Tinney Rebar Services, Inc. *and* International Association of Bridge, Structural, Ornamental And Reinforcing Ironworkers, Local Union No. 3, AFL–CIO. Case 6–CA–36203

July 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 6, 2009, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[2] The General Counsel 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.

We affirm the judge's finding that the Respondent did not violate Sec. 8(a)(3) by terminating employee John Bascovsky immediately, rather than let him work the remainder of the day, after he informed his supervisor that he was going to quit and pursue employment through the Union. In finding that the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that it would have terminated Bascovsky even in the absence of his union activity, we rely solely on the judge's finding that the Respondent established that it has a business policy of immediately terminating any employee who gives notice of intent to resign. We do not rely on the judge's speculation regarding the Respondent's purposes for the policy or on his discussion of Bascovsky's at-will employment status.

No exceptions were filed to the judge's finding that the General Counsel met his initial burden under *Wright Line* of showing that Bascovsky's protected conduct was a motivating factor in the decision to terminate him or to the judge's finding that the Respondent did not violate Sec. 8(a)(3) by discharging employee Joshua Ferris.

For the purpose of deciding this case, Member Schaumber assumes arguendo that the General Counsel satisfied his burden of showing that the Respondent's termination of Bascovsky immediately upon notice of his intent to resign was motivated by antiunion animus. He finds, however, that the reasons relied on by the General Counsel to establish the Respondent's antiunion animus—resentment toward the Union for attempting to recruit and, in the case of Bascovsky, recruiting its employees in August 2008, and hostility toward the Union for filing a lawsuit against it in April 2008—amply illustrate his position that the Board's use of the term "anti-union animus" is overly broad in that it may be understood to include hostility toward unionization in general, which is not unlawful, or toward specific actions of a union which do not themselves encompass Sec. 7 activities. To eliminate any confusion, Member Schaumber would prefer that the Board adopt the term "Section 7 animus" to refer to unlawful motivation arising from hostility toward protected activities. See *ATC/Forsythe & Associates*, 341 NLRB 501, 502 fn. 5 (2004).

The General Counsel's asserted reasons for finding "anti-union animus" in the present case well illustrate the distinction between "anti-union animus" and "Section 7 animus." As to the Respondent's resentment toward the Union for seeking to recruit, and recruiting, its employees, the judge specifically characterized the Union's activities as an attempt to *recruit* those employees, not as an attempt to *organize* them. Further, the judge characterized the Union as a "competitor" of the Respondent and noted that while Mark Tinney, the Respondent's principal owner, "was not pleased" over Bascovsky's decision to leave, it was clear "that Mark would have been equally incensed over any competing employer who came on his jobsite and lured one of his best workers away." In these circumstances, Member Schaumber would find that the Respondent's resentment toward the Union as a competitor may have evidenced "anti-union animus," but it did not engender "Section 7 animus." As to the Respondent's hostility toward the Union for filing the lawsuit, as the Supreme Court observed in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 534 (2002), "ill will is not uncommon in litigation." Thus, the Respondent's hostility toward the Union, as an adversary in a lawsuit, may evidence "anti-union animus," but it does not itself establish "Section 7 animus." In sum, Member Schaumber finds that "Section 7 animus" is absent here, but, as noted above, he assumes for the purpose of deciding this case that the General Counsel met his burden of establishing "anti-union animus" as the Board commonly uses that term.

JoAnn Dempler, Esq., for the General Counsel.
Jeffrey J. Morella, Esq. and *Joseph Carnicella, Esq. (Morales and Associates, P.C.),* of Pittsburgh, Pennsylvania, for the Respondent.
Joshua M. Bloom, Esq. (Joshua M. Bloom & Associates, P.C.), of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL, JR., Administrative Law Judge. This case was heard by me on January 27, 2009, in Pittsburgh, Pennsylvania, pursuant to an original charge filed on September 4, 2008, by Iron Workers Local 3 (the Union) against Tinney Rebar Services, Inc. (the Respondent).

On November 21, 2008, the Regional Director for Region 6 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On December 4, 2008, the Respondent filed timely its answer to the complaint essentially denying the commission of any unfair labor practice and asserting certain affirmative defenses. The Respondent filed an amended answer, again denying the commission of any unfair labor practices on January 2, 2009, and a second amended answer on January 12, 2009.

At the hearing the parties were represented by counsel and were afforded a full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. 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 Respondent,[1] I make the following

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation, maintains and operates an office and place of business in Oakdale, Pennsylvania, and has been engaged in the fabrication and installation of rebar. The Respondent admits that during the past 12-month period ending August 31, 2008, in conducting its operations, it purchased and received at its Oakdale, Pennsylvania facility goods and services in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I would find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted by the parties that International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 3, AFL–CIO has been a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND TO THE LITIGATION; UNDISPUTED MATTERS

As noted, Tinney Rebar Services engages in the fabrication and installation of steel reinforcing bar (rebar), which is used in the construction industry to strengthen concrete. Before operating as Tinney Rebar Services, Inc., principal owner/operator Mark Tinney (Mark) operated another company, Three Rivers Steel Corporation, which also was engaged in the fabrication and installation of rebar. Three Rivers Steel, however, was a signatory to a collective-bargaining agreement with the Union (Local 3) that was to have been in effect until May 31, 2009. However, sometime in February 2005, Mark shut down Three Rivers Steel and established Tinney Rebar Services as a nonunion company.

In the summer of 2008, Jami Tinney, the spouse of Mark, held the position of president of Tinney Rebar Services; Mark served as vice president; and Harry Tinney, Mark's brother, served as a field supervisor.[2] Tinney Rebar Services also employed in its offices John Gulakowski, a salaried employee whose duties included reviewing Federal and State tax matters and estimating contract price quotes and detailing—blue-

[1] The Charging Party Union did not file a brief. On March 6, 2009, the General Counsel filed her motion seeking the striking of the last sentence in fn. 1 on p. 9 of the Respondent's posthearing brief. The General Counsel submits that the last sentence, to wit, "In fact, those tapes no longer exist," is not supported by any evidence of record.

The Respondent in opposition responded, noting that the General Counsel on p. 18 of her brief argues for the drawing of an adverse inference for the Respondent's purported failure to produce tapes from the Company's security cameras, which possibly could have shown alleged discriminatee Ferris working in the shop, as well as whether Supervisor Harry Tinney was present there on August 28, 2008.

The Respondent submits that the only evidence to support what it views as a wholly speculative argument is contained in a brief cross-examination of Mark Tinney by the General Counsel on p. 203 of the transcript, whereat Tinney essentially states that the Company has 12 different (security) video cameras located around and inside the buildings; that the cameras are operational (going) all the time; and they show the activities of the employees in the shop.

The Respondent contends that the General Counsel did not follow up these answers with further questioning to flesh out certain pertinent information—for example, whether the cameras were indeed operating on the day and time in question; whether they were capable of recording images sufficient for identification of specific persons, including Ferris or Harry Tinney; and whether the tapes for the day in question still existed.

The Respondent argues that there is insufficient evidence of record to support an adverse inference against it regarding the tapes and, furthermore, that the Company was under no obligation to elicit any information about the tapes at all. The Respondent contends that the General Counsel is obliged to prove her case and if the tapes were significant thereto, she should have elicited sufficient evidence to warrant the adverse inference, and therefore the motion to strike should be denied.

