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W. D. Manor Mechanical Contractors, Inc. and Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC. Cases 28–CA–22384, 28–CA–22394, 28–CA–22487, and 28–RC–6650

December 7, 2011

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On May 5, 2010, Administrative Law Judge John J. McCarrick issued the attached decision. The General Counsel filed exceptions and a supporting brief. Additionally, the Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's cross-exceptions, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,²

¹ The Respondent and the General Counsel have 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by: creating the impression that employees' union activities were under surveillance; threatening employees with unspecified reprisals for supporting the Union; threatening to close its facilities if employees supported the Union; threatening employees who support the Union by inviting them to quit; telling employees that it is futile to support the Union; directing employees to call the police if union supporters attempt to apply for jobs with the Respondent; and interrogating employees about their union activities and those of other employees. There are also no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by imposing more onerous working conditions on employees by restricting their breaktimes and relocating break areas, and by discharging Jarrod Retzlaff because of his union activities.

We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act when Supervisor Joshua Carrillo threatened to discharge employees who talked about the Union in late December 2008, as this finding would be cumulative of other threat-of-discharge violations found. We similarly find it unnecessary to pass on the judge's dismissal of the allegation that on December 15, 2008, Sheet Metal Foreman Scott Hartranft unlawfully threatened employees with discharge if they engaged in protected activity, as it would also be cumulative of other threat-of-discharge violations found.

We also adopt the judge's recommendation to set aside the election, relying on his findings of objectionable conduct that correspond to the unfair labor practice findings which we have adopted herein.

and to adopt the recommended Order³ as modified and set forth in full below.⁴

1. The consolidated complaint alleges, among other things, that the Respondent imposed more onerous working conditions on unit employees, in violation of Section 8(a)(3) and (1) of the Act, by increasing the prices of items for sale in the Respondent's vending machines. In his recitation of facts, the judge stated that around January 24, 2008, the Respondent prohibited employees from using the vending machines in the main office and, as a substitute, placed additional vending machines into the shop area where the unit employees worked, but with higher prices. The judge did not, however, make any findings concerning this allegation.⁵

The evidence presented in support of the allegation came from the testimony of unit employee Paul Brimie. Brimie testified that the prices of certain items in the new

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) on March 27, 2009 by promulgating a rule that employees were not allowed to organize, solicit for, or speak about the Union during company time, but only on break time and after hours, we do not rely on his finding that the rule was overly broad. We instead find that the Respondent's rule was discriminatory because it was promulgated to prohibit only discussion of or solicitation on behalf of the Union while the Respondent allowed work time discussion of other subjects and other forms of solicitation during work time, including solicitation for participation in "check pools," a form of gambling.

We also adopt the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by issuing a warning to employee Robert Jones on March 27, but do so on the basis that the warning was for union-related solicitation while, as referenced above, the record shows that the Respondent allowed the check pool solicitation to take place during work time.

² We shall amend the judge's conclusions of law to conform to the violations found.

³ We shall modify the judge's recommended remedy to include the standard remedial language for the violations found, and to be in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011), by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to conform to our findings herein and to include the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

We shall also modify the judge's Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁵ Although the judge did not reference this complaint allegation in his conclusions of law and recommended Order, his notice to employees provided that the Respondent will not "impose more onerous working conditions by . . . increasing the prices on vending machine items for sale for sheet metal employees because of their support for the Union." Because, as discussed below, the evidence does not establish this violation, we shall delete this provision from the notice.

The judge did find, however, that the Respondent violated Sec. 8(a)(3) when, in the process of making these changes, it restricted employee breaktimes and relocated their break area. There are no exceptions to this finding.

vending machines in the shop area were approximately 10–20 cents higher than the prices in the vending machines in the main office. Brimie subsequently added, however, that he had no direct knowledge of the change, but had learned of the disparity in prices by speaking to an employee who stocked the vending machines. Brimie further testified that, 2 days later, the employee told him that prices in the main office vending machines were adjusted to be the same as those in the shop area.

In defense, the Respondent presented the testimony of its shop foreman, Trevor Davies. Davies testified that there were never any price discrepancies between the vending machines in the main office and those in the shop area.

We find that the evidence fails to establish the violation alleged. First, Brimie's testimony was hearsay. "Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997) (quoting *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied 598 F.2d 1267 (2d Cir. 1979)). As there was no additional evidence to corroborate the asserted price discrepancy, Brimie's testimony is entitled to little weight. See generally *Northern States Beef*, 311 NLRB 1056, 1056 fn. 1 (1993).

Second, even considering Brimie's testimony in the light most favorable to the General Counsel, it would still not establish a violation.⁶ Brimie's testimony indicated that there was only a 10–20 cent price increase on certain vending machine items. Such a change is too insignificant to establish the imposition of an onerous working condition.⁷ Moreover, Brimie's testimony fails to show that the price change was retaliatory, as he indicated that the prices in the Respondent's other vending machines (not accessible to the unit employees) were raised to the same levels just 2 days later. Accordingly, as the record fails to show that the price changes constituted an onerous working condition imposed on employees in retaliation for their protected activity, we shall dismiss this complaint allegation.

2. We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging unit employees Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen. We thus agree with the

⁶ Thus, although the judge failed to make credibility resolutions regarding the arguably conflicting testimony of Brimie and Davies, we find that a remand is not necessary in these circumstances.

