

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:)	
)	
ALLIANCE MECHANICAL, INC.)	
)	
Respondent,)	
)	
and)	NLRB Case No. 27-CA-21338
)	
ROAD SPRINKLER FITTERS LOCAL UNION)	
NO. 669, U.A., AFL-CIO,)	
)	
Charging Party.)	

CHARGING PARTY LOCAL 669’S EXCEPTIONS

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”), respectfully submits these Exceptions to the Decision of the Administrative Law Judge in this case, pursuant to Rule 102.46(b)(1) of the Rules and Regulations of the National Labor Relations Board.¹

Charging Party Local 669 specifically excepts to the following:

1. The ALJ’s failure to find that Respondent Alliance Mechanical, Inc. (“Alliance,” “Respondent,” or “the Employer”) illegally refused to hire Aaron Hoffman because of his affiliation with Local 669, and issue the appropriate remedy.

ALJD, *Passim*.

¹ Citation to the ALJ’s decision in this matter will be designated by the abbreviation “ALJD, P. ____,” and will include page and line numbers where relevant. The grounds for each exception, including reference to the record and supporting legal authorities and argument, have been set forth in the supporting brief filed along with these Exceptions.

2. The ALJ's failure to find that Respondent illegally threatened and interrogated Mr. Hoffman about his affiliation with Local 669 and issue the appropriate remedy. ALJD, *Passim*.
3. The ALJ's failure to order a remedy on behalf of Mr. Hoffman for the Employer's illegal refusal to consider him for employment because of his affiliation with Local 669. ALJD, P. 15-16
4. The ALJ's failure to credit Mr. Hoffman's testimony. ALJD, P. 3-11
5. The ALJ's crediting of Mr. Aho and Ms. Fuller's testimony. ALJD, P. 3-11.
6. The ALJ's failure to conclude that Mr. Hoffman was qualified for the open job positions at Alliance. ALJD, *Passim*.
7. The ALJ's conclusion that "Due in part to Respondent's west-central Colorado location, Local 669 members, usually from Denver, tend not to work for Respondent for extended periods of time. Moreover, new construction employment opportunities are not as plentiful in Respondent's location as in Colorado's urban locales." ALJD, P. 3, lines 1-5.
8. The ALJ's conclusion that Respondent's requirement that new employees sign yellow dog contracts was "well beyond the Section 10(b) limitations period..." ALJD, P. 3, line 7.
9. The ALJ's conclusion that David Skluzacek was hired as an apprentice service technician. ALJD, P. 3, lines 15-17.
10. The ALJ's conclusion that "the only position Respondent was seeking to fill after laying off Julio Rodriguez in February was an experienced or lead service

- technician. This was a position which Aho had been trying to fill for over 3 years.” ALJD, P. 3, lines 20-25.
11. The ALJ’s conclusion that “[t]he service technician position requires a set of skills distinct from that of a pipefitter[,]” and attendant factual findings, including, *inter alia*, “the Alliance Mechanical service technician position entails significant sales skills when dealing with clients[,]” and “Aho had been performing all of the service work for Respondent himself because he had been unable to find a qualified service technician.” ALJD, P. 3, lines 23-31.
 12. The ALJ’s conclusion that both of the job advertisements that Respondent ran between April and November of 2009 should “be seen as seeking an experienced service technician.” ALJD, P. 4, lines 5-14.
 13. The ALJ’s statement concerning why Local 669 Business Agent Rich Gessner told Mr. Hoffman to call Alliance to seek employment with the company. ALJD, P. 4 n. 8, lines 46-51.
 14. The ALJ’s conclusion that Mr. Hoffman was a journeyman pipefitter rather than a journeyman sprinkler fitter. ALJD, P. 4, line 18.
 15. The ALJ’s conclusion that determining what was said in the conversation between Mr. Hoffman and Mr. Aho “require a credibility determination that goes well beyond the surface. After giving the matter careful consideration, including all the witnesses’ relative demeanor as well as their relationships (Fuller being Aho’s employee), and recognizing that Aho harbors union animus, I nevertheless find Aho and Fuller's version to be the more credible.” ALJD, P. 5, lines 24-29.