I have considered the motion in the context of the entire record and the parties' relative positions as stated in their respective briefs and would conclude that while the challenged statement in the Respondent's brief is arguably extra record, I view it to be in the nature of argument based on the record evidence or a reasonable interpretation thereof. Accordingly, I will deny the motion to strike. *Horizon Contract Glazing, Inc*., 353 NLRB No. 16 (2008); and *Alaska Pulp Corp.*, 326 NLRB 522 fn. 1 (1998).

[2] Jami Tinney is the sole owner of the Respondent and is responsible for payroll and other administrative matters; she is an admitted statutory supervisor and agent. Mark handled sales, oversaw jobsite work, and tended generally to the operation of the business. Mark's duties also included interviewing, hiring, and firing of employees; he is an admitted statutory supervisor and/or agent. The Respondent stipulated and agreed that Harry Tinney is likewise a statutory supervisor/agent. (See GC Exh. 2.)

printing—rebar installations. Tinney Rebar Services during the time employed about seven workers in its shop facilities,[3] five rebar fabricators and two truckdrivers; Tinney also employed two draftsmen who worked under Gulakowski.

Although Tinney Rebar Services operated as a nonunion company, the Union had outstanding issues with the Company stemming from Mark Tinney's operation of Three Rivers Steel, including the alleged nonpayment of welfare and pension contributions, the subject of a suit in Federal court. This lawsuit was ongoing at the time of the discharges of the two alleged discriminatees in late August 2008.

Around June 20, 2008, Tinney Rebar Services had contracted with the Commonwealth of Pennsylvania to install rebar at a local high school construction project, the West Allegheny High School (West Allegheny). This project under Pennsylvania law was deemed a prevailing wage job which called for the payment of $29.13 in hourly wages and $18.12 hourly for total fringe benefits for each employee assigned to the West Allegheny job. Tinney Rebar Services employed mainly three employees on the West Allegheny site: Harry Tinney, George Cook, and alleged discriminatee John Bascovsky.

During August 2008, representatives of the Union made about four visits to the West Allegheny site and spoke to the Company's installers, including Bascovsky, about wages. On or about August 27, 2008, Tinney Rebar Services, through counsel, wrote to counsel for the Union advising, inter alia, that representatives of the Union had harassed its employees on the West Allegheny jobsite and interfered with them in the performance of their job. Tinney's counsel demanded that such activities cease immediately.[4]

On Friday, August 29, 2008, alleged discriminatee Bascovsky told Harry Tinney (Harry) that he was quitting Tinney Rebar Services and would commence working for the Union the following Tuesday; the Respondent terminated Bascovsky that day. On August 29, 2008, the Respondent also terminated alleged discriminatee Joshua (Josh) Ferris.

IV. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint essentially alleges that on August 29, 2008, the Respondent immediately terminated John Bascovsky, rather than allowing him to continue working until an alleged agreed-upon time of his voluntary cessation of employment with the Company, because he joined and supported the Union, all in violation of Section 8(a)(3) and (1) of the Act.

The complaint also essentially alleges that the Respondent violated the Act on August 29, 2008, by terminating Josh (formally Joshua) Ferris and since that date has failed and refused to employ him because Ferris was the stepson of Bascovsky, that the Respondent believed Ferris supported the Union, engaged in concerted activities, and to discourage employees from engaging in protected activities.

[3] The Respondent's facilities include two warehouse facilities which house corporate offices and the fabrication shop. The warehouse facilities are about 50 by 125 feet in size.

[4] See GC Exh. 6, a letter from Tinney Rebar Services to union counsel Joshua M. Bloom dated August 27, 2008.

V. THE PARTIES' PRESENTATION OF THIS CAUSE

A. The General Counsel's Witnesses and Relevant Testimony

The General Counsel called as its principal witness John Bascovsky, and Joshua (Josh) Ferris as well as Mark and Harry Tinney.[5]

Bascovsky testified that he began his employment with the Respondent in January 2008, and his last day was August 29, 2008. Bascovsky stated that during most of the summer of 2008, he was working at the West Allegheny High School job installing grade beams and building rebar walls and step footers, the general kinds of applications for installing rebar in buildings. Bascovsky believed this job commenced coincident with the end of the school term around the first week of June. Bascovsky noted that his immediate supervisor to whom he reported directly was Harry Tinney (Harry).[6]

Bascovsky recalled that at some point, other (non-Tinney) workers at the West Allegheny site asked him whether he was being paid at the prevailing rate. Reacting to this, Bascovsky said that he asked Harry about the matter. According to Bascovsky, Harry said that he knew nothing about it, but would check with Mark Tinney (Mark). Later, according to Bascovsky, Harry reported to him that Mark said that the job was not bid by the Company at the prevailing wage rate but that if Bascovsky ever heard anything to the contrary, Harry would take some action. Bascovsky stated he was being paid at the rate of $13 per hour on the West Allegheny job.[7]

Turning to August 28, 2008, Bascovsky stated that he was working at the high school on a grade beam with Harry, when Local 3 Representative Chad Rink came to the jobsite and informed him that the Local would be hiring soon; Rink left an application and other information about the Union at the jobsite. Bascovsky said that while on break he read the paperwork and ultimately took them home at the end of the day to read them more carefully.

Bascovsky stated that he decided that night to join Local 3 and, on the following morning of August 29,[8] told Harry of his intentions and that he was leaving primarily for financial reasons. According to Bascovsky, Harry tried to talk him out of leaving, offering as an inducement the Company's planned purchase of a new machine for which he was being considered

[5] The Tinneys testified under and pursuant to Rule 611(c) of the Federal Rules of Civil Procedure, which governs the testimony of witnesses deemed adverse or "hostile" to the party who called them.

[6] Bascovsky volunteered that Jami Tinney never came out to the West Allegheny job and also he had never seen Mark Tinney at the site.

[7] As noted, the prevailing rate greatly exceeded the flat $13 rate. Mark Tinney testified and acknowledged that the West Allegheny contract provided a prevailing rate of $29.13 per hour and $18.12 per hour in fringe benefits. (Tr. 27.) See also GC Exh. 2, the Respondent's payroll records for the West Allegheny job.

[8] Bascovsky said that customarily he met Harry at the Company around 6:30 a.m. and they would both ride to the West Allegheny site together. Another employee at the high school job, George Cook, met them there as he lived very close to the school. On August 29, Bascovsky said he had reported consistent with this practice at around 6:30 a.m.

as an operator. However, having made up his mind to leave, Bascovsky said that he, nonetheless, asked Harry if he would like him to finish up that day or the next week or so. According to Bascovsky, Harry said that the decision would be up to Mark ultimately and he would consult with him.

Bascovsky testified that he waited for Mark to arrive, although Harry had said that he could stay and work for the day. Bascovsky said that Mark arrived around an hour or so later but walked past him while heading to the office. Bascovsky said that shortly thereafter Mark approached him and literally threw a check at him, saying that this was his last paycheck and to get the (expletive deleted) off of his property; Mark also said that he was going to sue him. Bascovsky stated that he told Mark that he was sorry it had to be this way, gathered up his personal tools, and left the Company for his residence.[9]

Bascovsky said that shortly after arriving at his residence, his stepson, Joshua Ferris, knocked on the door. Bascovsky said that he asked Ferris why he was there and Ferris told him that he had just been fired (by Mark) and the only "reason" given him (by Mark) was to go home and ask your stepdad.