⁷ Cf. *Henry Vogt Machine Co.*, 251 NLRB 363 (1980), enf. denied 718 F.2d 802 (6th Cir. 1983) (employer violated Sec. 8(a)(3) and (1) by discontinuing subsidized lunches for its employees, in retaliation for their having voted for union representation).

judge that the General Counsel met his initial burden of showing, under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent's discharge of these employees was motivated by animus toward their protected activity. In particular, we emphasize that the record shows that the Respondent had ample knowledge of the Union's organizing activities, that the Respondent demonstrated its animus by its numerous violations of the Act, that the Respondent advanced unsupported and pretextual explanations for the discharges, and that the Respondent discharged these employees only 4 days after receiving notice of the Union's representation petition. In addition, the discharges occurred on the same day that the Respondent discharged employee Jarrod Retzlaff, a known union supporter.⁸ This evidence is more than sufficient to demonstrate that the Respondent knew or at least suspected that each of the discharged employees was involved with the Union, and that this involvement was a motivating factor in the Respondent's decision to discharge them. See *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004), enf. 156 Fed.Appx. 330 (D.C. Cir. 2005). We further agree with the judge, for the reasons stated in his decision, that the Respondent has failed to sustain its rebuttal burden, under *Wright Line*, of demonstrating that these employees would have been discharged in the absence of the Respondent's anti-union animus. Accordingly, the Respondent's discharge of these unit employees violated Section 8(a)(3) and (1) of the Act as alleged.⁹

AMENDED CONCLUSIONS OF LAW

1. The Respondent, W.D. Manor Mechanical Contractors, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

⁸ As noted in fn. 1 above, the Respondent does not except to the judge's finding that Retzlaff's discharge was unlawful.

⁹ In view of our adoption of the judge's findings that the discharges violated Sec. 8(a)(3), we find it unnecessary to pass on the judge's additional finding that these discharges also violated Sec. 8(a)(4), because the remedy would be essentially the same. We further find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(3) and (4) by subcontracting sheet metal fabrication work after March 16, 2009, in order to reduce available work and justify these discharges, as the finding of these additional violations would not materially affect the remedy.

Contrary to his colleagues, Member Pearce would adopt the judge's findings that these discharges violated Sec. 8(a)(4), as the record shows that the discharges were in retaliation for the filing of the representation petition. See *Concrete Form Walls, Inc.*, 346 NLRB 831, 831 (2006), enf. 225 Fed.Appx. 837 (11th Cir. 2007) (respondent violated Sec. 8(a)(3), (4), and (1) by discharging employees because they voted in a representation election). Further, for the reasons stated by the judge, Member Pearce would also find that the Respondent's subcontracting of the sheet metal work violated Sec. 8(a)(3) and (4) as alleged.

2. Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Promulgating overly broad no-solicitation rules prohibiting employees from speaking with union agents or with other employees about the Union during company time.

(b) Promulgating and enforcing a discriminatory rule prohibiting solicitation during working time.

(c) Creating the impression that employees' union activities were under surveillance.

(d) Threatening employees that they must notify the Respondent of the Union's presence on the Respondent's jobsites.

(e) Threatening employees with discharge for violating its overly broad no-solicitation rules.

(f) Threatening employees with discharge or other unspecified reprisals for supporting the Union.

(g) Threatening to close the Respondent's facilities if employees supported the Union.

(h) Threatening employees who support the Union by inviting them to quit.

(i) Telling employees that it is futile to support the Union.

(j) Directing employees to call the police if union supporters attempt to apply for jobs with the Respondent.

(k) Interrogating employees about their union and other protected concerted activities and asking employees to disclose the union activities of other employees.

4. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

(a) Disciplining and discharging Nathaniel Weimann for engaging in union and other protected concerted activity.

(b) Imposing more onerous working conditions on employees by restricting their breaktimes and relocating break areas.

(c) Refusing to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron because of their union and other protected concerted activity.

(d) Discharging Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen because of their union and other protected concerted activities.

(e) Issuing a written warning to Robert Jones for violating its discriminatory no-solicitation rule.

5. The remaining allegations of the amended consolidated complaint are dismissed.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent promulgated overly broad no-solicitation rules prohibiting employees from speaking with union agents or with other employees about the Union during company time, we shall order the Respondent to rescind these rules and notify its employees in writing that the rules are no longer in force.

Having found that the Respondent violated Section 8(a)(3) and (1) by disciplining and discharging Nathaniel Weimann and by discharging Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen, we shall order the Respondent to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

In addition, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron, we shall order the Respondent to offer them reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Further, we shall order the Respondent to make these individuals whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall also be required to expunge from its files and records any and all references to the unlawful discipline, discharges, and unlawful refusals to hire, and to notify Jones, Weimann, Retzlaff, Brimie, Chavez, Duffy, Nielsen, Jameson, Latham, Rico, Osteros, and Lebron in writing that this has been done and that the unlawful conduct will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, W.D. Manor Mechanical Contractors, Inc.,

Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating overly broad no-solicitation rules prohibiting employees from speaking with union agents or with other employees about the Union during company time.

(b) Promulgating and enforcing a discriminatory rule prohibiting solicitation for the Union during working time.

(c) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(d) Threatening employees that they must notify the Respondent of the Union's presence on the Respondent's jobsites.

(e) Threatening employees with discharge for violating its overly broad no-solicitation rules.

(f) Threatening employees with discharge or other unspecified reprisals if they support the Union.

(g) Threatening to close the Respondent's facilities if employees support the Union.

(h) Threatening employees who support the Union by inviting them to quit.

(i) Threatening employees by telling them that it is futile to support the Union.

(j) Directing its employees to call the police if union supporters attempt to apply for jobs with the Respondent.

(k) Coercively interrogating employees about their union and other protected concerted activities or those of other employees.

(l) Imposing more onerous working conditions on employees because of their union and other protected concerted activities.

(m) Refusing to hire job applicants because of their union and other protected concerted activities.

(n) Discharging or otherwise discriminating against employees for supporting the Union, Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC, or any other labor organization.

(o) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the Union.

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

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

(a) Rescind the overly broad no-solicitation rules, issued on December 10 and 15, 2008 and March 6, 2009, prohibiting employees from speaking with union agents or with other employees about the Union during com-

pany time, and notify employees in writing that this has been done and that the rules are no longer in force.

(b) Rescind the discriminatory rule prohibiting solicitation for the Union during working time, and notify employees in writing that this has been done and that the rule is no longer in force.

