

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

W.D. MANOR MECHANICAL CONTRACTORS, INC.

and

**Cases 28-CA-22384
28-CA-22394
28-CA-22487**

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 359, AFL-CIO-CLC**

W.D. MANOR MECHANICAL CONTRACTORS, INC.

Employer

and

Case 28-RC-6650

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 359, AFL-CIO-CLC**

Petitioner

GENERAL COUNSEL'S ANSWERING BRIEF

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GENERAL COUNSEL'S ANSWERING BRIEF

W.D. Manor Mechanical Contractors, Inc. (Respondent) would have the Board ignore substantial record evidence that it went to extraordinary lengths to keep the Sheet Metal Workers International Association, Local No. 359 (the Union) from organizing its employees. In doing so, Administrative Law Judge John J. McCarrick (the ALJ) found that Respondent repeatedly violated the Act. These violations ran the gamut from threatening to fire its employees, and following through on these threats by actually disciplining and discharging them, because they engaged in Union activity, and failing to consider for hire and failing to

hire employee applicants because of their Union affiliation, to altering the way it had always done business by hiring temporary workers instead of recalling laid-off employees and subcontracting fabrication work to reduce workload and cause the termination of employees. Respondent's arguments provide no basis for rejecting the ALJ's well-reasoned findings and credibility resolutions, and should therefore be denied.¹

I. PROCEDURAL HISTORY

The hearing in this matter was held on dates between October 6 and November 18, 2009, in Phoenix, Arizona, upon allegations contained in the Consolidated Complaint (the Complaint). (GCX 1(h)) The ALJ issued his Decision on May 5, 2010 (ALJD), finding that Respondent engaged in a campaign of unfair labor practices intended to thwart its employees' rights to engage in union activities as well as objectionable conduct to a certification election concerning the Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC (Union). Respondent was found to have committed unfair labor practices by violating Sections 8(a) (1), (3), and (4) by the following acts and conduct:

- threats of discharge, and shutting its doors (ALJD at 20);
- threats of replacement (ALJD at 20);
- forbidding employees to speak to the Union (ALJD at 18);
- interrogating employees about their Union activities (ALJD at 18);
- disciplining and discharging employees (ALJD 28, 34)
- imposing more onerous working conditions on employees which were designed to isolate them from the Union (ALJD 29);
- failing to consider for hire and failing to hire employee-applicants (ALJD 32);
- hiring temporary employees instead of recalling laid off employees (ALJD 32); and
- subcontracting fabrication work to reduce workload and cause the termination of employees. (ALJD 34)

¹ Respondent's Cross-Exceptions also contain argument responsive to the Acting General Counsel's Exceptions, and will be addressed below.

In addition, the ALJ found that the above violations constituted objectionable conduct to an election in Case 28-RC-6650, held on April 16, 2009, and recommended that the election be set aside and the case remanded to the Regional Director to conduct a new election. (ALJD at 38) On June 2, 2010, CGC filed limited exceptions to the ALJD, requesting that in all other respects outside of the limited exceptions, the Board should adopt the ALJ's recommended decision and order.

II. RESPONDENT'S EXCEPTIONS

Respondent takes exception to the following findings and conclusions of the ALJ:

- that Respondent violated section 8(a)(1), (3) and (4) of the Act by discharging Paul Brimie, Pedro Chavez, Charles Duffy and Terrance Neilsen due to their Union activities;
- that Respondent violated Section 8(a)(1), (3) and (4) of the Act by outsourcing the fabrication work of Respondent;
- that Respondent violated Section 8(a)(1) and (3) of the Act by failing to hire and failing to consider for hire employee Mahelio Rico, Don Latham, James Osteros, Fernando Lebron, and Lance Jameson;
- that Respondent violated Section 8(a)(1) of the Act by promulgating overly-broad and discriminatory rules;
- that the ALJ found certain individuals to be supervisors under the Act;
- the ALJ's authorizing the amendment of specific dates in specific allegations; and
- the ALJ failure to rule on compliance matters.

III. DISCUSSION AND ANALYSIS

A. Discharge of Five Union Supporters

1. ALJ's Findings

The ALJ, based on the credited record evidence, found that Respondent violated Section 8(a)(1), (3), and (4) of the Act on March 16, 2010, by terminating five sheet metal

employees who worked in Respondent's fabrication shop, hiring temporary employees and outsourcing fabrication work to a subcontractor, Omni Fabrications. Respondent contends that the ALJ erred because there was no evidence of union animus in connection with the terminations and subcontracting; that the ALJ substituted his business judgment regarding the outsourcing of the fabrication work; and that there was no evidence to support the finding that Respondent took this action against its employees in violation of Section 8(a)(4) of the Act.

Contrary to Respondent's cross-exceptions, the record supports the ALJ's findings and conclusions. More particularly, the ALJ correctly relied on substantial record evidence to find that union animus and the filing of a petition for certification by the Union were the motivating factors in Respondent's decision to terminate five fabrication shop employees and to outsource fabrication work. Moreover, the ALJ considered but rejected Respondent's suggestion that the discharges and outsourcing were legitimate business decisions.