Bascovsky explained his relationship with Ferris and how Ferris came to be employed by the Respondent. According to Bascovsky, Ferris' mother was his high school sweetheart, but they both married other persons. After their respective divorces, he and Ferris' mother began dating and decided to marry. Bascovsky said that Ferris was looking for work and the Respondent (through Harry) had asked the employees if they knew of any prospective employees. Bascovsky stated that he told Harry that his then girlfriend's son was indeed looking for a job and one with benefits and recommended Ferris to Harry, According to Bascovsky, Harry gave him an application for Ferris; Bascovsky said he gave the application to Ferris who was ultimately hired by the Respondent.

Bascovsky stated that Ferris' mother and he decided to get married while attending the wedding of a relative in Las Vegas, Nevada. Bascovsky said that he submitted for Harry's approval a request for time off form to the Company on August 7, 2008,[10] requesting time off for August 20, 21, and 22.

Bascovsky said that he told "pretty much everyone down there" (meaning to me, the employees and management presumably) of his plans to get married, but specifically Harry and a number of shop employees, including Dominic Massella and Richard Liebert. Bascovsky stated that he also spoke to Jami Tinney about going to Las Vegas (Tr. 83) and informing her that upon his return, he would be requesting tax and insurance forms to change his status.[11]

Bascovsky noted that he also spoke to Mark about his marriage plans, he believed on Tuesday, August 19 (a payday), while he was receiving his paycheck. However, Bascovsky could not recall whether he told Harry that he was going to Las Vegas for another's wedding or that he himself was getting married. He noted, however, that Mark congratulated him on the occasion.

Bascovsky testified that he and Ferris' mother, Michelle, were married on August 21, in Las Vegas. Bascovsky recalled that while in Las Vegas, he received a telephone call from Harry congratulating him on his marriage and also informing him that Mark had hired Ferris who would be starting work on the Monday Bascovsky was scheduled to return.[12]

Bascovsky related that his marriage decision and plans were made "sort of last minute," and because he and Michelle did not want to upstage the relative's marriage, they decided not to tell the family of their plans. Accordingly, Bascovsky stated that he did not tell Ferris until after the fact by telephone from Las Vegas on August 21. Bascovsky stated that upon his return to work the following Monday, August 25, he told "everyone" of his marriage, including Harry;[13] however, he could not recall speaking to Mark or Jami about his marriage.

Bascovsky stated that his regular practice was to leave the shop for his assignments in the field around 6:30 a.m. As far as he knew, the office personnel usually did not arrive until 8 or 9 a.m., but always later than he. Accordingly, Bascovsky said that he never had the opportunity to meet with Jami and change his tax and insurance forms before his discharge.

Joshua (Josh) Ferris testified that his employment with the Respondent began on August 25, 2008; his last day of work was August 29, 2008.

Ferris stated that his duties and responsibilities for the short time he was employed included working in the shop building rebar caissons, basically steel or iron frameworks or skeletons of rebar square or circular in shape that are filled with concrete and employed in the building construction industry.

Ferris recalled that Mark Tinney interviewed him for the job on about August 19 and provided him information about the job he was applying for, as well as the Company.[14] Ferris stated that at the time of the interview with Mark, he told him that the

[9] Bascovsky said that he called Chad Rink of the Union and told him what had transpired. Rink did not testify at the hearing.

[10] See GC Exh. 7, a copy of Bascovsky's leave request. Bascovsky noted that he mistakenly entered on the form August 7, 2007, and should have indicated 2008. Bascovsky noted that he added "wedding" in the remarks or comments part of the form. The form instructs the employee to return the completed form to Jami Tinney and states, "No Form = No Pay."

[11] Jami Tinney did not testify at the hearing.

[12] Bascovsky said that he did not speak directly with Harry but received the call by way of a message recorded on his phone. Bascovsky stated that Harry specifically mentioned Ferris as his "stepson" in the call. Bascovsky noted that he erased the message from his phone as he customarily does and could not produce the recorded message at the trial.

[13] Bascovsky volunteered that at the time Harry also was contemplating marrying a woman he had dated in high school and both joked about Ferris now being his stepson and now being "tied down" by marriage. Bascovsky related that Ferris' natural father had not really been present in his life and he hoped to help him out and called Ferris his stepson out of this concern. Bascovsky stated at the hearing that he is 41 years old and Ferris is 23.

[14] Ferris identified R. Exh. 8 as the application he submitted to the Respondent on August 19. He also identified R. Exh. 1, the Tinney Rebar Services' notice of rules and regulations and policies as of January 2008. Ferris stated that on that day he received it, he read it (at least in part), and understood that he was an "at will" employee although he did not know what this term meant at the time. See also R. Exh. 9, a copy of a notice and regulations acknowledgement and acceptance form signed by Ferris on August 27, 2008. Ferris acknowledged that he received the aforementioned rules and regulations document.

Company was looking for workers and that Bascovsky had provided him an application. Ferris also testified that he told Mark that Bascovsky was his mother's boyfriend. Ferris, however, admitted that he did not mention to Mark that Bascovsky and his mother enjoyed a more serious relationship such as being engaged because he did not know this to be true. Ferris stated that he did not refer to Bascovsky as "step dad" because the marriage to his mother had not taken place at the time of the interview. Ferris also noted that he did not personally know Harry Tinney before making application.

Ferris related certain events taking place on Thursday, August 28, the day before he was discharged by the Respondent.

According to Ferris, that day he was not feeling well, suffering as he was from a week-long bout with a stomach flu. Ferris said that he spoke to Harry Tinney about his condition and asked him if he could leave early and make up the hours over the next couple of days. Ferris testified that he told Harry that he had contracted the flu the week before but now needed to see a doctor as his condition had not improved. According to Ferris, Harry said that he would speak to Mark and get back with him. According to Ferris, after a time Harry told him to go ahead and take leave. Ferris stated that he asked Harry about the need to produce a doctor's excuse and Harry said that this would not be necessary; simply to report to work the next day. Ferris also testified that Harry did not tell him he was required to submit a leave request form.

Ferris said that he punched out that day at about 11:02 a.m.[15] and went immediately to the doctor's office where he was seen by a physician who prescribed an antibiotic for his condition and instructed him to go home, rest, and drink fluids. Ferris admitted that he had no proof of his having been to the doctor, no bill, or any other documentation because the insurance plan was in his mother's name.[16] Ferris also testified that he did not believe any such proof was necessary based on Harry's advice.

Ferris stated that he reported for work on Friday, August 29, at about 6:44 a.m. and immediately went to work building caissons. At about 9 a.m., Ferris said he was approached by Mark who asked him to accompany him to the front of the shop and initially asked if he knew that his stepfather had left; Ferris responded that he did not know and asked Mark why. According to Ferris, Mark said that he had fired Bascovsky, that it just was not working out. According to Ferris, he said, "okay" and turned away from Mark to go back to his assignment, whereupon Mark handed him an envelope containing his paycheck. Ferris said he asked Mark what the check was for and Mark said he had to let him go, that he was not working out. Ferris said he again asked why and Mark said, "Go ask your stepfather about it."

Ferris said he simply turned away, gathered his belongings, and was about to leave the premises when a coworker (unidentified) asked him where he was going. Ferris said he told the man that he had been fired, to which the coworker asked why. Ferris said that he told him he was told to ask his stepfather about it. Ferris said that while he was talking to the worker, Mark came out and ordered him off the property saying, "Get the [expletive] off the property." Ferris said he then proceeded to Bascovsky's home to get a reason for his discharge.

Ferris testified that he had never received a written or verbal discipline during his tenure with the Company although he did receive guidance (his word) for functions he did not know how to do or for which he needed help; Ferris said he never received any "guidance" for things he might have done incorrectly.