(c) Within 14 days from the date of this Order, offer Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and/or discharges of Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, Terrance Nielsen, and Robert Jones, and within 3 days thereafter, notify each of them in writing that this has been done and that the discipline and/or discharges will not be used against them in any way.

(f) Within 14 days from the date of this Order, offer Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron reinstatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired on January 20, 2009.

(g) Make Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron, and within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful refusals to hire will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re-

cords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.¹¹ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 9, 2008.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 28-RC-6650 is severed and remanded to the Regional Director for Region 28 for the purpose of conducting a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending imme-

diately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been re-hired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 7, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT promulgate overly broad no-solicitation rules prohibiting you from speaking with union agents or with other employees about the Union during company time.

WE WILL NOT promulgate or enforce a discriminatory rule prohibiting solicitation for the Union during working time.

WE WILL NOT create the impression that we are engaged in surveillance of your union and other protected concerted activities.

WE WILL NOT threaten you that you must notify us of the Union's presence on our jobsites.

WE WILL NOT threaten you with discharge for violating our overly broad no-solicitation rules.

WE WILL NOT threaten you with discharge or other unspecified reprisals if you engage in union or other protected concerted activities.

WE WILL NOT threaten to close our facilities if you engage in union or other protected concerted activities.

WE WILL NOT threaten you by inviting you to quit if you engage in union or other protected concerted activities.

WE WILL NOT threaten you by telling you that it is futile to support the Union.

WE WILL NOT direct you to call the police if you see union supporters attempt to apply for jobs with us.

WE WILL NOT coercively interrogate you about your union and other protected concerted activities or those of other employees.

WE WILL NOT impose more onerous working conditions on you because of your union and other protected concerted activities.

WE WILL NOT refuse to hire job applicants because of their union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union, Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT issue disciplinary warnings to you because of your support for and activities on behalf of the Union.

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

WE WILL rescind the overly broad no-solicitation rules, issued on December 10 and 15, 2008 and March 6, 2009, prohibiting you from speaking with union agents or with other employees about the Union during company time, and WE WILL notify you in writing that this has been done and that the rules are no longer in force.

WE WILL, within 14 days from the date of the Board's Order, offer Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen whole for any loss of earnings, with interest, and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and/or discharges of Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, Terrance Nielsen, and Robert Jones, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline and/or discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron reinstatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired on January 20, 2009.

WE WILL make Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron whole for any

loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful refusals to hire will not be used against them in any way.

W. D. MANOR MECHANICAL CONTRACTORS,
INC.

Sandra L. Lyons, Esq., for the General Counsel.

Keith F. Overholt, Esq. and *Valerie J. Walker, Esq.* (*Jennings, Strauss & Salmon*), of Phoenix, Arizona, on behalf of the Respondent.

Pat Montroy, Esq., of Phoenix, Arizona, on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Phoenix, Arizona, on October 6–9 and November 16–18, 2009, upon an order consolidating cases and consolidated complaint (the complaint), as amended,¹ issued on May 29, 2009, and the order directing hearing on objections issued on May 29, 2009, by the Regional Director for Region 28.

The complaint alleges that W.D. Manor Mechanical Contractors, Inc. (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) by engaging in multiple acts of interrogation of employees about their union activities; by engaging in multiple acts of surveillance of employees' union and concerted activities; by promulgating overly broad and discriminatory rules; by repeatedly threatening employees with discharge and plant closure for engaging in union activities; by telling employees it would be futile to support the Union; by isolating employees who supported the Union; by telling employees to call 911 when job applicants who displayed union affiliation asked for job applications; by issuing written discipline to Robert Jones; by hiring temporary workers; by imposing more onerous working conditions; by delaying hiring qualified applicants; by disciplining and discharging Nathaniel Weimann, Robert Jones, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielson; by denying access to its application procedure to union supporters; by failing to hire applicants who supported the Union; and by outsourcing its fabrication work. Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

The Union filed a petition with the Board on March 11, 2009, in Case 28–RC–6650. Pursuant to a “Stipulated Election Agreement” on April 16, 2009, an election by secret ballot was

¹ At the hearing, counsel for the General Counsel made a motion to amend the complaint by changing the dates in pars. 6(b) and (c) to January 12, 2009, and by withdrawing pars. 5(a) and 6(d). There being no objection, the amendments were granted.

conducted. On April 21, 2009, the Petitioner filed 41 timely objections to the election. On May 29, 2009, after conducting an investigation, the Regional Director for Region 28 issued his order directing hearing on objections in Case 28–RC–6650. The objections generally track the allegations of the complaint.

On June 1, 2009, the Regional Director for Region 28 issued an order consolidating Cases 28–RC–6650, 28–CA–22384, 28–CA–22394, and 28–CA–22487 for hearing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the General Counsel and Respondent, I make the following findings of fact

I. JURISDICTION

Respondent admitted it is an Arizona corporation, with an office and place of business located in Phoenix, Arizona, where it is engaged in providing mechanical contractor production and services specializing in plumbing, process piping, process HVAC systems, natural and medical gas systems, sanitary, storm sewer, and fire lines. Annually, Respondent in the course of its business operations purchased and received at the Respondent's Phoenix facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that the Sheetmetal Workers International Association, Local No. 359, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Respondent's business

Respondent has been engaged in the heating, air-conditioning and plumbing business in the Phoenix metro area since 1945. In about 1999, Respondent's president, Brian DeWitt (DeWitt), and Executive Vice President Don Petty (Petty) bought Respondent. DeWitt operates the plumbing side of the business and Petty the heating and air-conditioning side. Respondent's heating and air-conditioning business requires the use of fabricated sheet metal ducts and fittings which are made at Respondent's sheet metal shop located at its Phoenix facility. Respondent's hierarchy in the heating and air-conditioning part of the business runs from Petty to Sheet Metal Superintendent Shawn Bowser (Bowser). Bowser is responsible for both the sheet metal fabrication shop (the shop) and Respondent's field operations. The shop is operated by Sheet Metal Shop Foreman Trevor Davies (Davies). Sheet Metal Shop Leadman Joshua Carrillo (Carrillo) reports to Davies. Respondent employs sheet metal fabricating employees in its shop who make ducts and fittings which are installed on Respondent's jobsites in the field by Respondent's other sheet metal employees. In the field, two job superintendants report to Bowser. Below the job superin-

tendants are project managers. Eight foremen report to the project managers.