2. Facts

a. Respondent's Fabrication Shop

Respondent provides mechanical contractor production and services, specializing in plumbing, process piping, process HVAC systems, natural medical gas systems, sanitary, storm sewer and fire lines. (Tr. 43) In the air conditioning and heating section, Respondent has a fabrication shop where ductwork is made. (Tr. 45) That ductwork is then transported to various jobsites and installed into the various buildings that are either under construction or under a tenant improvement project. Respondent employs sheet metal employees at both the fabrication shop and in the field. The fabrication shop is responsible for taking large coils of sheet metal and fabricating it into different types of ductwork for installation into buildings.

b. Decision to Discharge Five Fabrication Shop Employees

On March 11, 2009, the Union filed a petition for an election with the National Labor Relations Board. (Tr. 352) On March 12, 2009, Respondent became aware of that petition. (Tr. 11, GCX 15) On March 16, 2009, a conference call was held between the Union, Respondent and the Board to discuss an election agreement, during which it was agreed that an election would be held on April 16, 2009. (Tr. 354) Later that afternoon, Respondent terminated five known union supporters from the fabrication shop – Paul Brimie (Brimie), Pedro Chavez (Chavez), Charles Duffy (Duffy), Jarrod Retzlaff (Retzlaff), and Terrance Neilsen (Neilsen).

c. Respondent's Knowledge of Union Activities of its Employees

Although Respondent admits it was aware of Retzlaff's union activities, it argues that, because it had no knowledge of the other four employees' union activities, the ALJ erred in finding their discharges violated of Section 8(a)(1) and (3) of the Act. Each of the four employees – Brimie, Chavez, Duffy and Neilsen – testified as to their union activities and Respondent's knowledge of those activities. Brimie, Chavez, Duffy and Neilsen were each involved in union activities at or near the fabrication shop, in full view of Respondent's supervisors. (Tr. 337-339, 634, 642-644) Chavez, Duffy, and Neilsen signed union authorization cards while at or near the fabrication shop. (Tr. 498, 618, 644) Brimie had Union stickers on his tool box that was used everyday in the fabrication shop, as well as on his truck, parked outside Respondent's facility. (Tr. 562-566; 568-569)

Further, Respondent was fully aware that a petition for certification had been filed by the Union, and that Union Organizer Pat Montroy (Montroy) had been visiting employees of the fabrication shop prior to the petition being filed. Based on this credible record evidence,

the ALJ had ample grounds to conclude that Respondent was aware of the Union activities of these five employees.

d. Respondent Continued Hiring Temporary Employees and Outsourcing of Fabrication Work

Respondent's stated reason for the discharge of the five employees – a slowdown in work – was contradicted by undisputed evidence of its own actions. At the same time that work was “slowing down,” it continued to hire temporary employees for sheet metal work and outsourced fabrication work that its fabrication shop was fully capable of producing. (Tr. 72, 430, 1177; GCX 5-11) At hearing, Respondent failed to offer any plausible explanation for its use of temporary labor and could not show that it had ever used temporary labor in close proximity to employees' being laid off for “lack of work.” (Tr. 1224) Further, Respondent's justification for the use of outsourcing of the fabrication work – a quicker turnaround – was contradicted by none other than Respondent's Vice President of Sheet Metal Operations Don Petty (Petty). Petty testified that once a fabrication plan was given to Omni for ductwork, Omni would take approximately five to six days to give Respondent a quote for the job. (Tr. 1214) But Petty admitted that if the fabrication shop was used for the ductwork, there would be no five-day waiting period for a quote and the fabrication shop could immediately begin to fabricate the needed ductwork. (Tr. 1229)

e. ALJ's Conclusions

The ALJ found that the record evidence established that the Union's attempts to organize Respondent's fabrication employees and the filing of the petition was the motivating factor in its decision to terminate the employees as well as to subcontract their work to temporary sheet metal employees. (ALJD 33-34) The ALJ further found that the outsourcing of fabrication work while claiming that it had no work for these five employees

was also motivated not only by the union activities of the five employees but due to a petition having been filed by the Union for a certification election. (ALJD 34) The ALJ properly considered Respondent's stated defense concerning the outsourcing of the fabrication work. (ALJD 34) The ALJ cited record evidence that the use of Omni created up to a five-day delay in production of duct that would not have occurred if Respondent's fabrication shop made the ductwork and, therefore, that Respondent's rationale for continuing to use Omni was not supported by the evidence. (ALJD 34)

3. Discussion

a. Legal Analysis

As set forth in [Wright Line](#), 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and approved by the Supreme Court in [NLRB v. Transportation Management Corp.](#), 462 U.S. 393, 395 (1983), the Acting General Counsel has the initial burden of making a *prima facie* showing that anti-union animus "contributed" to the employer's decision to take adverse action against an employee. The Acting General Counsel presented a strong *prima facie* showing in this case. The fabrication shop employees were each heavily involved in Union activities at the shop, Respondent was aware of those activities, and, as found by the ALJ, Respondent's decision to discharge, outsource the duct work, and use temporary employees was motivated by anti-union animus. (ALJD 33-34) Moreover, the record shows, and the ALJ found, that Respondent failed to sustain its affirmative burden under *Wright Line*. (ALJD 34)

In addition to his application of *Wright Line*, in finding a violation, the ALJ also correctly states that an employer violates Section 8(a)(3) by discharging the employees involved in fabricating duct work and subcontracting the work for anti-union reasons.

(ALJD 34) See *Healthcare Employees Union, Local 399 v. NLRB*, 463 F. 3d 909, 918-19 (9th Cir. 2006), on remand sub nom. *St. Vincent Medical Center*, 349 NLRB No. 36 (2007); *Reno Hilton Resorts v. NLRB*, 196 F. 3d 1275, 1282-83 (D.C. Cir. 1999), enfg. 326 NLRB 375 (1998); *NLRB v. Joy Recovery Tech. Corp.*, 134 F. 3d 1307, 1314-15 (7th Cir. 1998), enfg. 320 NLRB 356 (1995); *Lear Siegler*, 295 NLRB 857, 860 (1989). Cf. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272 n.16 (1965) (distinguishing complete business closings from situations where “a department is closed for anti-union reasons but the work is continued by independent contractors”).