Harry Tinney testified that he was the field supervisor on the West Allegheny high school project, on which John Bascovsky and another employee, George Cook, were working during the summer of 2008. Harry acknowledged that he was onsite when the representatives of the Union visited the project on several occasions in August, and after each visit he called his brother Mark to tell him what had transpired. Harry stated that he viewed these visits as an interference with the job and routinely reported any such interference to the office. Harry recalled Chad Rink as one of the visiting union representatives and viewed his repeated visits as an interference with his crew's work performance and reported him to Dan Fornello, the West Allegheny project foreman employed by the general contractor. Harry stated that there were union workers on the project and that he complained to Fornello that Rink should be dealing with them as opposed to coming on the Respondent's worksite and interfering with his workers. Harry said that he suggested to Fornello that Rink should direct any questions to the project office.

Harry testified that on possibly the Thursday before Labor Day he and Bascovsky were in a ditch building a grade beam while Cook was handing them rebar, and Rink again came onsite and began a conversation with Cook, possibly including discussions of prevailing wages. Harry stated that he was not completely sure of this, but did recall that Rink told Cook that he had heard there was a lot of work (with the Union), possibly in a casino construction project; that he felt the (Tinney) employees did good work and the Union wanted good workers for this project. Harry stated he told Rink that his workers had no time to talk to him and Rink left.

Harry testified that on the following Friday (August 29) morning, Bascovsky informed him that he was going to work for the Union, that he was quitting. According to Harry, Bascovsky apologized for the short notice but said he could not pass up the money. Harry said that he definitely tried to talk Bascovsky out of quitting but could not recall informing him about a new machine the Company was going to buy. According to Harry, Bascovsky told him that he was to start with the Union on the Tuesday following Labor Day (Monday), on which day no one was scheduled to work at West Allegheny.

Mark Tinney testified and admitted that business agents from the Union had visited the West Allegheny site about four times and that Union Representative Chad Rink visited three times and another, Gregory Christy, once. Mark said that his brother Harry called him after each visit. Mark also related that Harry told him the union representatives had spoken to his employees, Bascovsky and George Cook, at the site about there being a lot

[15] Ferris identified GC Exh. 9 as a copy of his timecard for the week covering Monday through Thursday of the week beginning August 25, 2008, which indicated that he punched out at 11:02 a.m. on August 28.

[16] Notably, Ferris did not produce a copy of the prescription or the bottle containing the medicine he claimed was prescribed for him on August 28, nor did he produce a copy of his mother's insurance policy.

of work coming up for those working with the Union, and that they had mentioned to Harry that his workers were good workers and performed well. Mark said that Harry told him that Chad Rink in particular wanted them to work for the Union and, toward that end, left a union business card, a (union) pay schedule, and applications at the worksite on the carpenters' stool/work bench on August 28.

Turning to the morning of August 29, Mark admitted to receiving a call from Harry who told him that Bascovsky had decided to go to work for Local 3. Mark admitted that on that day he asked John Gulakowski to prepare a final check for both Bascovsky and Ferris.[17] Mark conceded that he decided to cut Bascovsky's final check based on his brother's telling him that he was going to work for the Union. Mark said that his decision to terminate Ferris was made the night before, on August 28.

B. The Respondent's Witness and Relevant Testimony

Mark Tinney testified that as a general proposition he is customarily available throughout each business day on company premises, either in the shop area or in the office. He stated that his wife, Jami, while also readily available throughout the workday, does not work full time at the Company. However, John Gulakowski, his detailing employee, is customarily onsite all day and is readily available to any employee.

Tinney stated that on Thursday, August 28, he was onsite at the Company the entire day, especially during the morning hours.[18]

Turning to the matter of Ferris, Mark stated that while he could not recall the precise date he interviewed him and reviewed his application pursuant to hiring him, he did annotate Ferris' application (R. Exh. 8) with a highlighted and circled remark "Friend [of Bascovsky]" and "$11 [per hour]."[19] Mark recalled that Ferris himself told him he was a friend of Bascovsky at the interview session.

Mark testified that Ferris did not request from him any time off because of illness on Thursday, August 28, and he was not aware of Ferris' making any such request of his wife. According to Mark, he and John Gulakowski discussed terminating Ferris because he had left work without informing anyone in management and because other employees had complained about Ferris' poor work habits in the shop.[20]

Mark insisted that he had no knowledge of Bascovsky's relationship with Ferris' mother and that Bascovsky had only mentioned in passing that he was going to Las Vegas to attend a friend's wedding, to which he made no response.

Regarding his decision to terminate Bascovsky, Mark stated it was his Company's policy to release immediately any employee who gives notice of an intention to quit. He noted that his brother, Harry, called him at home around 6:45 a.m. on August 29 and informed him of Bascovsky's decision to quit.

Harry Tinney testified that he worked a full day on Thursday, August 28, from about 6 a.m. or a little later until around 2 or 2:30 p.m. at the West Allegheny site, along with John Bascovsky and George Cook. Harry stated that he did not leave the site at any time during that day.[21] Harry specifically denied speaking with Ferris on August 28 and in fact volunteered that he has never had a conversation with him except "once or twice," saying hello or good morning. Harry emphasized that Ferris did not ask him for permission to leave work because of illness on August 28.[22]

Harry stated that he was aware of Bascovsky's relationship with Ferris' mother, that he was dating her. Harry said that he was also aware that Bascovsky went to Las Vegas, that Bascovsky had told him that he was going to attend a friend's wedding. Harry testified that Bascovsky did not tell him that he himself was getting married. Harry also said that he simply could not recall calling Bascovsky while he was in Las Vegas. Harry related that George Cook later told him that Bascovsky had married Ferris' mother on his return from Las Vegas. Harry noted that he never informed Mark about Bascovsky's relationship with Ferris' mother.

Harry volunteered that he was "pretty new" at the Respondent's business and that he knew some of the shop workers by name and they (probably) knew him because he was Mark's brother. He stated that workers only occasionally have asked him questions about work-related problems. Harry noted that he knew that Gulakowski worked in the office and sometimes came to the West Allegheny site to handle problems with blueprints; that Jami Tinney, to his knowledge, handled office matters and did not work in shop, but certainly not in the field; and Mark, to his knowledge, handled sales from the office. Harry stated that he actually did not know who was in charge of the shop but guessed that it was Gulakowski.

Regarding Bascovsky's termination, Harry stated that when Bascovsky informed him of his intention to quit the Company and join the Union, he immediately called Mark but had no hand in the decision to discharge him. Harry noted he was not

[17] Mark noted that Gulakowski's duties did not include preparing payroll, so he asked his wife Jami to "walk" Gulakowski through the payroll computer program by telephone.

[18] Mark noted that he generally handles and generates sales telephonically from the office and does not very often go out and visit customers. He volunteered that on occasion he does go out to the field to check on the status of jobs.

[19] The application contains a box stating "Referred By." The box contains the names Harry Tinney and John Bascovsky with an arrow drawn by Mark from Bascovsky's name and the word "Friend" and "$11" is circled next to friend.

[20] Mark admitted that when interviewed by the Board agent investigating the matter, he did not mention in his statement anything about Ferris' unexcused absence and could not remember providing a copy of Ferris' time to her. Mark said that he basically answered her questions and could not recall her asking about whether Jami was present on August 28.

[21] On cross-examination, Harry stated that he was working at the West Allegheny site all of the summer of 2008, and he rarely, if ever, left the site to return to the shop. If he needed something, he would send a worker to get it. Whenever he left the site, Harry said it was mainly to get coffee. Notably, Bascovsky, testifying on rebuttal, said that he could not be sure whether Harry left the worksite on that Thursday although Harry at least once or twice a week in his view did leave the site to go shop for something or the other. (Tr. 145.)