16. The ALJ's conclusion that "Fuller has the best and most consistent memory of the three." ALJD, P. 5, line 37.
17. The ALJ's conclusion that Mr. Aho "was pretty sure his conversation with an applicant with an Arizona fire sprinkler background, i.e. Hoffman, was in person." ALJD, P. 6, lines 4-9.
18. The ALJ's conclusion that "[w]hen Hoffman brought the application back that afternoon, it contained nothing about any service technician experience. His application only sought journeyman sprinkler fitter (pipefitter) work." ALJD, P. 6, lines 40-43.
19. The ALJ's conclusion that the conversation between Mr. Aho and Mr. Hoffman concerning a job at Respondent was in person and that Ms. Fuller "recalled that during the afternoon conversation between Aho and Hoffman that Aho specifically told Hoffman he was looking for service technician[,]" and attendant quotations of Ms. Fuller's testimony. ALJD, P. 6-8, lines 45-51; 1; 1-5.
20. The ALJ's conclusion that Mr. "Aho's recollection was quite similar[]" to Ms. Fuller's, and attendant quotations. ALJD, P. 7, lines 5-25.
21. The ALJ's conclusion that Mr. Hoffman's testimony about his job application process with Respondent was untrue, including, *inter alia*, his conclusions that Respondent had only been looking to hire a service technician; it was "a near certainty" that Aho would have asked Mr. Hoffman whether he had any service experience, "pipefitters are common, whereas service technicians are not...[;]" "there is no doubt in my mind that Aho told Hoffman he was not hiring

journeymen [fitters][;]" and "[i]s Hoffman trying to testimonially [sic] create a sprinkler fitter job where there was none?" ALJD, P. 8, lines 26-37.

22. The ALJ's recounting of Mr. Hoffman's job application, the skills he had, his questioning why Mr. Hoffman would not have put himself "in the best possible light for a potential employer" by not listing certain experience he had on his job application (ALJD, P. 7, lines 45-51; P. 8, 1-11), then answering that question by stating "I think the obvious answer is that Hoffman, faced with an employer who was looking for a qualified service technician, did not do so because he knew he did not fit the only job available." ALJD, P. 8, lines 11-12.
23. The ALJ's conclusion that "Hoffman hesitantly tried to convince Fuller that he had [service] experience." ALJD, P. 8, lines 15-16.
24. The ALJ's conclusions that Mr. Hoffman was not qualified for any of the positions at Alliance during the relevant time period, including, *inter alia*, the conclusion that:

Consistent with his testimony, Fuller, as noted above, remembers him telling her that he did have service technician experience. I find, therefore, that Hoffman hesitantly tried to convince Fuller that he had such experience. Even so, he did not tell her he held a back-flow certification, something an experienced service technician [sic] would possess. Such a certificate would have led Aho to discuss his application in more detail. Clearly, his "extended" experience with service work was too minimal to be realistically presented to Aho. So why did he claim it orally first to Fuller and later to me at the hearing? The answer is that he knew a more careful inquiry would reveal that he was inflating his service skills, and that is why he never claimed service technician experience on his application, even though he is orally, even under oath, willing to make the claim.

In addition, Hoffman knew he needed to be believed concerning his contention that Aho never asked him about his service work experience, meaning that he wants to convince me that the only job he and Aho discussed was a journeyman sprinkler fitter and that was the job Aho would not offer him because of his Local 669 background.

Furthermore, why did Hoffman contend that his conversation with Aho was on the telephone? Both Aho and Fuller have credibly testified that his interview was in person. Is that because he wanted to avoid witnesses, such as Fuller, who could credibly deny the conduct alleged to be in violation of Section 8(a)(1)? I tend to think so.

I regard Hoffman's testimony and his claim to Fuller that he had experience as a service person to be misleading. Furthermore, his testimony about pleading for a chance ["Well, you want to give me a chance?"] makes no sense in view of the fact that there was no job to offer him. Hoffman's testimony, taken as a whole, leads me to conclude that his description of what Aho told him during the interview cannot be trusted. There is simply too much inconsistency in his testimony. I find it to be contrived. ALJD, P. 8, lines 15-40.