Respondent argues that the ALJ, in finding that the outsourcing of the fabrication was a violation of Section 8(a)(3) and (4), substituted his business judgment for Respondent. This argument ignores that the ALJ considered the reasons offered by Respondent and rejected those reasons against the backdrop of union animus, timing and all other credible record evidence. (ALJD 33-34) Respondent’s attempt to recast the ALJ’s decision as second-guessing business judgment is without basis. The ALJ simply determined, as ALJs do, that Respondent’s stated reasons were pretext, not legitimate business justifications.

b. Credibility of Respondent’s Witnesses

To be successful, Respondent’s cross exceptions would require that the Board overrule and reject the ALJ’s credibility resolutions. Respondent fails to establish that doing so is warranted. Respondent argues that because its witness, Petty, testified for two hours regarding Respondent’s decision to outsource the duct work, the ALJ must credit his testimony that this was done for purely a business reason, over all other witnesses who testified with regard to the decision to continue outsourcing at the same time Respondent claimed there was no work and had to fire five union supporters. In any event, as is evident

from the ALJ's decision and the record as a whole, the ALJ's credibility resolutions are well-founded and reasonable. Moreover, the Board has a longstanding and established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

B. Refusal to Hire and Refusal to Consider for Hire Applicants

1. ALJ's Findings

The ALJ found that Respondent violated Section 8(a)(1) and (3) of the Act when it failed to hire and consider for hire five employee-applicants who sought employment with Respondent on January 20, 2009.² Respondent cross-excepts to such findings and conclusion on the bases that the ALJ erred in failing to find that applicant Mahelio Rico (Rico) falsified his job application rendering him ineligible for hire and finding that all five of the applicants would have been hired. Contrary to Respondent's cross-exceptions, the record supports the ALJ's findings and conclusions. More particularly, the ALJ correctly found that union animus was the motivating factor in Respondent's failure to hire and failure to consider for hire five sheet metal applicants who applied for work when Respondent was seeking sheet metal employees and in fact hired approximately 28 sheet metal employees after January 20, 2009. (ALJD 30-32)

2. Facts

a. January 20, 2009 Applications

On January 20, 2009, seven job applicants arrived at Respondent's main office with the intent to apply for sheet metal positions. These applicants were all either out of work

² CGC has excepted to the ALJ's failing to find that Respondent similarly discriminated against two other employee-applicants.

sheet metal employees or union organizers, with authorization from the Union to apply for and accept any employment with Respondent. (ALJD 8; Tr. 309-311; 731-733; 767; 796-7987; 844; 871)

Two of these applicants arrived at Respondent's main office early in the morning without any outward indication that they were union supporters. (Tr. 700; 733) Those two were Don Latham (Latham), who had learned that Respondent was hiring through Respondent's Foreman Scott Reese (who had instructed Latham fill out an application at the main office), and Lance Jamison (Jamison). (Tr. 308; 695-696; 700; 734; 769; 796; GCX 57) Upon arriving at Respondent's main office, Latham rang the buzzer. Respondent's receptionist Ruth Patterson (Patterson) asked them what they wanted, and Latham informed her that they were there to apply for sheet metal jobs. Patterson allowed Latham and Jamison into the office, gave them each an application, clipboard, and pen, and invited them to sit in the waiting area to fill out the applications. (ALJD 8; Tr. 700-01; 734)

A short time later, the five other applicants, James Osteros (Osteros), Fernando Lebron (Lebron), Marco Molina (Molina), Montroy and Rico, arrived. Unlike Latham and Jamison, they wore Union jackets, shirts, and hats. When Montroy rang the buzzer and announced that they wanted to apply for sheet metal jobs, Patterson informed them that Respondent was not hiring. Montroy responded that that could not be correct, because there were two applicants inside filling out applications. After some back and forth between the Montroy and Patterson, Montroy told the group that they should leave because Respondent would not hire them because they were Union. At that moment, about 10 men entered the lobby area, including Sheet Metal Superintendent Shawn Bowser (Bowser) and President Brian De Witt (DeWitt). DeWitt went outside and asked Montroy what they wanted.

Montroy replied that they wanted to apply for work. DeWitt said he would get them applications and walked back into the office. (ALJD 8; Tr. 327-30; 735; 799-801; 805; 846; 874)

When Patterson began to place the applications on clipboards and gather pens for the five employee-applicants in Montroy's group, DeWitt told her to just give them the applications, and not to give them clipboards or pens. DeWitt then took these applications outside to Montroy. Montroy asked if they could come into the office and fill them out and DeWitt stepped within a foot of Montroy and said in a raised voice "[d]o you need to?" Sensing a threat, Molina positioned himself behind Montroy. DeWitt also told Patterson, "if this happens again, you can just call 911 and tell them that you feel threatened and that they would come and take [them] away for a couple of hours. Take them to jail." (ALJD 8-9; Tr. 333-34; 764; 808-09; 850; 879)³ Based on Respondent's conduct, Montroy and Molina decided the risk of retaliation was too great to warrant completing an application which would include their home addresses. (Tr. 334-35; 809) Although Respondent hired 19 sheet metal employees between January 20 and January 30, 2009, it hired none of the applicants that came to its office on January 20. (ALJD 10:5-9)

b. ALJ's Conclusions

The ALJ found that the record evidence established that five of the applicants were qualified for the positions, that Respondent was hiring, that union animus contributed to the decision not to hire them, and that they had applied and expressed a genuine interest in becoming employees of Respondent. (ALJD 32) Moreover, the ALJ rejected Respondent's defenses concerning the applicants being "over qualified" or did not possess the specific