[22] On my examination, Harry testified that he never approved leave sick or otherwise for any (shop) employees because this was not within his responsibility as a field supervisor. (Tr. 193.)

present when either Bascovsky or Ferris was actually terminated.

John Gulakowski testified that he was employed by the Respondent as a salaried employee whose duties included the timely submission of his quotes and detailing blueprints for projects. Gulakowski stated that he has not worked in the field for sometime, although his job occasionally requires him to visit a site to deal with problems associated with the project blueprints.

Gulakowski stated that he was aware Bascovsky was employed by the Respondent and he was somewhat familiar with the circumstances surrounding his leaving the Company. Gulakowski said that on the morning of August 29, he learned from Harry Tinney that Bascovsky was quitting to go to work for the Union, that he was to start the new job that following Monday. Gulakowski said he also spoke to Mark Tinney over the phone about the matter. According to Gulakowski, Mark said that he would be in shortly, but to compute Bascovsky's hours and prepare a final check for him. Gulakowski said that Mark also asked him to prepare a final check for Ferris in that conversation. Gulakowski stated that he did as he was instructed and prepared the checks for both Bascovsky and Ferris.

Gulakowski recalled that Ferris was hired by the Respondent to work in the warehouse; beyond that, he had no first hand knowledge that Bascovsky was dating Ferris' mother or that he had married her until after Bascovsky had returned from Las Vegas.

Gulakowski noted that some of the warehouse employees[23] approached him and complained about Ferris, saying that he was not doing a great job; he was disappearing, walking away from his tasks a lot throughout the day. However, according to Gulakowski, it was Ferris' leaving the job early on Thursday (August 28) without giving a reason that led to his being terminated.

Gulakowski testified that both he and Mark had heard the complaints about Ferris and then, later in the day on Thursday, they discussed his situation; on Friday morning, he and Mark decided to let him go.

Gulakowski stated that he was present when Mark terminated Bascovsky, but he did not hear any conversation they might have had; he also saw Mark hand him his paycheck. Gulakowski also said that he was present when Mark terminated Ferris. According to Gulakowski, Mark told Ferris he was not working out, had left the job (repeatedly), and especially on Thursday, the day before. Gulakowski stated that essentially Ferris was absent without leave (AWOL) for half the day; the Company did not know where he went so he was let go. According to Gulakowski, Ferris simply took his check and left without saying anything in response. Gulakowski stated he was not aware of Mark's telling Ferris to talk to his stepdad.

Richard Liebert testified that he has been employed by the Respondent since about July 19, 2007, and knew Ferris and Bascovsky, both of whom[24] worked for the Company. Liebert said that he usually worked in the shop and never made any rebar installation in the field.

Liebert stated that in his view Ferris was not a good worker because he could not really perform the job; he did not seem to "catch on" to building the rebar, basically repetitive work. Also, Liebert said that he had to ask Ferris to pick up his pace a little, to help others out, and had to instruct him on how to do job functions better. However, Liebert stated that he never told Gulakowski that there were problems with Ferris and in fact could not recall discussing Ferris with anyone in management, and not with Mark in particular.

Liebert noted that he and his fellow workers did not openly discuss Ferris or their view that his work was so deficient that he should have been fired. Liebert recalled that he spoke to fellow shop worker Domenic Massella about Ferris' poor performance, that he was not a good worker and just was not "getting" it in effect. Liebert testified that as far as he knew Ferris only worked about 3 to 4 days for the Company, having left the Company on a Thursday or Friday.

Dominic Massella testified that he is a current employee at Tinney Rebar Service, working as a laborer whose main job is fabricating rebar in the shop, but sometimes in the field.

Massella stated that Ferris worked for the Company for a few days and he worked with him building rebar caissons on occasion. According to Massella, Ferris would work sometimes and sometimes he would kind of stand there simply watching. Massella stated that he knew that Ferris left work early one day, but could not say he "disappeared" that day or others by going to the bathroom or otherwise not being on the job for long periods of time. Massella noted that on the day Ferris left early, he did not talk to him directly and did not know if Ferris spoke to anyone on that day. According to Massella, if he wanted to leave early, he would speak to someone in charge—either Mark, Gulakowski, or Harry (Tinney).[25]

Massella stated that he also knew John Bascovsky and that while employed with the Company he got married. However, to Massella, he only found out about Bascovsky's marriage after the fact when he returned to work.

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[23] Gulakowski could not recall the names of any of the employees who complained about Ferris' work habits, however, simply saying that there was more than 1 of the 12 employees working in the shop who complained about him. Gulakowski admitted that he did not issue Ferris any warnings, verbal or written, and in fact did not speak to him at all, presumably during Ferris' short tenure with the Respondent. Gulakowski also volunteered that he has no role in handling employee leave requests and such matters would not normally come to his attention.

[24] Liebert testified that he saw Bascovsky occasionally on a social basis in the town taverns. Liebert stated that Bascovsky told him on one such occasion after his termination that he was going to shut Mark (Tinney) down. On cross-examination by the counsel for the Charging Party, Liebert denied telling Bascovsky that Mark told the employees that he would give them $1000 to kick Bascovsky's rear end. Liebert also denied telling Bascovsky that he would lie to keep his job at Tinney Rebar because he did not know he was going to testify in that matter until the week prior to the trial. (Liebert stated that he was not subpoenaed to testify by either party.)

[25] Massella did not state that he had actually sought permission to leave work early and had in fact consulted with any of the three persons he mentioned.

VI. CONTENTIONS OF THE PARTIES

A. The General Counsel

The General Counsel contends that the Respondent had harbored animus against the Union since at least 2005, when Mark Tinney decided to shut down his union company—Three Rivers Steel. Since that time, she further contends, the Respondent's antipathy to the Union was inflamed by the Union's pension and welfare Federal suit against Mark Tinney's companies in April 2008, as well as the Union's representatives coming on the West Allegheny jobsite speaking to the Respondent's employees about wages in the summer of 2008. The General Counsel submits the Union's visitations in August 2008 were particularly galling and vexatious to the Respondent because the West Allegheny job was a prevailing wage job and Mark Tinney knew he was paying Bascovsky less than half of what the job called for. She notes that the Respondent tried to halt the Union's visits first through Harry's protests to the union representatives and later the project's foreman. Then, when this proved unavailing, the Respondent sent a letter to the Union's attorney complaining of harassment. In spite of these efforts, the union representatives came back to the West Allegheny site on August 28 in an obvious attempt to recruit the Respondent's employees to work for it.

The General Counsel argues that it is against this background of hostility toward Local 3 that the Respondent's angry, accelerated, and summary discharge of Bascovsky on August 2 when he announced his decision to work for the Union took place, and it clearly demonstrates the Respondent's unlawful motivation. She asserts further that the Respondent's asserted reasons for Bascovsky's discharge were pretextual and should be rejected.

Regarding the termination of Ferris, the General Counsel contends that the credible evidence of record clearly showed that he was familiarly associated with Bascovsky, that Mark Tinney knew of this association and fired Ferris because of that close association and in retaliation against Bascovsky for engaging in protected activity—working for the Union. In short, Ferris was punished derivatively, so argues the General Counsel, for his association with an employee who chose to exercise his statutorily protected rights. She contends further that Ferris, contrary to the Respondent, was not fired for poor performance and/or leaving the job without permission. She notes that the manner of Ferris' termination was not even consistent with the Company's normal practice wherein Jami Tinney prepared the employees' checks. The General Counsel essentially asserts that Mark Tinney, angry with and upset over Bascovsky's decision to quit and join the Union, in knee-jerk fashion decided to visit his wrath on Bascovsky's stepson, Ferris, and punish him also with a summary but pretextual discharge.

