 letter, alluded to Kirk's status on the Newberry Homes project. Tr. 256. Furthermore, according to Isgro, the Newberry Homes project lasted through December. Tr. 168-169.

<sup>16</sup> GC Exh. 6.

<sup>17</sup> Ybarra conceded that the Kirks raised these issues at the meeting. Tr. 253. Furthermore, she did not refute their testimony regarding her remark about the trouble they were causing her. Tr. 50-51, 103-105.

<sup>18</sup> Ybarra did not refute McVicar's credible version of the meeting. Tr. 125.

<sup>19</sup> GC Exh. 10.

*F. The Diminution in Work Hours Afforded Kirk*

During the week of December 6, Kirk worked a total of 57 hours. However, his work hours decreased during the week of December 13 to a total of 16.5. His work hours further decreased to a total of 11 during the week of December 26. During the week of January 3, Kirk worked 30 hours. However, the weeks that followed reflected a clear diminution in the amount of work afforded him: 10 hours during the week of January 10; 4 hours during the week of January 17; and 8.5 hours during the week of January 24. The total work assigned to Kirk during that 3-week period was 22.5 hours.<sup>20</sup> Furthermore, after December 20, Kirk was assigned fire taping work. He complained about being relegated to such work, which is typically done by first-year apprentices. However, Isgro told him that this was all the work he had available at the time.<sup>21</sup> As a result, Kirk filed for unemployment insurance benefits on January 28. Apparently, that filing was based on his underemployment by the Respondent, as he did not indicate that he had been terminated by the Respondent. On January 29, Anthony Wilk, on behalf of Isgro, told Kirk that there was no more work available for him.<sup>22</sup> Thereafter, Kirk continued to inquire with Isgro about any available work and was always told that none was available.<sup>23</sup>

The Respondent's records indicate that Kirk, an employee with over 4 years of experience and seniority, was not given the opportunity to work commensurate with the opportunities available after January 1. The Respondent had eight employees on its payroll at the beginning of December 2001, as the Newberry Homes project began to wind down.<sup>24</sup> In December and January, the Respondent's work force shifted over to the Ser Casa Academy (Ser Casa) project.<sup>25</sup> The project daily reports indicated the following number of employees performing dry-wall-related work at the Ser Casa project during that period:<sup>26</sup>

<sup>20</sup> GC Exh. 2.

<sup>21</sup> I credited Kirk's version of his conversation with Isgro. Tr. 99-101. Isgro, on the other hand, was not a credible witness. He initially testified that Kirk did not complain about fire taping. However, when confronted with his prior sworn statement, he conceded that Kirk complained about doing such work. As such, I did not credit Isgro's prior sworn statement that he told Kirk at the time that he was being restricted to fire taping because Ybarra heard from an unspecified source that Kirk was exceeding the scope of his work by performing carpentry. Tr. 174-177.

<sup>22</sup> Based on Kirk's credible and unrefuted testimony, I find that the Respondent relied on Wilk, a foreman carpenter, on several occasions to communicate with Kirk on behalf of Isgro. Tr. 83, 99, 305. As such, Wilk was an agent of the Respondent for such purposes and Kirk's hearsay testimony regarding such communications are received as party admissions.

<sup>23</sup> The Respondent also attacks Kirk's credibility with respect to his desire to get work simply because he filed for unemployment insurance benefits. However, I found Kirk to be credible about his attempts to get work with the Respondent and it is clear that he was filing for benefits as a precautionary measure. Tr. 84-85. In fact, he had applied earlier for unemployment benefits before being called back for a few days of work. Tr. 56-58.

<sup>24</sup> GC Exh. 15.

<sup>25</sup> The Ser Casa Academy project is also referred to in the record as the St. Anne's project.