³ Notably, at hearing, Patterson testified that Montroy yelled at, harassed, and intimidated her. The ALJ discredited her testimony, based on a tape recording of the events made by Montroy, which "clearly establishes that at no time did he or any other job applicant yell, intimidate or harass Patterson." (ALJD 9:16-19)

qualifications the position required, that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. (ALJD 32) The ALJ correctly notes that, after January 20, 2009, Respondent hired 28 sheet metal employees in addition to using temporary labor. (ALJD 32)

3. Discussion

a. Legal Analysis

As set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.2d 83 (3d Cir. 2002), the Acting General Counsel has the initial burden of showing that:

(1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Moreover, as explained by the Board in *Toering Electric Co.*, 351 NLRB 225 (2007), the Acting General Counsel has the burden in a hiring case to prove that the discriminatee “was an applicant entitled to protection as a Section 2(3) employee, i.e., an applicant genuinely interested in seeking to establish an employment relationship with the employer.” As found by the ALJ, each of the three *FES* factors and were established that the five discriminatees were entitled to protection as Section 2(3) employees.

First, the evidence demonstrated that Respondent was hiring or had concrete plans to hire at the time the seven discriminates applied or sought to apply for work. This evidence included an advertisement had been placed in the Arizona Republic for sheet metal workers of all skill levels, field and shop on or about December 7, 2009. (GCX 3) Moreover, it is

undisputed that the Respondent hired numerous sheet metal workers on and after January 20, 2009, as listed above. These hires had varying ranges of experience in sheet metal and their applications, as noted above, were not completely filled out in certain areas.

Second, the evidence demonstrated that the seven discriminatees had experience or training relevant to the announced or generally known requirements of the positions for hire. As stated in its Arizona Republic advertisement, Respondent was looking for sheet metal workers for all skill levels – inexperienced as well as experienced. Again, looking at the applicants that were hired, their skill levels and experience run the gamut. Further, it is undisputed that the seven discriminatees all had sheet metal experience from 7 to 25 years. None of the discriminatees’ qualifications were challenged by Respondent when they testified. Indeed, Respondent’s usage of sheet metal workers with no experience reveals that seven discriminatees had the experience relevant to the generally known requirements for Respondent’s sheet metal positions.

Third, the evidence demonstrated that Respondent’s antiunion animus contributed to the decision not to hire, or consider for hire, the seven discriminatees. See *Wright Line*, 251 NRB at 1083. Five discriminatees went to Respondent’s facility showing Union affiliation. They were treated much differently than the two discriminatees—Latham and Jamison—who showed no Union affiliation. Latham and Jamison were invited in to the office, given job applications, clipboards and pens and invited to fill them out in the office. The five discriminatees showing Union affiliation were not. The record evidence and findings of the ALJ also show numerous statements by supervisors showing union animus.

Finally, the evidence establishes that each of the seven discriminatees “was an applicant entitled to protection as a Section 2(3) employee, i.e., an applicant genuinely

Electric Co., supra. In *Toering Electric*, the Board explained that this requirement embraces two components: first, that “there was an application for employment,” and second, that “the application reflected a genuine interest in becoming employed by the employer.” Both elements are present here. As to the first element, it must be shown that “the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf.” The record includes the testimony of five of the discriminatees that they individually applied for work, completed the application, and turned it in to either the receptionist or Bowser. As to the second element, each applicant testified as to their interest in the position. Respondent failed to put at issue the genuineness of any of the applicants.

b. Respondent’s Cross-Exceptions

Respondent contends that because Rico put union employers on his application for employment where he did not actually work, the ALJ erred in finding that Respondent’s failure to hire or consider Rico for hire was a violation of the Act. Respondent offered no evidence in the hearing that Rico was rejected for employment for this reason. Respondent’s reasons for not offering the applicants employment at the time were that the applicants did not fill out their applications completely and did not have uniform mechanical code licenses.⁴ (Tr. 243, 248) At no time, until Rico was on the witness stand, did Respondent even know that Rico had not worked for the employers he listed on his job application. (Tr. 779-780)

Moreover, Respondent argues that the ALJ erred when he found that the applicants would have been hired by Respondent in the absence of union animus. Respondent provides no evidence in support of this contention. The credible evidence points to the exact opposite,

⁴ This contention contradicts the evidence presented in the hearing concerning the employees who were hired. (See GCX 33-37, 60-78)

as found by the ALJ. Respondent was hiring at the time the applicants applied for work. Respondent hired 28 sheet metal workers after the applicants applied. Of those 28 employees, none possessed superior qualifications to the applicants, several did not fully complete their applications, many did not have a uniform mechanical code license, and two had prior criminal convictions.

Accordingly, the ALJ correctly found that Respondent violated the Act in refusing to hire and refusing to consider for hire five applicants and Respondent's cross-exceptions should be denied.

C. Overly-Broad and Discriminatory Rules

1. ALJ's Findings

The ALJ properly found that Respondent, through Sheet Metal Foreman Scott Hartranft (Hartranft), promulgated an overly-broad and discriminatory rule by telling employees that employees were not to speak to union agents on company time, and that if they were caught speaking to a union agent, they would probably be fired. (ALJD 4; 19) The ALJ found that the term "company time" is presumptively invalid. Respondent contends that the ALJ erred by not finding that Respondent clarified those terms and effectively communicated the clarification to employees. Respondent further contends that the ALJ erred in his application of *Swardson Painting*, 340 NLRB 179 (2003), to the allegation concerning the overly-broad rule that employees could not talk to the union agent if he came on the jobsite and if the union agent came on the jobsite, to report it immediately to Respondent. Respondent's contentions are without merit and should be denied.