The General Counsel submits that the Respondent's claim that Ferris was such a poor worker that it was justified in discharging him simply does not hold water. She notes that the two shop mates called by the Respondent, while opining that Ferris was not necessarily a good performer, never told management about his deficiencies. Most notably, the General Counsel asserts that because the Respondent employed about seven employees in the shop and called no one to corroborate Gulakowski's and Mark Tinney's testimony that they had received complaints from other employees about Ferris' work habits, an adverse inference should be drawn by the trier of fact that their testimony would not be supported.

The General Counsel asserts that no one in management ever spoke to Ferris about having left early on August 28, in short never investigated the matter; and this failure casts doubts on the legitimacy on the Respondent's termination for this reason. She also notes that Mark Tinney admitted that the Company employed security cameras around the area where Ferris worked. She contends that the Respondent failed to produce these tapes which would presumably have recorded Ferris obtaining the approval of Harry Tinney to leave early on the day in question. She submits that this failure also warrants an adverse inference.

Finally, the General Counsel contends that the Respondent's witnesses, principally the Tinney brothers, are not deserving of credible consideration. She notes that Mark demonstrated dishonesty in his business relations with the Commonwealth of Pennsylvania, specifically his paying less than the prevailing wages to his workers and including a salaried employee, Gulakowski, as an hourly employee on the pay sheets. As for Harry, she contends his recollection of events was poor to the point of disbelief.

The General Counsel submits that Gulakowski's testimony that he and Mark Tinney discussed Ferris' unexcused absence Thursday evening and decided to terminate him at that time did not make sense. She asserts that if they were truthful, Mark would not have waited until Harry told him of Bascovsky's decision the next morning to have Jami Tinney explain to Gulakowski how to prepare final checks for both men.

The General Counsel also asserts that Liebert's testimony appeared to be coached. Massella remembered little about Ferris' work habits and, moreover, did not support the Respondent's contention that Ferris was such a poor worker that his termination for that reason was justified. The General Counsel also notes that inasmuch as both Liebert and Massella are currently employed by the Respondent, they have a clear bias in favor of their employer.

By contrast, the General Counsel asserts that both Bascovsky and Ferris were straightforward, honest, and consistent, and therefore should be credited.

B. The Respondent

The Respondent contends that on Friday, August 29, Bascovsky, an at-will employee, told Harry Tinney that he was quitting his employment at the Respondent to join the Union; he indicated that he was willing to work the remainder of that day, but would be starting with the Union on the following Tuesday after Labor Day. However, Mark Tinney decided, in the interest of preserving employee morale, to avoid possible damage by Bascovsky's remaining onsite, and consistent with his company policy decided to terminate Bascovsky immediately. The Respondent submits that its action under these circumstances and for these legitimate business reasons posed no violation of the Act.

Regarding Ferris, the Respondent contends that according to his workmates, Ferris performed poorly on the job and com-

pounded this deficiency by leaving work early on August 28 without permission. Based on his poor record and consistent with company policies, the Respondent asserts that Mark Tinney decided to terminate Ferris. The Respondent notes that Ferris clocked in for work at 6:45 a.m. on August 28, and Harry Tinney testified that he and Bascovsky, as was their normal practice, left for the West Allegheny job at 6:30 a.m. The Respondent also asserts that Harry Tinney also credibly testified that he did not return to the shop during the entire workday and could not have approved Ferris' early departure at 11:02 a.m. on August 28.

The Respondent submits that Ferris testified falsely about obtaining Harry's permission to leave early. The Respondent also implies that Ferris stated reason for leaving work early—illness requiring medical attention—was also false because he provided no credible evidence of having seen a physician who allegedly prescribed antibiotics for his condition.

The Respondent further asserts that Ferris, having worked at the Company for several days must have known that either Mark, Jami, or even John Gulakowski readily were available and could have been consulted about his need for time off. Yet, Ferris did not seek permission from either of them. Rather, he claimed to have sought permission from Harry, a field supervisor who had little or no contact, let alone administrative or managerial involvement, with the shop workers. The Respondent submits that Ferris' testimony is not worthy of belief.

The Respondent also contends that Bascovsky was not credible. The Respondent notes that while Bascovsky claimed to have told everyone in the shop about his plans to marry Ferris' mother in Las Vegas but, incredibly, did not tell Ferris about his plans, and Ferris did not know from his shop mates. Furthermore, Harry Tinney, with whom Bascovsky worked, candidly testified that he knew that Bascovsky was dating Ferris' mother but he was unaware of the claimed marriage plans or the marriage until after the fact. The Respondent also points out that, according to employee Massella, Bascovsky's marriage was not discovered until after he returned from Las Vegas. The Respondent submits that neither Mark Tinney nor John Gulakowski was aware of Bascovsky's marriage to Ferris' mother, and that this connection to any claim of a retaliatory discharge of Ferris fails for lack of credible evidence.

On balance, the Respondent submits that both Bascovsky and Ferris were terminated for good and legitimate cause.

VII. APPLICABLE LEGAL PRINCIPLES

Section 8(a)(3) of the Act[26] provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1)[27] turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. This showing must be by a preponderance of the evidence. Then upon such showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance of evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.[28] Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, she is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.[29]

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Manno Electric,* 321 NLRB 278 (1996); *Farmer Bros Co.*, 303 NLRB 638 (1991).

While the *Wright Line* tests entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

It is worth a reminder that the Board admonishes judges considering an employer's defense(s) to the actions taken against employees not to substitute their business judgment for that of the employer, because the action taken may have been exercised on the basis of the employer's particularized business judgment. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004). The Board, moreover, has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it

[26] See 29 U.S.C. §158(a)(3). Notably Sec. 8(a)(3) prohibits the discriminatory treatment of both union and nonunion employees if the employer's conduct was motivated by antiunion animus. *Thorgren Tool & Molding*, 312 NLRB 622 (1993).

[27] See Sec. 8(a)(1) of the Act (Sec. 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act." Because a violation of Sec. 8(a)(3) often entails a wrongful interference with employee rights, these sections of the Act are often charged conjunctively in most unfair labor complaints.

[28] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984); *Interboro Contractors,* 157 NLRB 1295 (1966).

[29] *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine*, 337 NLRB 644 (2002).

was honestly invoked and in fact was the cause of the action taken. *Framan Mechanical, Inc.*, 343 NLRB 404 (2004).

It is also worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113, 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).

Most notably for the instant litigation, the Board has held that an employer may violate Section 8(a)(3) by accelerating the termination of an employee who gives notice of his intent to resign his employment if it can be shown that the accelerated departure decision was connected to protected activity. G*elita USA Inc.*, 352 NLRB 406 (2008).[30]

Also, it is clear that an employer may violate the Act by discharging an employee because of his relationship with another person who has engaged in protected activity. *Thorgren Tool and Molding*, supra at 628, 631; *Harbor Cruises, Ltd.*, 319 NLRB 822, 841 (1995); and *PJAX,* 307 NLRB 1201, 1203–1205 (1992), enfd. 993 F.2d 878 (3d Cir. 1993).[31]

Discussion and Conclusions

The charges against the Respondent reduced to their essence are that the Company unlawfully discriminated against Bascovsky by accelerating his departure from the Company because he announced his intention to work for the Union and, as to Ferris the Company, knowing of their close relationship, terminated him in retaliation for Bascovsky's action. Thus, this case presents a somewhat unusual scenario in that one of the alleged discriminatees desired voluntarily to end his employment and the other discriminatee lost his job derivately, or so it is alleged, because of the former's decision.