During the period November to December 2008, Respondent was working on several jobs that involved installation of heating and air-conditioning systems. The jobs included the Musical Instrument Museum (MIM), the Banner Ironwood Medical Center (BIMC), Mayo Hospital, General Dynamics, and several ongoing service projects. The MIM jobsite was new construction for a two-story museum to display musical instruments. The BIMC jobsite involves new construction of a large hospital.

2. The union organizing

In January 2008, the Union began a campaign to organize Respondent's sheet metal employees in the shop and in the field. Pat Montroy (Montroy), the Union's organizer, began contacting Respondent's sheet metal employees in January 2008 and set up a meeting for Respondent's sheet metal employees. Montroy contacted Wes Bowser, one of Respondent's foremen at its General Dynamics jobsite. In February 2008, Montroy met with Respondent's president, Brian DeWitt, at Respondent's Phoenix facility and told DeWitt that the Union wanted Respondent to sign a contract covering its sheet metal employees. DeWitt deferred the matter to Executive Vice President Don Petty, who ran the heating and air-conditioning part of the business. In February, Montroy called Petty several times and left a message that he wanted to talk about a collective-bargaining agreement. When Petty did not return his calls, Montroy sent Petty a letter at the end of February 2008. At this time, the Union decided to stop its organizing efforts at Respondent. In November 2008, the Union resumed its organizing efforts when one of Respondent's sheet metal employees came to the Union expressing interest in the Union. In November and December 2008, Montroy went to Respondent's MIM, BIMC, and Mayo Hospital jobsites to speak to employees during their breaks in the jobsite parking lots. Montroy also spoke to employees by phone and met them after work and solicited authorization cards. Montroy called Respondent's sheet metal shop leadman, Joshua Carrillo, and met him at the union hall on November 26, 2008. They discussed the benefits of organizing the Union at Respondent and Montroy gave Carrillo a packet of union information to give to Respondent's sheet metal employees.

On December 13, 2008, Montroy went to Respondent's sheet metal fabrication shop at 6 a.m. with a box of doughnuts for the employees. When Carrillo learned of Montroy's presence, he told Montroy he was not supposed to be there. Montroy left and returned to the shop at 8 a.m. while the sheet metal employees were on a break in Respondent's parking lot. Montroy spoke to the employees about the Union for about 10 minutes and then left.

The organizing culminated in the Union filing a petition with the Board on March 13, 2009, in Case 28-RC-6650 seeking to represent a bargaining unit of Respondent's sheet metal employees.

3. The events at the MIM jobsite

Respondent's sheet metal employee Robert Jones (Jones) has worked at various jobsites for Respondent since January 2005.

Jones began work at the MIM jobsite installing ductwork in November 2008. Jones had been a member of the Union for 12 years from 1986 until 1998 and rejoined the Union in April 2009. Respondent's sheet metal foreman on the MIM jobsite, Scott Hartranft (Hartranft), was Jones' supervisor.

On December 8, 2008, Jones spoke with Montroy at lunch off the MIM jobsite and signed a union authorization card.

On December 9, 2008, Hartranft was speaking to Respondent's sheet metal workers near their cars. Hartranft then came to Jones' car where Jones was eating lunch and asked Jones if he had seen or spoken to any union representatives.² Jones said he had not.

On December 10, 2008, Hartranft spoke to a group of Respondent's sheet metal employees after work near the box where tools and materials were stored. Hartranft told the employees that if Montroy happened to come on a jobsite, the employees were not to speak to him and were to notify Hartranft immediately of Montroy's presence on the jobsite. Hartranft said the employees were not allowed to speak to Montroy about the Union on company time and that if employees were caught speaking to him they would probably be fired.

On December 15, 2008, at a morning meeting on the MIM jobsite, Hartranft told about four of Respondent's sheet metal employees that if Montroy showed up at the jobsite they could not speak to him. Hartranft told the employees that they could talk to Montroy or about the Union only on their 30-minute lunchbreak and not on their 15-minute breaks as that was company time. Hartranft also said that Respondent's sheet metal superintendent, Shawn Bowser, said Respondent would close the doors if they went Union.³

In January 2009, Jones spoke with his coworkers about the Union during breaks and also while working. From January to March 2009 Jones carpooled to and from work with Respondent's supervisor, Tom Turner. During the time they shared in the car, Jones told Turner that he supported the Union.

In early March 2009, at the MIM jobsite, Respondent's superintendent, Mike Longley (Longley), addressed Respondent's sheet metal employees. Longley read them a letter⁴ from Plumbers Local 469 Business Manager Phil McNally. The letter, addressed to Local 469 members said in part:

Please be advised the consequences if, while on the clock, you fail to work or otherwise engage in efforts to support the organizing effort you will be subject to discipline, up to and including discharge.

Longley also told the sheet metal employees that they were not allowed to discuss organizing during company hours but only on employees' lunch hour or on employees time or after hours. Longley added that Respondent's sheet metal employees were not permitted to talk to the plumbers about organizing the Union. Longley said if a plumber walked up and talked to them

² Hartranft denied interrogating Jones about the Union. I credit Jones whose testimony was detailed and given without animosity toward Respondent. Hartranft's testimony was vague and too tailored to the interests of Respondent.

³ Hartranft denied making these statements. For the reasons cited above, I credit Jones.

⁴ GC Exh. 19.

about the Union, they were to report it to Longley or Hartranft and that there would be disciplinary action taken if the Union was discussed on company time.