<sup>26</sup> Daniel Ross, the Ser Casa project manager for O'Brien Waterford, the firm responsible for supervising the project, was called as a witness

December 3: none; December 4: none; December 5: none; December 6: none; December 7: none; December 12: none; December 13: none; December 14: none; December 17: two tapers; December 18: two tapers; December 19: one hanger and three tapers; December 20: three tapers; December 21: none; December 26: none; December 27: none; December 28: none; January 2: none; January 3: one taper; January 4: two hangers and two fire tapers; January 7: three hangers and one taper; January 8: three hangers and four tapers; January 9: three hangers and one taper, but noted that the hangers left at 9:30 a.m.; one taper; January 10: none; January 11: none; January 14: "misc." fire taping, but no work force noted; January 15: one taper and two fire tapers; January 16: one taper and two fire tapers; January 17: one taper; January 18: none; January 21: three hangers; January 22: four hangers; January 23: four hangers; January 24: four hangers; January 25: two hangers and one taper; January 28: four hangers and three tapers; January 29: eight hangers and three tapers; January 30: six hangers and three tapers.

In addition, during February, the Respondent hired over 40 employees in February for its Oakland University project.<sup>27</sup> Of those employees, about 24 employees were drywall finishers. By the middle of February, the Respondent had approximately 59 employees on its payroll.<sup>28</sup>

#### Discussion

##### *A. The 8(a)(3) and (1) Violations*

The General Counsel alleges that the Respondents discriminated against Kirk in violation of Section 8(a)(3) and (1) by: (1) demoting him to the position of first-year apprentice on or about December 20; (2) assigning him to perform firetaping duties only after December 20; (3) reducing his hourly wage rate on or about December 20; (4) reducing his number of hours worked on or about December 20; and (5) discharging him on or about January 29.<sup>29</sup> The Respondent concedes that Kirk's hourly wage rate was reduced on December 20 as a result of his demotion from the position of assistant superintendent, but contends that the demotion occurred in September. It further asserts that there was little or no work available for drywall finishers after December 20. Finally, the Respondent contends that Kirk was not discharged on January 29, but rather, chose to leave voluntarily and filed for unemployment benefits on January 28, after becoming disenchanted with the amount of work hours available to him and the type of work available.

Under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that the employee engaged in union or other concerted protected activity,

by the Respondent and identified the daily reports documenting the Respondent's work force on that project. Tr. 221-222; R. Exh. 2.

<sup>27</sup> Ybarra and Patrick Steele, a superintendent for the Respondent, testified that it hired drywall workers for this project. GC Exh. 18; Tr. 202, 251.

<sup>28</sup> GC Exh. 17; Tr. 304.

<sup>29</sup> In accordance with the General Counsel's motion, the original dates specified in the complaint for the discharge and assignment to only firetaping duties at pars. 11-12 were amended to conform to the proof.

the employer had knowledge of such activities, the employer took adverse action against the employee, and there is a nexus or link between the protected concerted activities and the adverse action. Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory reason.

The record established that, during the summer of 2001, inspectors from the Department of Labor indicated to Kirk and another employee, Brian Warner, that the Newberry project was covered by prevailing wage requirements. Kirk then went to discuss the issue with Isgro. Isgro denied that it was a prevailing wage project.<sup>30</sup> One month later, Kirk asked Ybarra and Isgro whether the Newberry project was subject to prevailing wage requirements and was told that it was not. Neither Ybarra nor Isgro took any action against Kirk as a result of such discussions. However, in mid-December, Union Official Kesslak contacted Ybarra about wages and benefits owed to Kirk. A few days later, on December 20, Ybarra wrote a letter accompanying Kirk's paycheck. The letter stated that there had been an error in the Respondent's accounting department, as it had been brought to her attention that Kirk's rate of pay had not been changed to reflect the change in his position from assistant superintendent to apprentice. The rate of pay stated was that of a first-year apprentice. On December 21, Kirk filed a prevailing wage complaint with Clancy, the contractor's representative, in order to secure outstanding wages and benefits on the Newberry Homes project. After December 24, notwithstanding the fact that there was other drywall work available, Kirk was assigned primarily to firetaping duties. After January 10, Kirk was given a total of 22.5 hours of work until he filed for unemployment insurance benefits on January 28. On January 29, Isgro told Kirk that he had no more work for him. Thereafter, on several occasions during February, Kirk communicated with Isgro, inquired about available work and was told that none was available.