2. Facts

On or about December 10, 2008, Hartranft held a meeting of sheet metal employees on the jobsite, while employees were signing out for the day. (Tr. 396-397). Hartranft told employees that if Montroy (a union organizer) happened to come on a jobsite, they were not to speak to him on company time about Union activities and threatened the employees that if they were caught speaking to Montroy on company time, they would probably be terminated. (Tr. 398-399) Hartranft similarly admonished employees that if Montroy came on the jobsite, that employees were not to speak to him and were to notify Hartranft immediately if he showed up. (Tr. 398-399) Respondent presented no evidence concerning either Respondent or the general contractor's exclusionary property interest at the jobsite that would justify the exclusion of Montroy. (ALJD 19)

3. Legal Analysis

a. "Company Time"

The Board has repeatedly instructed that the term "company time" or "work hours" is inherently ambiguous and thus presumptively unlawful, because it connotes all hours of the workday, including employees' break and lunch times. *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), *enfd.* 261 F. 3d 493 (3d Cir. 2001); *Southwest Gas Corp.*, 283 NLRB 543, 546 (1997); *MTD_Products, Inc.*, 310 NLRB 733 (1933); *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984); *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

Respondent's burden is to prove that it communicated or applied the rule in a way that conveyed a clear intent to permit discussions and/or solicitation during break time or other periods when employees are not actively at work. *MTD Products*, at 733; *Ichikoh Mfg.*, 312 NLRB 1022 (1933), *enfd.* 41 F. 3d 1507 (6th Cir. 1004); *Our Way, Inc.*, at 395 n.6. A

clarification of an ambiguous rule or a narrowed interpretation of an overlybroad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994). "Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule." *Teletech Holdings*, 333 NLRB 402, 403 (2001), citing *Norris/ O'Bannon*, 307 NLRB 1236, 1245 (1992). *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003) (prohibiting discussion of union unlawful).

b. Respondent's Cross-Exceptions

Respondent argues that because employee witness Robert Jones (Jones) explained his understanding of the difference between paid time and unpaid time, Respondent must have effectively communicated a clarification on the terms "company time." Respondent, however, cannot rely on Jones' testimony but must present credible evidence that Respondent clarified the term, not one individual employee's subjective understanding of paid and unpaid time. Respondent did not present any evidence that it, at any time, attempted to clarify Hartranft's rule. Therefore, Respondent's cross-exceptions should be denied.

c. Rule to Not Talk to Montroy and Exclude Montroy

An employer who denies non-employee union representatives access to private property for purposes related to the exercise of employees' Section 7 rights bears a threshold burden of establishing that, at the time it denied access, it had a property interest that entitled it to exclude individuals from the property. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997), *enfd.* 187 F. 3d 1080 (9th Cir. 1999), *cert. denied* 529 U.S. 1098 (2000), *cited in Swardson Painting Co.*, 340 NLRB 179 (2003). Additionally, informing employees not to talk to a union representative if he shows up at the jobsite violates Section 8(a)(1) when

given without any apparent valid reason. *Gold Shield Security and Investigations, Inc.*, 306 NLRB 20, 22 (1992).

d. Respondent's Cross-Exceptions

Respondent argues that even though it presented no evidence that Montroy was an unauthorized visitor, the ALJ should have inferred that he was unauthorized because he was not an employee or a vendor, and that anyone visiting the site was required to sign in and attend an orientation on safety. The record is devoid, however, of any evidence that Hartranft's admonitions to employees were in support of these rules. The credible evidence shows that Hartranft was not seeking to enforce the general contractor's rules but seeking to exclude any union influence over Respondents' employees. Respondent's contentions are without merit and its cross-exceptions should be denied.

D. Warning to Robert Jones

1. ALJ's Findings

The ALJ found that Bowser's statements to Jones that he was not allowed to organize, solicit for, or speak about the Union during company time, but only on break time and after hours, was an overly broad no-solicitation rule and that Respondent's subsequent enforcement of that rule against Jones violated Section 8(a)(3) of the Act. Respondent argues that, because the ALJ did not distinguish between passive and active solicitation, he erred in his determination that the warning was discriminatory. Respondent's cross-exception has no merit.

2. Facts

On or about March 27, 2009, Sheet Metal Forman Harry Dempsey (Dempsey) observed Jones talking to another employee about the Union. (Tr. 140) Dempsey also

testified that there is no prohibition against talking while working and that he has talked to Jones about non-work matters such as fishing while working at jobsites in the past. (Tr. 139) Dempsey testified that when he saw Jones talking to another employee about the Union, he called Bowser, to report Jones' union discussion. (Tr. 141) When Bowser arrived, Bowser gave Jones a verbal warning for talking about the Union. (Tr. 142) Bowser told Jones that he was not allowed to speak about the Union during company time. (Tr. 417) At that point, the only behavior Dempsey had observed and reported was Jones talking about the Union. (Tr. 142, 145)

Later in the day, Dempsey observed Jones come back to the jobsite after break time, place a Union t-shirt near the gang box, and later take the t-shirt and give it to another employee and return to his original place of work. (Tr. 145-148) Dempsey again called Bowser and told him what he had observed. (Tr. 277) Bowser prepared a written warning for Jones immediately after the report and gave it to Jones that afternoon. (Tr. 149, GCX 20) In the 19 years he has been employed by Respondent, this is the one and only instance where Bowser disciplined an employee for solicitation of any kind. (Tr. 276)

3. Legal Analysis

An employer may not prohibit discussions about a union even during working time while permitting discussions about other non-work subjects. *M.J. Mechanical Services*, 324 NLRB 812, 814 (1997). It is also unlawful to restrict conversation about union matters during work time while permitting conversations about other nonwork matters. *Emergency One, Inc.*, 306 NLRB 800 (1992).