4. The events at the BIMC jobsite

Jones was transferred to the BIMC jobsite on March 19, 2009. When Jones reported to the BIMC jobsite he was wearing an orange T-shirt with union logo. During his first 4 days on the BIMC job, Jones gave union stickers to employees and talked to employees about supporting the Union both during work and breaktime.

On March 27, 2009, Jones, wearing his orange union T-shirt and hardhat with a union sticker affixed, asked employees if they wanted union stickers to put on their hardhats. Respondent's BIMC sheet metal foreman, Harry Dempsey (Dempsey), observed Jones talking to fellow employees about the Union. Dempsey called Bowser and told him Jones had been talking about the Union. Soon thereafter Bowser and Brian Van Kuren (Van Kuren), Respondent's sheet metal superintendent at the BIMC jobsite, approached Jones. Bowser told Jones that he was not allowed to organize, solicit for, or speak about the Union during company time, only on breaktime and after hours. Jones went back to work and talked about the Union with the sheet metal employee with whom he was working. Later in the day, Dempsey saw Jones give a union T-shirt to a fellow employee. Dempsey again called Bowser and told him what he had seen. Shortly thereafter, Bowser approached Jones with a written warning⁵ for soliciting for the Union. Respondent does not prohibit its sheet metal employees from speaking with each other during working time about a variety of nonwork-related subjects. Dempsey admitted that if he hears sheet metal workers talking too much on the job he merely admonishes them to get back to work. Respondent permitted "check pools" at the BIMC jobsite. A "check pool" is a form of gambling in which Respondent's employees contributed money to a pool while they were working. When the employees receive their paychecks they check the check numbers to see if they have a winning poker hand and this determines who wins the pool of money that has been collected. Respondent's foreman, Turner, has posted flyers for charity motorcycle runs for his motorcycle club on the Conex, a box holding tools and materials, at the MIM jobsite. These flyers solicited employees to come to a picnic and give money to a charity. Longley solicited employees to bring food for a food drive while employees were in safety meetings. Finally, Respondent has permitted union stickers from the Plumber's Union to be put on gang boxes as well as stickers of cars.

5. The events at the shop

a. The supervisory status of Sheet Metal Shop Leadman Joshua Carrillo

Carrillo reported to Sheet Metal Shop Foreman Davies, who Respondent has admitted is a supervisor within the meaning of the Act. 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

Davies as to which employees to hire. Carrillo's recommendations were usually followed. Shop employee Jarrod Retzlaff (Retzlaff) was interviewed by Carrillo over the phone in August 2008 and told he was hired. Shop employee Pedro Chavez (Chavez) was hired by Carrillo to work in the shop in December 2008. Employee Terrence Nielsen (Nielsen) interviewed solely with Carrillo and Carrillo hired him in October 2008. Carrillo issued discipline to employees during the period December 13, 2008, to January 10, 2009.⁶ During the period October to December 7, 2008, while Davies was on medical leave, Carrillo filled Davies' job.

b. Carrillo's conduct

On a December 13, 2008, Union Agent Montroy went to Respondent's fabrication shop during a lunchbreak. The following Monday, Carrillo told the shop employees that he knew Montroy had been to the shop on Saturday. Carrillo said the employees should not expect to go Union, that Respondent would never go Union and if the employees wanted a union job to pack your shit right now and go down to the hall because it was never going to happen. Carrillo added he knew there were cards that had been floating around and anybody caught signing the card would be gone. Carrillo said Respondent would close the doors on the Company before they went Union and the employees would all be out of work. Pedro Chavez (Chavez) said Carrillo told a group of shop employees "he didn't want nobody signing any—talking to the sheet—the Union guys."⁷ No other shop employee who was present at this meeting testified that Carrillo made this statement. Moreover, it appears from the context of Chavez' testimony that he was confused about whether Carrillo was talking about signing union cards or prohibiting talking to union agents. I do not credit Chavez' testimony.

Dennis Kupiec (Kupiec) is a leadman in Respondent's shop and has been employed by Respondent from September 2006 to the present. Kupiec testified that on December 15, 2008, "There was something said about (the) union" by Carrillo. "He said that if you guys wanted to go union, that's on you, but as of right now, we have to continue working on our jobs." Kupiec could recall only this much of what Carrillo said even though he acknowledged Carrillo spoke for about 10 minutes. When I asked Kupiec if Carrillo said anything else, he responded, "Well, I'm just speculating. I don't remember exactly everything that was said." I conclude that Kupiec was indeed speculating and I give no weight to his testimony.

Gregory Louis (Louis) has been employed in Respondent's shop since about June 2008. Louis testified that on December 15, 2008, Carrillo told employees:

If you want to go Union, no hard feelings, just let him know so he can have someone replace us—replace them or whatever. Its something like that, something towards if you wanted to go Union, you're willing to go Union, just you can go ahead, and go just let him know if he—do he has to replace you or something like that.⁸

⁵ GC Exh. 20.

⁶ GC Exhs. 21–24.

⁷ Tr. 496, LL. 22–23.

⁸ Tr. 1118, LL. 20–25.

Louis added:

It's been a year so it's hard to remember. Basically if you wanted to go Union you the right to, willing to do—to go down to the Union if you wanted to. Just basically let him know so he can replace you so, you know, stuff like that, you know. It's hard to explain.⁹

Clearly, Louis memory was lacking concerning the details of the employee meeting Carrillo addressed on December 15, 2008. I give no weight to his testimony.

Later, on December 15, 2008, Carrillo had a conversation with shop employee Paul Bremie (Bremie) while loading a truck. Bremie asked Carrillo why Respondent would not go Union. Carrillo replied it was because of an argument the owners had with Local 359 and that it was not going to happen; that Respondent would close down before they went Union. From this point until March 16, 2009, Bremie observed Carrillo monitoring employees' conversations in the shop area.

A few weeks after shop employee Nathan Weimann (Weimann) was hired in December 2008, Carrillo asked if Bremie was having another union meeting. Thereafter, Carrillo asked Weimann if he was having a union meeting each time he saw Weimann speaking with another shop employee.