25. The ALJ's conclusion that Aho's testimony at the hearing was consistent with the sworn affidavit he gave during the investigatory stage of the case. ALJD, P. 8, lines 43-51; P. 9, lines 1 – 11.

26. The ALJ's conclusions that:

The credible fact scenario, contrary to the affidavit, is that Juan Rodriguez was hired as a laborer and Skluzacek was being groomed to learn service technician [sic] work. Indeed, Skluzacek's application form states that he was applying for the service technician job. And, those are the facts no matter what Aho said in his affidavit. It was not until the hearing that Aho became aware of his own imprecision. Yet his inexactitude on a matter of definition cannot override the underlying facts.

Accordingly, I do not concur that, taken in context, Aho's descriptions of Juan Rodriguez' and Skluzacek's jobs render him not credible. Accordingly, I find that Aho's credibility is unshaken by this apparent inconsistency. ALJD, P. 9, lines 9-19.

27. The ALJ's conclusion that there was no violation of either Section 8(a)(1) or (3) of the Act for a refusal to hire Mr. Hoffman. ALJD, P. 9, lines 23-25.

28. The ALJ's conclusion and attendant factual finding that Alliance did not illegally interrogate Mr. Hoffman or make any unlawful statements or threats, including, *inter alia*:

The complaint alleges that Aho coercively interrogated an employee (Hoffman) about his union membership. It also asserts that Aho, in telling Hoffman that he does not hire union people, threatened him in a way which deprived him of his Section 7 rights. Above, I have not found Hoffman to have given credible testimony. While it is not necessary to repeat my specific findings above, I note that in general it is not Aho's modus operandi to coercively interrogate or make threats to prospective applicants. He cannot afford to, since he needs skilled fitters and an experienced service technician. He knows that union-trained sprinkler fitters are valuable assets and possess skills he wants to use. So he is alert to such individuals and prefers them to people whose training is not as rigorous. This means he simply looks at applications and can often determine if the applicant has a union background. Moreover, as Fuller noted, Aho generally assesses whether an individual is a good candidate by asking him about some type of fire suppressant system. Here, Hoffman's application announced his union apprenticeship training and his journeyman status. It also told Aho that he had worked for a contractor, Western States, which Aho knew to be under a union contract. He did not need to interrogate Hoffman to learn about his union status. And, if he had, based on what was in the application, it would have been permissible under the Act. See *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Instead, Aho's method to avoid union organizing was, simultaneous with an employment offer, to require such an applicant to sign the yellow dog agreement. That is the procedure he used when he hired fitter Julio Rodriguez. It, or some acceptable substitute, may have been employed when in late 2009, he hired an experienced lead service technician from Grand Junction, Brice Hawley. ALJD, P. 9;10, lines 29-37; 1-13.

29. The ALJ's conclusions in footnote 11 concerning Mr. Skluzacek, including, *inter alia*, his conclusion that "Skluzacek may have needed some time learning the business, including installing sprinklers before taking on the service duties, does not undermine Aho's testimony concerning why he hired Skluzacek. The General Counsel's argument to the contrary is rejected." ALJD, P. 9 n. 11, lines 41-51.
30. The ALJ's conclusion accepting "Aho's repeated contention that he has hired union employees and has no problem with doing so – so long as they promise not to organize his company." ALJD, P. 10, lines 15-16.
31. The ALJ's conclusion that:

As Aho operates in that fashion, and as I do not believe Hoffman's testimony about the interview process, I find that the General Counsel has failed to prove, by credible evidence, that Aho interrogated Hoffman about his union membership. Nor did Aho tell Hoffman, as alleged, that he did not hire union people, because he does, though he wishes them to forgo their rights under the Act. In any event, the questions Aho did ask were limited – mainly to Hoffman's service technician background – and had no impact on Hoffman's Section 7 rights. The principal reference to Hoffman's connection to the Union came from Hoffman's application, not from anything Aho initiated. This aspect of the complaint will be dismissed. ALJD, P.10, lines 18-25.

32. The ALJ's failure to find that Alliance illegally refused to hire Mr. Hoffman.

ALJD, P. 10-12.