To find an employee's activity to be concerted, "it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied 474 U.S. 948 (1985). Furthermore, the activity must relate to potential group action or the bringing of group complaints to the attention of management. In other words, there must be evidence that the employee "at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor." *Meyers Industries (II)*, 281 NLRB 882, 886-887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). In *Meyers Industries (II)*, id. at 888, the Board clarified that the act of a single employee can constitute concerted activity within the meaning of Section 7 when it invokes the provisions of a CBA:

<sup>30</sup> The fact that Kirk inquired about the prevailing wage issue with other unspecified employees is of no consequence since there was no indication that he sought to initiate group action or that the Respondent knew that he spoke to other employees about that issue.

In short, in construing Section 7 we are not holding that employee contract rights are more appropriate subjects for joint employee action than are rights granted by Federal and state legislation concerning such matters as employee safety. We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee invocation of statutory rights is not. We believe that we best effectuate the policies of the Act when we focus our resources on the protection of actions taken pursuant to that process.

Kirk invoked a statutory right when he filed a prevailing wage claim.<sup>31</sup> Under the standard set forth in *Meyer Industries (II)*, that action alone does not constitute concerted activity. However, Kirk was assisted in the presentation of his wage grievance by the Union, with whom the Respondent had a CBA. Kirk first spoke to Kesslak, the Union's business agent, in November regarding the Respondent's failure to provide wages and benefits. Kirk then presented his pay stubs to Kesslak to document his potential grievances. Kesslak contacted Ybarra on December 14 to discuss Kirk's outstanding wages and fringe benefits, as well as Kirk's labor classification. As such, the filing of the prevailing wage claim was so interrelated to Kirk's involvement with the Union that it was tantamount to an invocation of employee contract rights embodied in the CBA and, therefore, concerted protected activity. See *Westchester Iron Works Corp.*, 333 NLRB 859, 865 (2001). Kirk was also engaged in union activities. In that regard, the Respondent knew that Kirk contacted the Union for its help, as Kesslak contacted Ybarra on Kirk's behalf in mid-December. Ybarra confirmed such knowledge in her written communications to Kirk on December 14 and 20, and her comments to the Kirks during their meeting in late December.

Shortly following Kesslak's conversation with Ybarra on December 14, the Respondent took adverse action against Kirk by reducing his hourly wage from \$17 to \$11.35, demoting him from an assistant superintendent to a first-year apprentice, restricting him to firetaping duties, and, by drastically reducing his work hours, constructively discharging him on January 29. See *Sullivan Transfer Co.*, 247 NLRB 772, 775 (1980).

The timing of the Respondent's adverse action and Ybarra's comments at the late December meeting—that Kesslak was overreacting and “trying to pit us against each other”—reveal antiunion animus.<sup>32</sup> The Respondent had not taken any action in response to Kirk's inquiries about prevailing wages during the summer of 2001—a time when the Union was not involved. However, there was an adverse, albeit gradual, response by the Respondent over the course of the month and a half following Kesslak's contact with Ybarra and the filing of the prevailing wage complaint: Kirk was demoted and his hourly wage was lowered to the level for a new drywall employee; he was assigned to firetaping, an activity also normally assigned to new drywall employees; and his assigned work hours gradually

disappeared. The only reasonable inference that can be drawn is that the Respondent's actions in December were motivated by Kirk's union and other protected concerted activity.