About a week or two after Carrillo's December 15, 2008 shop employee meeting, Carrillo held a meeting of shop employees and said the Company doesn't want to go Union. While pointing his finger out the door, Carrillo said, "If employees want to pursue the Union, go ahead and go, there was no ill will."

In December 2008, a short time after the December 15 shop meeting, Carrillo again met with shop employees and told them:

He had said—he made he comment to us that if any of us were interested in joining the sheet metal Union that he did—that neither him nor WD Manor had anything against us, but to let them know so that we could get our final paychecks and go our separate ways because WD Manor was not a Union shop and never will be. He had made the comment that WD Manor will shut the shop's doors before they ever became a Union sheet metal shop.¹⁰

On about January 20, 2008, a number of union supporters went to Respondent's facility to apply for jobs. The following day, Carrillo told the shop employees that their break location had been changed and that they could not take breaks outside the door to the public parking area but only outside in the work area that was segregated from public access. Three days later, Carrillo told employees they could not leave the shop through the main office but only through the doors that led to the parking lot which Carrillo had to unlock. This policy made it impossible for employees to use the break room in the main office which had been accessible prior to this time. The shop employees used vending machines in the main office break room. Later, vending machines were put into the shop for employee use with higher prices for vending items.

A few days after January 20, 2009, the union agents drove vehicles past Respondent's facility during breaktime pulling prounion signs and honking their horns. Shop employees were able to see the union signs through the rollup door that opened to the public parking area. Later that day, Carrillo told employees that they could no longer take breaks by that door.

Respondent's facility is located in a part of Phoenix that is not particularly safe. There have been instances of thefts in Respondent's facility and security has been an issue since at least 2005.¹¹ In November 2008, Respondent issued a memo¹² instructing employees concerning its policy regarding unauthorized visitors to its facility. The memo noted that there had been instances of unauthorized persons in its facility. On January 27, 2009, Respondent conducted a meeting concerning security issues at its facility. The memo¹³ of the meeting discussed creation of a new break area in the shop, as well as monitoring of the north rollup door in the shop.

6. The events at the front office

a. The applications

On January 20, 2009, seven union representatives and union members went to Respondent's facility to apply for jobs as sheet metal workers. The seven included Montroy, Donald Latham (Latham), a business agent for the Union, Mahelio Rico (Rico), an organizer for the Union, Marco Molina (Molina), a business representative for the Union, and Lance Jameson (Jameson), James Osteros (Osteros), and Fernando Lebron (Lebron), members of the Union. All seven had been given permission by the Union to apply for jobs and work for Respondent. All were available to work for Respondent and all were qualified to work as sheet metal workers. Montroy, Rico, Molina, Osteros, and Lebron all wore caps, T-shirts, or jackets that contained easily readable union logo.

Latham and Jameson were the first to arrive at Respondent's facility on January 20, 2009. They wore no clothing items that identified them as union supporters. Admission to Respondent's office is accomplished by means of a remotely controlled clear glass door operated by Respondent's receptionist, Ruth Patterson (Patterson). A visitor must press a buzzer that notifies Patterson of a visitor's presence. A speaker system also operated by Patterson allows a conversation between Patterson and the visitor. Latham pressed the buzzer to gain entrance and Patterson asked if she could help him. Latham said he was there to fill out an application. Patterson admitted Latham and Jameson and gave them applications which they proceeded to fill out.

A few minutes later, Montroy, Rico, Molina, Osteros, and Lebron arrived at Respondent's office and walked to the front door. Montroy pressed the buzzer and Patterson asked if she could help him. Montroy said they were there to fill out applications for sheet metal jobs. Patterson said Respondent was not hiring. Montroy said he saw two people filling out applications and Patterson said that they had been invited in. Montroy said he did not think the two were invited in and that they wanted to

⁹ Tr. 1119, LL. 10–15.

¹⁰ Tr. 639, LL. 17–24.

¹¹ R. Exh. 2.

¹² GC Exh. 13.

¹³ GC Exh. 14.

fill out applications. Patterson said no. Montroy asked if she was denying them applications and Patterson made no reply. Montroy said we are sheet metal workers and will give 8 hours work for 8 hours pay. Patterson said Respondent was not hiring. Montroy asked if she was discriminating against them because of their union affiliation and Patterson made no reply. Montroy again asked for applications and Patterson repeated Respondent was not hiring. Montroy once again asked if she was discriminating because they were union members.

When Patterson made no reply, Montroy decided to leave. Just as the applicants were leaving, Montroy observed that about 10 men appeared inside Respondent's front office including Shawn Bowser and Brian DeWitt. DeWitt came outside and asked if he could help. Montroy said they were there to fill out applications for employment and that Patterson was denying them applications. DeWitt went back into the office and returned with applications. Montroy asked if they could go into the office and fill out the applications and DeWitt replied, while stepping toward Montroy, "Do you need to?" The five union supporters filled out applications but Montroy and Molina did not submit the applications because they felt intimidated. The other five completed applications and gave them to Patterson. At no time have the five employees who submitted applications been offered employment with Respondent.

While the five job applicants waited outside the office, DeWitt went into the office and in the presence of both job applicants Latham and Jameson 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 the guys away for a couple of hours. Take them to jail."¹⁴

A few moments later, Bowser approached Latham, one of the two applicants still inside the office filling out applications, and asked if he was Don. Latham replied he was. Bowser walked away for a few minutes and later returned and asked Latham, "Hey, you're with the Union, right?" and Latham responded that he was. Bowser also asked Jameson, the other applicant in the office, "[I]f I was part of Local 359." Jameson replied that he was not.

Patterson testified that Montroy yelled at her, harassed, and intimidated her. However, a review of Montroy's recording¹⁵ made at the time he was present at Respondent's facility on January 20, 2009, clearly establishes that at no time did he or any other job applicant yell, intimidate, or harass Patterson.

b. Patterson's duties

Patterson has been Respondent's front desk receptionist for 10 years. Her duties include answering the phone, typing, and directing guests and visitors who come into Respondent's main office.