By promulgating and enforcing a rule that prohibits employees from discussing the Union, Respondent has violated the Act. Respondent's initial verbal warning to Jones by

Bowser was not for solicitation but for “talking” about the Union. Dempsey testified that the only thing he heard or observed before he called Bowser on March 27, 2009, was Jones speaking to another employee about the Union. This is akin to a “no talking” rule, not a no-solicitation rule. Respondent allows employees to talk about any non-work subject they want with the exception of the Union. This is a clearly invalid rule and the subsequent discipline for that rule is unlawful.

The written warning given to Jones on March 27, 2009 by Bowser was for Jones delivering a Union t-shirt to another employee. There was no solicitation by Jones of another employee. Jones simply obtained the t-shirt while on break and delivered it to the employee with no discussion.⁵

4. **Respondent’s Cross-Exceptions**

Respondent’s argues that the ALJ erred because he did not distinguish between active solicitation and passive solicitation. Respondent ignores the testimony of its own supervisors, Dempsey and Bowser, that the only reason Jones was given the written warning was because he talked to employees about the Union and gave an employee a t-shirt. Respondent argues that because Jones handed out stickers and placed stickers on company property, that it was justified in issuing the written warning. The problem with Respondent’s arguments is that Respondent was unaware at the time it issued the warning that Jones had passed out stickers at work and placed stickers on company property. Respondent now wants to use this to justify its warning given over six months prior and criticize the ALJ for not using it as justification for Respondent’s actions. The ALJ correctly used the testimony of Dempsey and

⁵ Jones testified that he had passed out stickers to employees and placed stickers on tool boxes in the past. However, Respondent was unaware of these activities at the time it disciplined Jones, and Respondent was only aware of Jones talking about the Union and delivering a t-shirt to another employee at the time of Jones’ discipline.

Bowser concerning their reasons *at the time* for issuing the written warning, and found them to be discriminatory. Respondent's cross-exceptions are without merit and should be denied.

E. Carrillo is a Supervisor Under Section 2(11) of the Act

1. ALJ's Findings

The ALJ correctly determined that Fabrication Shop lead man Joshua Carrillo (Carrillo) is a supervisor under Section 2(11). (ALJD 20) Respondent argues that, because Carrillo reports directly to the fabrication shop foreman and employee Jones reports to foreman in the field, Carrillo and Jones have the same authority and therefore, the ALJ inconsistently ruled that Carrillo was a supervisor and Jones was not. Respondent's cross-exceptions are without merit.

2. Facts

Carrillo is the fabrication shop lead man. (Tr. 162) The ALJ found that Carrillo's job duties as leadman included monitoring employees in the shop to ensure work is done, assigning work, interviewing job applicants and making recommendations to Sheet Metal Shop Foreman Trevor Davis (Davis) as to which employees to hire. Carrillo's recommendations were usually followed. Carrillo hired Chavez and Neilson, issued discipline to employees, and effectively recommending hiring and discipline that Davies invariably followed. (ALJD 20) There was a plethora of evidence in the hearing showing Carrillo's authority as a supervisor.

There is absolutely no evidence of any kind that Jones possessed any of the authority possessed by Carrillo. Further, Jones status as an employee was never raised by Respondent in the hearing and Jones was never referred to by any witness as a lead man. Jones installed duct work at jobsites – that was the extent of his duties. (Tr. 387)

3. Legal Analysis

Section 2(11) of the Act defines the term “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

The possession of any one of these authorities is sufficient to deem the employee invested with such authority as a supervisor. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Westwood Health Care Center*, 330 NLRB 935 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994); *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1983). Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649-650 (1991); *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972). Once the individual actually possesses any of the statutory authorities, he does not lose it by exercising it infrequently or even at all. *Babcock & Wilcox Construction Co.*, 288 NLRB 620, 621 n. 3 (1988); *Groves Truck & Trailer*, 281 NLRB 1194 fn. 1 (1986); *Opelika Foundry*, 281 NLRB 897 (1986).

4. Respondent's Cross-Exceptions

There is no doubt that Carrillo was a supervisor under Section 2(11) of the Act where he monitored employees to ensure work is done, assigned work, interviewed job applicants, made hiring recommendations, hired at least two employees, issued discipline. Respondent's contention that, because employee Jones reported to a foreman, does not change these essential and determinative facts. Respondent's cross exception should be denied.

F. ALJ's Amendment of Dates Concerning Certain Allegations

1. ALJ's Findings

The ALJ allowed the amendment of certain allegations after the hearing and, additionally, made certain findings based upon the credible evidence presented in the hearing as he determined that the matters were fully litigated. (ALJD 18) Respondent contends that it has been prejudiced by these rulings of the ALJ because the allegations are not "closely connected," it has resulted in a duplication of the charges, and Respondent did not have an opportunity to object to the amendments. Respondent's contentions are without merit as the ALJ followed the facts presented at the hearing, facts to which Respondent presented a defense, and properly adjusted his findings to conform to the facts.