Since the four elements of a prima facie violation of Section 8(a)(3) and (1) were established, the burden shifted to the Respondent to prove that it took the adverse actions for a legitimate nondiscriminatory reason. The Respondent asserts that Kirk was demoted from the position of assistant superintendent and his wages reduced upon the discovery of the “accounting” mistake. It further contends that the Respondent did not have much work available for finishers in December and January. The Respondent did not meet its burden. At the meeting held with the Kirks and the Union to discuss Kirk's grievances on January 16, the Respondent actually asked for the Union to send it another apprentice instead of Kirk. The record further reveals that, after telling Kirk at the end of January that it had no work for him, the Respondent continued to carry approximately 24 drywall finishers on its payroll in February. Indeed, the Respondent even hired additional drywall finishers for its Oakland University project in February. By the time the middle of February came around, the Respondent had 59 employees on its payroll—a big leap from the eight employees that had been on its payroll at the beginning of December.<sup>33</sup>

#### B. The Independent 8(a)(1) Violation

The General Counsel further asserts that the Respondent committed an independent violation of Section 8(a)(1) when Isgro constructively discharged Kirk on January 29 by telling him that there was no work available. It is alleged that the Respondent took such action after Kirk enlisted the support of the Union at the January 16 meeting with regard to outstanding wages and fringe benefits, and then filing a prevailing wage complaint against the Respondent. The Respondent denies that Isgro made such a statement.

As I previously found, the credible evidence indicates that Isgro made such a statement at the end of a gradual process of phasing-out the assignment of work to Kirk. Furthermore, during the two workweeks between the January 16 meeting, and Isgro's statement on January 29, Kirk was provided with a total of 14 hours of work. He also continued to be assigned the less desirable job of firetaping. As such, Isgro's statement effectively sent the message to Kirk and other employees that, if they engaged in union or other concerted protected activity, they could be discharged. Such statement was an independent violation of Section 8(a)(1). *Benesight, Inc.*, 337 NLRB 282, 283 (2001).

<sup>33</sup> The General Counsel requests that I draw an adverse inference and strike the Respondent's testimony regarding its lack of work defense because the Respondent failed to timely provide all employee payroll records pursuant to subpoena. GC Br. at 23–25. The motion is denied. The General Counsel was provided with the requested documents, albeit late, at trial and chose to proceed after a lengthy recess to review them before proceeding with cross-examination. Tr. 289–294. In addition, the General Counsel was later given an opportunity to reopen the record if she wished to do so in order to elicit testimony with respect to subsequently produced records. Tr. 333.

<sup>31</sup> See 5 U.S.C. §301; R.S. §161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 29 U.S.C. §259; 40 U.S.C. §276a–276a–7; 40 U.S.C. §276c; and 29 CFR §1.1–1.9. See also 48 Fed.Reg. 19533 (1983).

<sup>32</sup> Tr. 105.

## CONCLUSIONS OF LAW

1. By demoting Allen Kirk to the position of first-year apprentice on or about December 20, assigning him to perform firetaping duties only from about December 20 until January 28, reducing his hourly wage rate on December 20, reducing his number of hours worked after January 10, and constructively discharging him on or about January 29, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By constructively discharging Kirk on January 29 by telling him that there was no work available, the Respondent violated Section 8(a)(1).

## 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.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>34</sup>

## ORDER

The Respondent, Ybarra Construction Company, Detroit, Michigan, and D&P Drywall, Inc., of Dearborn Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, withholding work from, demoting, reducing the wages or benefits of, or otherwise discriminating against, any employee for engaging in union or other protected concerted activity.

(b) Telling employees that they could be discharged or have work withheld from for engaging in union or other protected concerted activity.

<sup>34</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.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Allen Kirk full reinstatement to his former job of a second-year apprentice drywall finisher, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Allen Kirk whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) 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.

(d) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix,"<sup>35</sup> at its own expense, to all employees in the District Council 22, International Union of Painters and Allied Trades, AFL-CIO, CLC who were employed by the Respondent at its Newberry Homes and Ser Casa Academy projects, at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) 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.

<sup>35</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."