Patterson keeps herself informed if Respondent is hiring by asking Bowser, who is responsible for Respondent's sheet metal manpower needs. She requires this information to inform job applicants if Respondent is hiring. While Patterson testified that Respondent had stopped hiring sheet metal employees in late 2008 and early January 2009, the record reflects 29 sheet

metal employees were hired from about January 19 to the end of March 2009 timeframe.¹⁶

Patterson told job applicants who called the office to come down to the office and fill out a job application. Patterson also informed job applicants whether Respondent was hiring. Patterson usually told applicants at Respondent's office if there were no openings but would give the applicant a job application form if the applicant wanted one. The applicant was always allowed to fill out the application inside the office. After the job applicant filled out the application, Patterson will make sure the applicant has signed the application. Patterson put it in the in-box for the appropriate hiring official. Bowser got all applications for sheet metal jobs.

7. Respondent's hiring practice

Bowser is responsible for hiring Respondent's sheet metal employees in the field. Bowser maintains a list of sheet metal applicants for 5 years. In making hiring decisions, Bowser relies on referrals, an applicant's experience, qualifications, certifications, loyalty to Respondent, and training. Because jobs have a budget for labor costs some sheet metal employees are hired at a varying range of hourly wages and experience. Bowser said he keeps a favorites list of applicants as well as a phone list of applicants.

Despite Bowser's testimony to the contrary, Respondent was hiring sheet metal employees at the time the seven union applicants came to Respondent's facility on January 20, 2009. Thus, from January 20 to 30, 2009, Respondent hired 19 sheet metal employees. It appears that after January 20, 2009, Respondent hired 28 sheet metal employees¹⁷ in addition to temporary labor. While Bowser said a sheet metal license was a prerequisite for an applicant to be hired, many of those hired by Respondent in January 2009 did not have such licenses.¹⁸ Moreover, while Bowser said completing an applications and providing additional information concerning their qualifications was an important factor in the hiring process, many of those hired after January 20, 2009, did not complete their applications or provide additional qualifications.¹⁹ In addition, in January 2009 Respondent hired two sheet metal employees who reported on their applications that they had been convicted of felonies.²⁰

The record establishes that the seven union applicants who applied for sheet metal jobs at Respondent's facility on January 20, 2009, were qualified sheet metal workers.

8. The Nathan Weimann termination

Weimann was employed by Respondent in its fabrication shop as a sheet metal worker from December 17, 2008, until January 12, 2009. Weimann replied to a newspaper ad Respondent had placed for sheet metal workers. On about December 10, 2008, Weimann was interviewed by both Carrillo and Shop Foreman Trevor Davies. Weimann wore a union shirt to the interview. Carrillo asked the questions and asked

¹⁶ GC Exh. 46.

¹⁷ GC Exhs. 39, 40, and 46.

¹⁸ GC Exhs. 39 and 40.

¹⁹ GC Exhs. 35, 37, 60, 66, and 69.

²⁰ GC Exhs. 35 and 66.

¹⁴ Tr. 707, LL. 15-18.

¹⁵ GC Exhs. 81 and 82.

Weimann if he was in the Union. Weimann said he had been a member for 5 years. After the interview, Carrillo told Weimann he would call him that afternoon. When Carrillo did not call, Weimann called Carrillo the next day and left a message. A week later, Carrillo offered Weimann a job in the shop. After he was hired, Weimann spoke to shop employees about the Union in the work area, including Leadman Dennis Kupiec and Davies' son Jeremy. A few weeks after he was hired, after Weimann had a conversation with another employee, Carrillo came up to Weimann asked Weimann if he was having another union meeting. Carrillo said this to Weimann each time he saw Weimann speaking with another shop employee. Weimann signed an authorization card in December 2008.

On January 12, 2009, Weimann and shop employee Jessie Wilson (Wilson) were assembling a large sheet metal fitting consisting of several interlocking parts that had been made by shop employee Jarrod Retzlaff (Retzlaff). Initially, Weimann and Wilson had difficulty assembling the fitting and Carrillo yelled at them for not working fast enough. Weimann told Carrillo the fitting could be fixed and Weimann completed the fitting. When Weimann went to ship out the fitting, it was discovered that Retzlaff had made the fitting parts in the wrong size. Leadman Kupiec told Carrillo the fitting was the wrong size, that it was not Weimann's fault and that the fitting could be fixed. Later that day, Carrillo called a shop employee meeting and yelled at the employees saying they were all incompetent. Carrillo threw down his clipboard and told Weimann and Wilson to "pack your shit and get out."²¹ Weimann got his tools and went outside the shop. Later, Weimann spoke with Carrillo and asked what the problem was. Carrillo replied that Weimann could not complete the work correctly. Weimann said, "[S]hit happens." Carrillo yelled at Weimann, "Oh, shit happens. Is that your attitude towards life? If that's your attitude I don't need people in here like you stirring up trouble." Weimann said, "What are you talking about?" Carrillo told him, "You know exactly what I'm talking about. All the shit you been in here talking." When Weimann said Carrillo couldn't freak out on the employees for a simple mistake, Carrillo replied again, "I don't need people like your kind in here stirring up trouble." Weimann threw up his arms and Carrillo told him, "You need to pack your shit and get the fuck out right now."²²

According to shop employee Louis, Weimann told Carrillo, "I'm grabbing my tools, I quit."²³ Louis admitted he was 20 feet from Weimann and could not hear what was being said. Louis said that Weimann then came by where he and other employees were standing and said, "[H]e quit and said he'd see us later."²⁴ Louis later testified, in response to a question if he

²¹ Carrillo admitted that he told both Weimann and Wilson to get their tools and bring them to his office.