2. Facts

a. December 10, 2008 Statements

The Complaint alleged in paragraph 5(b)(1) through (6) that on or about December 9, 2008, Hartraft made statements in one conversation that violated Section 8(a)(1) of the Act. Based upon the credited testimony of Jones, the ALJ determined that the conversation took place on December 10, 2008 and determined that the matter was fully litigated because Respondent's witness Hartraft testified in defense of the allegations, stating he never made the statements.

b. December 18, 2008 Statements

The Complaint alleged in paragraph 5(e)(1) and (2) that on or about December 18, 2008, Carrillo made statements in one conversation that violated Section 8(a)(1) of the Act. Based upon the testimony of Weimann, who stated that on numerous times in late December 2008 and early January 2009, Carrillo made statements about Weimann having a union meeting, the ALJ sustained the allegation in paragraph 5(e)(1). Carrillo denied making the statements, regardless of what day they were alleged.

c. January 5, 2009 Statements

The Complaint alleged in paragraph 5(f)(1) through (8) that on or about January 5, 2009, Hartraft made certain statements to employees that violated Section 8(a)(1) of the Act. When the testimony of the Jones indicated that the statements were made on December 15, 2008, CGC moved to amend the date to December 15, 2008 in her brief to the ALJ. The ALJ allowed the amendment, stating that the matter was fully litigated. Again, Hartraft testified that he never made the statements, regardless of what day they were alleged.

d. January 8, 2009 Statements

The Complaint alleges in paragraph 5(g)(1) through (4) that on or about January 8, 2009, Carrillo made certain statements to employees that violated Section 8(a)(1) of the Act.

As the testimony of Duffy indicated that the statements probably occurred in late December 2008, the ALJ determined the matter was fully litigated and sustained allegations in paragraph 5(g)(1)(2) and (3).

e. March 23, 2009 Statements and Verbal Warning

The Complaint alleges in paragraph 5(j) and 5(k) that on March 23, 2009, Superintendent Brian Van Kuren, Dempsey, and Bowser violated Section 8(a)(1) by statements they made to Jones. As the record indicated that the statements and subsequent discipline occurred on March 27, 2009, the ALJ determined that matter was fully litigated and sustained both allegations. Dempsey and Bowser both testified concerning the statements and the subsequent discipline.

3. Legal Analysis

Respondent argues that, because some of the “on or about” dates were allowed to be amended and were found by the record evidence to have occurred a day or a few weeks away from the originally date alleged in the Complaint, Respondent has been denied due process. The Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices. *Monroe Feed Store*, 112 NLRB 1336 (1955); *Owens-Corning Fiberglass v. NLRB*, *supra*. When an issue relating to the subject matter of a complaint is fully litigated, the ALJ and the Board are expected to pass upon it even though it was not specifically alleged to be an unfair labor practice in the complaint. *Id.* See also *Enloe Medical Center*, 346 NLRB 854 (2006). It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in a complaint if it is fully litigated and closely related to the subject matter of the complaint. *Pergament United States*, 296 NLRB 333, n.6 (1989) (unplead violation was found based on

the testimonial admissions of respondent's witnesses).⁶ Such a practice has also been followed even in situations where the allegation found involved a different section of the Act than that alleged. See *Woodline Motor Freight*, 278 NLRB 1141, 1237 (1986), (adopting the administrative law judge's finding that a work rule change violated Section 8(a)(3) and (4), despite the absence from the complaint of a Section 8(a)(4) allegation); *enfd.* in pertinent part 843 F.2d 285 (8th Cir. 1988) *Cosmo Graphics*, 217 NLRB 1061 (1975); *Independent Metal Workers Local 1 (Hughes Tool)*, 147 NLRB 1573, 1576-1577 (1964).

The ALJ did not add new allegations to the Complaint nor did he add different sections of the Act than that alleged. The ALJ merely adjusted some of the "on or about" dates to the dates found in the record evidence. Such minor amendments are authorized by the Board in the cases cited above.

4. Respondent's Cross-Exceptions

Respondent baldly asserts that it would have presented different evidence if it had known that the dates were different. The record shows that Respondent did, in fact, present evidence concerning the statements made by Hartranft, Carrillo and the statements made concerning the discipline of Jones. Respondent was given the opportunity to, and did in fact, provide ample evidence in its defense of these allegations. The ALJ simply did not credit Respondent's witnesses in regard to the statements made and concluded that the statements were violative of the Act. Respondent's cross-exceptions should be denied.

G. ALJ's Remedy

1. The ALJ's Findings

⁶ See *Timken Co.*, 236 NLRB 757, 757-758 (1978), *enf. denied* on other grounds 652 F. 2d 610 (6th Cir. 1981); *Dawson Cabinet Co.*, 228 NLRB 290 n1 (1977), *enf. denied* on other grounds 566 F. 2d 1079 (8th Cir. 1977). See also *Sports Coach Corp.*, 218 NLRB 992 n.1 (1975); *Cosmo Graphics*, 217 NLRB 1061 n 2 (1975).

In determining that Respondent violated the Act in the discharge of employees Weimann, Brimie, Chavez, Duffy, Retzlaff and Neilsen, the ALJ ordered that those employees be reinstated and made whole for any loss of earnings and other benefits. The ALJ also ordered that applicants Rico, Jameson, Lantham, Osteros, and Lebron be offered employment and made whole for any loss of earnings and other benefits based upon Respondent's discriminatory refusal to hire them. Appropriately, the ALJ did not place a limitation on the time for which these employees and applicants would receive employment, reinstatement and/or backpay.

Respondent has filed cross-exceptions, arguing that the ALJ erred in not limiting the duration of employment for any of these employees and applicants and for not finding that Weimann would have been laid off in March or April 2009, even if he were not discriminatorily discharged in January 2009. Respondent's cross-exceptions have no merit as those are matters to be determined in a separate compliance hearing and are not before the ALJ during a hearing on unfair labor practices.

2. Legal Analysis

“After the entry of a Board order directing remedial action, the Regional Director shall seek compliance from all persons having obligations thereunder.” Section 102.52, Board's Rules and Regulations. “If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification...”.