33. The ALJ's conclusion that

On a factual basis, therefore, Hoffman was not in the running for the job given Skluzacek. He did not supply the background, did not say he held a backflow certificate and did not claim any sales experience. If he had those qualifications, he didn't put them on his application. He simply never presented himself as trained for that job. Indeed, my assessment of Hoffman as he testified was that his verbal skills are not consistent with those required of a salesperson. ALJD, P. 10, lines 37-42.

34. The ALJ's conclusion that it was "unlikely" that Mr. Hoffman would have taken the position that Respondent assigned to Juan Rodriguez for \$10 an hour, and that although the ALJ concluded that while Mr. Hoffman "might have taken" an apprenticeship position if one was available at Alliance, Aho did not have an apprentice position available. ALJD, P. 11, lines 1-5.

35. The ALJ's conclusion that Local 669 "concedes [Hoffman's] application gave Aho no notice of Hoffman's supposed other qualifications." ALJD, P. 11, line 7-8.

36. The ALJ's analysis of *FES*, 331 NLRB 9 (2000) and *Americlean*, 335 NLRB 1052 (2001), including the attendant factual determinations made in connection with that analysis. ALJD, P. 11, lines 8-19.

37. The ALJ's conclusion that Mr. Aho did not inconsistently handle job applications at Alliance. ALJD, P. 11, lines 21-29.
38. The ALJ's failure to draw an adverse inference against the Employer for failing to call Mr. Skluzacek as a witness at the hearing. ALJD, P.11, lines 31-46; P. 12, lines 1-5; P. 12 n. 15, lines 48-51.
39. The ALJ's conclusion that "Hoffman's use of the abbreviation 'TI' in his application is not, contrary to the Charging Party's brief, a reference to service technician duties. It is simply an abbreviation for 'tenant improvements,' i.e., remodeling work." ALJD, P. 11 n.14, lines 49-51.
40. The ALJ's conclusion that:
- The facts here mandate a clear finding that Respondent was not hiring journeymen sprinkler fitters in July or August. As *FES* requires there to be a job opening, and there was not, it follows that no Section 8(a)(3) and (1) refusal to hire violation occurred here. I shall recommend that this portion of the complaint be dismissed. ALJD, P. 12, lines 5-8.
41. The ALJ's conclusion that the "facial logic" of the Board's decision in *FES*, 331 NLRB 9 (2000), was "unavailing," and that he was therefore obligated to "look at all of the surrounding circumstances relating to Hoffman's application to determine if he was faced with an unlawful policy which would have denied him employment had there been a job." ALJD, P. 13, lines 25-28.
42. The ALJ's conclusion that, although Respondent "has engaged in a significant unfair labor practice..." by maintaining a policy requiring yellow dog contracts renouncing any affiliation with Local 669, "that the policy did not result in the refusal to hire the alleged discriminatee, Aaron Hoffman, I do not find that Hoffman is entitled to any remedy at this stage." ALJD, P. 14, lines 9-16.

43. The ALJ's limitation of the remedy in this case for the yellow dog contract violation to March of 2009, rather than extending the remedy back to October of 2008, the first date in the record on which the Employer required one of its employees to sign such an illegal agreement. ALJD, P.14, line 17.
44. The ALJ's conclusion of law that "[t]here is insufficient credible evidence to find Respondent committed any other unfair labor practices alleged in the complaint." ALJD, P. 15, lines 1-2.
45. The ALJ's failure to include in his conclusions of law and recommended order that Respondent violated Sections 8(a)(1) and (3) of the Act by refusing to hire Mr. Hoffman, and by illegally interrogating and threatening him about his affiliation with the Charging Party. ALJD, P. 14-16.
46. The ALJ's failure to expressly include in his recommended order a remedy against the Employer for its unlawful refusal to consider Mr. Hoffman for employment at Alliance. ALJD, P. 15-16.
47. The ALJ's recommended notice posting set forth in the Appendix to the ALJD insofar as it does not contain a remedy for the unlawful interrogation and threats that Mr. Aho made to Mr. Hoffman and to the extent that it does not contain a remedy for the illegal refusal to hire Mr. Hoffman. Appendix, p. 1.

Date: September 17, 2010

Respectfully submitted,

/s/ Jason J. Valtos

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Certificate of Service

I hereby certify that on September 17, 2010, I electronically filed Local 669's Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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