Turning to the circumstances surrounding Bascovsky's termination, it is clear that the Respondent, mainly through Mark Tinney, and the Union had been at odds with one and the other, but especially so during the month of August 2008. In my view, it was during this month that the parties' relationship took a serious turn for the worst. Notably, the Union sent its representatives—none of whom testified at the trial—to the West Allegheny jobsite with what I view as a very pointed attempt to recruit—not organize—the Respondent's workers. It also seems clear, at least inferentially, that wages, whether prevailing or not, were a major part of the Union's overtures to and enticement of the Respondent's employees to come to work for it.

The Respondent was not pleased with the Union's efforts to recruit its workers and as a consequence fired off the protest letter of August 27 to the Union. In my view, it was the Union's recruitment efforts, and not necessarily the Union's ongoing lawsuit[32] against Tinney Rebar Services that was the matter over which the Respondent became hostile to the Union. Of course, one has to acknowledge that the suit was not helpful in terms of the parties' relationship and the Respondent's attitude toward the Union. In agreement with the General Counsel, the lawsuit could plausibly be a component of the Respondent's animus to the Union at all material times.

It should be noted that Bascovsky, by all accounts, was a very good rebar worker whose performance was evidently noticed by the Union and to a certainty was appreciated by the Respondent, especially his immediate supervisor, Harry Tinney. On August 28, in spite of the Respondent's protests against the union representatives' "interference," Union Representative Rink again visited the West Allegheny job and this time left union applications and presumably wage-related documents for Bascovsky's consideration. Bascovsky decided the evening of August 28, to take the Union up on its offer. Then, early on August 29, he informed Harry of his intentions to quit and commence working for the Union starting on Tuesday, September 2, the day after Labor Day.[33] In my view, Bascovsky's decision to quit, while made rather hastily and with very short notice, was one he was on all points entitled to make.

First, it is undisputed that Bascovsky was an at-will employee of the Respondent, meaning that he and the Respondent were both free to terminate their employment relationship "at any time and for any reason."[34] Second, the Act includes among an employee's several rights the right to associate with unions, here to work for the Union. The issue is whether the Respondent, once apprised of Bascovsky's decision and his reasons, violated the Act by essentially summarily terminating him—accelerating his discharge as it were—because of his decision to work for the Union.

[30] See also *Buckeye Electric Co.*, 339 NLRB 334, 337–344 (2003), which also deals with the accelerated termination of an employee who announced his intention to work for a union and engaged in protected activities before his departure.

[31] Administrative Law Judge Leonard Wagner, quoting the Court of Appeals for the Seventh Circuit, "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations," determined that Sec. 8(a)(3) was violated by the employer who fired the brother of a person it believed was responsible for a union organizing campaign at one of its facilities (at 1203).

[32] See GC Exh. 3, copies of the complaint and related paperwork filed by the Union in Federal district court against Three Rivers Steel Corp. and Tinney Rebar Service Inc., on April 25, 2008. The suit was resolved and the case closed on November 10, 2008.

[33] In this regard, I have credited Harry's version of his encounter with Bascovsky on August 29. Bascovsky may have *offered* to finish up any work at the West Allegheny site for that Friday and even may have offered to stay another week. However, I believe that Bascovsky planned to start with the Union on September 2. Bascovsky testified to this point on direct examination by the General Counsel.

In this regard, I note also that Bascovsky, called as a witness by the Respondent, testified that he gave notice to the Respondent that he was leaving to work for the Union the following Tuesday (Tr. 145.)

[34] See R. Exh. 1, a copy of Tinney Rebar Service, notice of rules and regulations and policies as of January 2008.

In agreement with the General Counsel, for purposes of *Wright Line* I would find and conclude that the Respondent knew that Bascovsky was engaging in a protected activity, here opting to "associate" for employment purposes with the Union; that the Respondent harbored animus—principally bottomed on its resentment of the Union's attempt to recruit its workers, and successfully so with respect to Bascovsky—against the Union during the month of August 2008, and that Bascovsky's decision to terminate employment with the Respondent in favor of the Union was a motivating factor in the Respondent's decision to let him go on August 29.

Thus, it would appear that the General Counsel has met her initial burden under *Wright Line*. However, as noted above, I have found and concluded that Bascovsky was an at-will employee who clearly legitimately and voluntarily announced his decision to leave the Respondent's employ and that for all intents and purposes his last day would be that very day. Moreover, there is no dispute that he was given a final check by the Respondent covering the pay period August 24–30, 2008, except for about 6 hours for which he was not paid on August 29.[35]

It should be noted that the Respondent considered its ordinary workweek for payroll purposes to be Sunday through Saturday;[36] however, Bascovsky and others employed on the West Allegheny job worked only from Monday through Friday, but not on holidays.[37]

So in point of fact as I view the matter, Bascovsky's last day would have been Friday, August 29, because he would not have ordinarily worked on Saturday, August 30, and Sunday, August 31, and certainly not the Labor Day holiday—September 1.

The General Counsel's theory seems to rest on Bascovsky's testimony that he offered to work the entire day (Friday) (or perhaps the following week) to wrap up things at the worksite; the Respondent's rejection of his offer was unlawfully motivated; and, therefore, Bascovsky's tenure was unlawfully accelerated.

Having met her initial burden under *Wright Line*, I turn to the Respondent's defense. The Respondent essentially asserts that consistent with Bascovsky's status as an at-will employee and Mark Tinney's established practice or policy of immediately terminating employees who announce their intention to leave, the Respondent (through Mark Tinney) would have released him immediately as it did, irrespective of his having engaged in protected activity.

Notably, the General Counsel contends that Mark Tinney generally was not credible. I note that Mark exhibited a somewhat hostile demeanor at trial, and the entries on the payroll documents that he submitted to Pennsylvania pursuant to the West Allegheny contract were suspicious and of questionable honesty.

That said and acknowledged, I, nonetheless, found his testimony regarding his handling of personnel matters entirely logical, rational, and, hence, credible in the context of the Respondent's small business operation. Being mindful of the Board's admonition to judges regarding an employer's business decisions, I do not find it unreasonable for Mark to opt to release an employee who, without notice, announces his intention to quit, and in this case to work for a possible competitor—the Union. To be sure, given the Union's extensive and persistent recruitment efforts, in agreement with the Respondent, I believe that the Respondent's concerns about keeping Bascovsky on board were legitimate and honestly invoked. For instance, Bascovsky, if retained after announcing his intention to work for the Union, could have told the other West Allegheny employee (Cook) of the wages he was going to make with the Union, which could have affected Cook's morale and perhaps enticed him to leave the Respondent for the greener pastures of union employment. The Respondent could have lost two of the three-man work force at West Allegheny. Therefore, releasing Bascovsky immediately under the circumstances in my view was a legitimate business decision.

Clearly, Mark Tinney was not pleased over Bascovsky's decision to leave for the Union, and that certainly played a substantial role in the decision to release him that Friday. It seems equally clear on a practical level, however, that Mark would have been equally incensed over any competing employer who came on his jobsite and lured one of his best workers away.