[Section 102.52, supra.](#)

The amount of backpay, the tolling of backpay and the period of reinstatement and employment are matters to be determined in a compliance proceeding and not in a hearing concerning unfair labor practice allegations.

IV. RESPONDENT'S ARGUMENTS IN SUPPORT OF THE ALJ

Rather than file an Answering Brief to the Acting General Counsel's Exceptions to the ALJ's Decision, Respondent placed its arguments at the end of its Cross Exceptions. CGC will address its Reply to Respondent's arguments below.

A. Exception Concerning Delay in Hiring Weimann

Respondent argues that because the delay in hiring of Weimann was only one week and the cases cited by the [Acting General Counsel, *Savoy Brass Manufacturing Co.*, 241 NLRB 51 \(1979\)](#) and [Tradesmen International, Inc.](#), 351 NLRB 579 (2007), contain three to five month delay in hiring, the ALJ was correct in finding that a one week delay was reasonable. These cases, however, were cited for a different proposition – that a delay in hiring of an employee can be an unfair labor practice despite the discriminatee eventually being offered a job.

The ALJ's findings overlook the facts specific to this case, which include evidence that Respondent sought to fill positions immediately, the nature of the position to be filled, a construction job on a project quickly ramping up, and substantial evidence of animus towards applicants with any affiliation with the Union. Absent Weimann's repeated telephone calls to Respondent, the delay in this case could have extended months, or he may not have been hired at all. Moreover, Respondent failed to present any evidence as to the length of time that typically elapses between interview and hire; whether any other applicants were being considered at this time, or any other facts that could explain Respondent's failure to respond

to Weimann as promised. Under these circumstances, the record supports a finding that Respondent discriminated against Weimann by delaying his offer of employment as alleged in Complaint paragraph 6(a).

B. Exception Concerning Vending Machines

Respondent argues that because the evidence only showed vending machine prices were higher for the fabrication shop employees for a short time and that an employer would never do anything to alienate employees in the midst of an organizing campaign, the ALJ was correct in his decision to dismiss paragraph 6(f) of the Complaint. This argument has no merit.

First, the ALJ's decision is inconsistent; the ALJD dismisses the allegation in a general paragraph with no discussion but then provides for a remedy for this allegation in his proposed Notice. (ALJD 35: 8-10; Appendix)

Second, the record supplies ample evidence to support the finding of a violation, as suggested by the ALJ's Notice. The ALJ's decision shows the nexus of the union activities of the fabrication shop employees with the moving of the break area and vending machines. (ALJD 29: 32-39) The ALJ's Decision should be corrected to reflect, consistent with the proposed Notice, that Respondent violated the Act by increasing the price of items for sale in its vending machines as alleged in paragraph 6(f).

C. Exception Concerning Two Applicants

Respondent argues that because two applicants, Montroy and Molina, did not file applications when they went to Respondent's offices to apply for work, the ALJ was correct in failing to find that Respondent discriminated against them. However, as explained in the Acting General Counsel's exceptions, the ALJ relied on an over-expansive application of

Toering Electric Company, 351 NLRB 225 (2007), in dismissing these two employee-applicants from the Complaint.

The ALJ's sole basis for dismissing Montroy and Molina's claims is that they failed to submit their written employment applications to Respondent. (ALJD 31: 35-36) Significantly, there is nothing in *Toering* that states what form a valid application for employment must take. In this case, there is ample evidence that Montroy and Molina repeatedly told Respondent they wished to be considered for employment. (Tr. 329) They not only told the receptionist, Ruth Patterson, but also told Respondent's President, Brian DeWitt. See *Marriott Corp.*, 251 NLRB 1355 (1980) (oral request for employment in refusal to hire allegation).

Moreover, Respondent has waived its right to insist on a written application where it initially refused to provide one; discriminated against the employee-applicants when they sought to complete the applications by refusing to allow them in the building and refused to provide them clipboards and pens, and threatened the employee-applicants, both physically and by stating that Respondent would file false charges with the police to have them arrested if they showed up again. (ALJD 8-9; Tr. 327-30; 735; 764; 799-801; 805; 846; 850; 874; 879) Based upon the totality of the circumstances, Montroy and Molina have meet the *Toering* requirements and the Board should find that Respondent unlawfully failed to hire, or consider them for hire, as alleged in Complaint paragraph 6(h)(2).

D. Exception Concerning Compound Interest

Respondent argues that the ALJ was correct in not deviating from the Board's current practice of assessing simple interest to the remedies in this case. (ALJD 40) On May 25, 2010, the Board invited briefing on the remedial issue of compound interest on backpay in

several cases. See *Bashas' Food City*, Case 28-CA-21435, et. al., *Atlantic Scaffolding Company*, Case 16-CA-26108, and *Kentucky River Medical Center*, Case 9-CA-42249. As this issue is currently fully briefed and pending before the Board, CGC relies on those arguments set forth in those cases.

IV. CONCLUSION

Based on the foregoing and the entire record in this matter, the Acting General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1), (3), and (4) of the Act as set forth in the ALJD, and that Respondent's cross-exceptions should be rejected in their entirety. It is respectfully submitted that the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order, except as to those Complaint allegations that the ALJ did not find and which are subject to Acting General Counsel's limited exceptions filed on June 2, 2010. Finally, it is requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

Dated at Phoenix, Arizona, this 30th day of June, 2010.

Respectfully submitted,

/s/ Sandra L. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in W.D. MANOR MECHANICAL CONTRACTORS, INC., Cases 28-CA-22384 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 30th day of June 2010, on the following:

Via E-Gov, E-Filing:

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