Also, as noted, Bascovsky was an at-will employee who, on August 29, exercised his right to quit without notice or reason. The reciprocal of his right to quit, in my view, was the Respondent's right to release him immediately. Said another way, the General Counsel did not establish any requirement (save the requirements of the Act) under the parties' employment relationship that would convey to Bascovsky a right to continued employment either until the end of the business day on Friday, August 29, or any other date of his choosing under the facts and circumstances of this case.[38]

Therefore, I would find and conclude that early in his shift on August 29, 2009, Bascovsky announced to the Respondent that he was terminating his employment with it to go to work for the Union in order to garner higher wages; that Bascovsky only intended to continue working for the Respondent until the end of that business day and would be working for the Union thereafter, starting Tuesday, September 2, 2008; that the Respondent, in part because of animus against the Union, decided to terminate Bascovsky immediately and gave him his final check covering all but 6 hours of that pay week; that irrespective of its animus toward the Union and Bascovsky's decision to work for the Union, the Respondent, consistent with its business practices and his at-will employment status, would have taken the same action. I would find and conclude that the Re-

[35] See GC Exh. 5, copies of Bascovsky's pay records for weekly pay periods covering June 15–August 30, 2008. Bascovsky's final check covered 36 hours at $13 per hour. He normally worked a standard 40-hour week. I would conclude that he was not paid for 6 hours on the day he was terminated, a total of $78 gross.

[36] See R. Exh., the Respondent's "handbook."

[37] See stipulation (of the parties), GC Exh. 2, which includes copies of certified payroll records for the West Allegheny job from June 20 through August 2, 2008.

[38] In my view, those cases cited herein by the General Counsel, although involving accelerated terminations, are factually inapposite to the instant case.

spondent met its defensive burden under *Wright Line*, and I would recommend dismissal of this charge.

Turning to Ferris, I should note from the outset that I did not find him to be credible in crucial areas of his testimony. In fact, in agreement with the Respondent, I believe his testimony contained severe material falsehoods.

The essence of the Ferris charge is that he suffered termination and wrongfully so because of his close relationship with Bascovsky; that essentially the Respondent took out on him its ire over Bascovsky's decision to quit and join the Union.

Ferris readily admitted that he left work early on August 28, but did so because of illness and with the permission of Harry Tinney. It is also clear that upon his return to work on August 29, he did not produce a doctor's excuse or any other evidence to justify his early departure on August 28. Notably, Ferris admitted that he had interviewed with Mark Tinney for the job and had had been informed by him about the job he was applying for, the Respondent's operation and employee responsibilities; he also had received the Respondent's handbook which he claimed to have read and signed off on.[39]

Both the handbook and the warehouse personnel job description (R. Exh. 4) contain provisions dealing with absences due to illness that employees are required to follow. The handbook requires the employee, inter alia, to submit a "Time Off Request Form" upon his return to work and the job description requires the employee to call his warehouse manager if he is unable to come to work due to illness. There is no provision, however, for employees who leave work due to illness. Nonetheless, between the two documents, it is clear that employees are instructed to notify the Company through a supervisor and, in the case of warehouse employees, his *warehouse* manager.

Ferris, as noted, never submitted a leave form either before or after he left work or upon his return. However, he claimed to have notified Harry Tinney of his illness on August 28 and need to leave and received Harry's approval. First, Harry Tinney denied that he ever spoke to Ferris on August 28 because he reports to work around 6:30 a.m. and does not customarily return to the shop except on rare occasions at the end of the day, around 2:30–3 p.m. Moreover, Harry testified that it is not within the purview of his job as a field supervisor to grant warehouse employees' leave requests. I believe that Harry Tinney testified truthfully. Clearly, Harry's job in August 2008 was to supervise the men in the field, that is the West Allegheny job. It should be noted that Bascovsky could not say with any certainty that Harry left the job to go to the shop at around the time Ferris punched out on August 28. I believe that Ferris did not tell the truth about having sought and obtained Harry's permission to leave work at 11:02 a.m. on August 28.

I also do not believe that Ferris left work because of illness or that he saw a doctor who prescribed medicine (an antibiotic) for his stomach problem. It is noteworthy to me that the Ferris charge was filed on September 4, 2008. The trial took place on January 27, 2009. However, during the trial, Ferris testified that he saw a physician (unnamed, but not his regular doctor) through coverage under his mother's health insurance policy (not produced at the hearing) and received a prescription for medicine (not produced at the hearing). In short, Ferris had plenty of time to gather this important corroborative and readily obtainable documentation. Yet, he did not. I can only infer that he was not telling the truth regarding his early departure from the job on August 28.

As to his discharge, Ferris testified that Mark Tinney told him cryptically to ask his stepfather why he was being terminated, thereby implicitly tying his discharge to Bascovsky's decision to leave the Respondent and work for the Union. I would not credit Ferris' testimony in this regard; first, because he did not testify truthfully about the events of August 28, and because I believe he was possibly coached by Bascovsky or someone to tell this tale.

I note that at the trial Bascovsky referred to Ferris as his stepson. First, Ferris was 23 years old and Bascovsky was 41 at the time and had only been married to Ferris' mother since August 21, about a week at the time of Ferris' termination. In my view, this is unusual nomenclature for two grown men to use with respect to each other, as I view things, and frankly seems contrived. Moreover, I am not convinced that Mark Tinney ever knew that Bascovsky had married Ferris' mother by August 29. Of course, this kind of close family relationship would tend to buttress the charge that Ferris was retaliated against because of the relationship.

Be that as it may, the record evidence does establish that Ferris and Bascovsky did have a more than casual relationship—"friend"—and Mark Tinney to a certainty knew of this at the time he hired Ferris. Therefore, I would find and conclude arguably, but only minimally, that the General Counsel met her burden under *Wright Line* to establish a sufficient connection between the Respondent's animus toward Bascovsky's decision to leave for the Union and its decision to terminate Ferris.

However, I would find and conclude that the Respondent would have terminated Ferris irrespective of his connection to a fellow employee's unwelcome exercise of his statutory rights, but not because he was a poor worker, but because he was absent without leave and failed to comply with the Respondent's work rules governing employee leave taking.[40] I would recommend dismissal of this charge.

CONCLUSIONS OF LAW

1. The Respondent, Tinney Rebar Services, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[39] See R. Exh. 9, a copy of a notice and regulations acknowledgment and acceptance signed by Ferris on August 27, 2008, and the Respondent's handbook, R. Exh. 1.

[40] I have considered the Respondent's claim that Ferris was also fired for being a poor worker and would find and conclude that this defense is not sufficiently established. First, the two employees who testified about Ferris' poor work habits did not communicate their opinion to management. Gulakowski may have heard rumors about Ferris but did not seem sure of the matter. Mark Tinney, it seems, only got wind of this through Gulakowski. In short, I do not believe the Respondent would have terminated Ferris, a new and untried employee, for his work habits on August 29. In my view, this was a make-weight point, honestly considered by Tinney along with its primary decision to terminate him for being absent without leave. Again, it must be emphasized that Ferris' dishonesty on the stand weighed heavily against him and in favor of the Respondent.

2. The Union, Iron Workers Local Union No. 3, has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(3) and (1) of the Act by accelerating the discharge of John Bascovsky because of his decision to quit the employ of the Respondent to join the Union.

4. The Respondent did not violate Section 8(a)(3) and (1) of the Act by retaliating against Joshua Ferris because of his close relationship to John Bascovsky and his decision to quit the employ of the Respondent to work for the Union.

5. The Respondent did not otherwise violate Section 8(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The complaint is hereby dismissed.

Dated, Washington, D.C. May 6, 2009

[41] 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.