²² Carrillo testified he could not recall exactly what was said during these conversations with Weimann. While Carrillo's version of these conversations varied somewhat from Weimann's, Carrillo did not deny the substance of Weimann's testimony. Given Carrillo's lack of recollection and the failure to deny Weimann's testimony, I will credit Weimann's testimony.

²³ Tr. 1127, LL. 22-23.

²⁴ Tr. 1127, L. 25.

heard Weimann say he quit, testified, "Yeah, I heard him say it. Well he came by me—he told everybody bye. So, you know, I quit."²⁵ Based upon this confusing testimony as well as my earlier credibility assessment of Louis, it is clear that Louis' recollection of what Weimann said is poor and I will give no credit to his testimony.

Weimann got his tools and left. Carrillo issued Weimann a written warning²⁶ on January 12, 2009, for unsatisfactory work quality and fired him that same day for poor work performance.²⁷ According to Weimann, in the past he and other employees had made similar mistakes with fittings²⁸ at least once a week without receiving a warning.

9. The termination of Retzlaff, Brimie, Chavez, Duffy, and Neilsen

Retzlaff, Brimie, Pedro Chavez (Chavez), Charles Duffy (Duffy), and Terrance Nielsen (Nielsen) were all employed by Respondent as sheet metal workers in its shop.

Retzlaff was hired by Respondent in the shop in January 2004, fired in July 2007, and rehired by Carrillo in August 2008. Retzlaff discussed the Union with other shop employees and signed an authorization card. Retzlaff also talked to shop employee Greg Lewis about the Union and Retzlaff found that Lewis gave Carrillo all the information Retzlaff had given him. On February 23, 2009, when the Union learned Carrillo found out about Retzlaff's union activity, the Union sent Respondent a letter²⁹ identifying Retzlaff as a member of the union organizing campaign. Retzlaff talked to Montroy several times in the parking lot of a business adjacent to Respondent's facility and Retzlaff wore a union T-shirt to work in the presence of Carrillo and Davies.

Chavez was hired by Carrillo to work in Respondent's the shop in December 2008. Chavez signed an authorization card and became a member of the Union.

Brimie was hired by Respondent to work as a plumber in October 2008 and was transferred to the shop by Carrillo in December 2008. In February 2009, Carrillo told Brimie that there would be layoffs in the shop and sent Brimie to work in the field as a sheet metal worker installing ductwork. Two weeks later, Carrillo told Brimie to return to the shop since shop work was picking up. Brimie was a union member and spoke to other shop employees about the Union. Brimie also had union stickers on his toolbox at work and had a union sticker in the window of his truck that was parked on the street near Respondent's facility.

Duffy was hired by Respondent on November 16, 2008, to work in the shop. Duffy was interviewed by both Carrillo and Davies but Carrillo asked all of the questions. Carrillo called Duffy to tell him he had been hired. Duffy spoke to other shop employees about the Union at work and became a member of the Union in March 2009. Duffy also signed an authorization card. In March 2009, Duffy was seated with Brimie in

²⁵ Tr. 1128, LL. 9-13.

²⁶ GC Exh. 24.

²⁷ GC Exh. 25.

²⁸ Carrillo admitted that employees made mistakes with fittings that caused the metal to be discarded.

²⁹ GC Exh. 18.

Brimie's truck that had a visible union logo while Montroy was in a car parked near Bremies' truck. At this time, DeWitt came out of Respondent's facility and passed near Brimies' truck.

Nielsen was hired as a sheet metal apprentice in the shop by Carrillo in October 2008. Nielsen signed an authorization card in March 2009.

On March 16, 2009, Respondent fired all five employees citing a reduction in force³⁰ as the reason for the terminations.

10. The use of temporary labor

Respondent subcontracted for temporary labor in the field to perform sheet metal installation. Respondent used CLP Resources Inc. for temporary sheet metal workers at the MIM jobsite. Respondent signed a subcontractor authorization agreement with CLP Resources on April 4, 2009,³¹ yet began using CLP Resources for temporary sheet metal workers on March 22, 2009.³² From March 22 to April 12, 2009, Respondent used at least five CLP employees each week in the field.³³

During this same timeframe, Respondent utilized Allied Forces for temporary sheet metal workers at the BIMC jobsite. Invoices³⁴ from Allied reflect that Respondent paid Allied for temporary sheet metal labor during the March through May 2009 timeframe in the following amounts:

March 13, 2009	—	\$ 977.44
March 20, 2009	—	\$5,740.60
March 27, 2009	—	\$5,627.20
April 3, 2009	—	\$5,238.40
April 10, 2009	—	\$1,705.60
April 17, 2009	—	\$2,646.40
April 24, 2009	—	\$1,762.65
May 1, 2009	—	\$3,098.08
May 8, 2009	—	\$1,432.00

Contrary to Respondent's assertion in its brief that sheet metal employees did not transfer from the shop to the field, Petty indicated he did not know how often such transfers occurred.³⁵ Indeed, Carrillo transferred shop employee Brimie to the field. Further, Respondent uses both experienced and inexperienced sheet metal employees in the field.³⁶

11. Outsourcing fabrication work

Respondent was awarded a \$6-million subcontract to install heating and air-conditioning systems at the MIM in July 2007. The first construction drawings for air-conditioning systems were made in the summer of 2008. In the fall of 2008, Respondent began fabricating sheet metal for the MIM job. In November 2008, blueprints were prepared for ductwork to be fabricated and installed. However, it was not until January 2009 that Respondent had prepared its ductwork layouts to commence duct installation. In mid-January 2009, the MIM general

contractor wanted Respondent to complete its installation of ductwork by February 24, 2009.³⁷ However, this date was modified to March 31, 2009.³⁸ Petty testified that these new schedules were adhered to within "maybe a week here and there." However, the Omni purchase orders³⁹ indicate that ductwork was still being delivered as late as April 28, 2009.

Respondent was also awarded a \$10-million subcontract to install heating and air-conditioning systems at the BIMC in the summer of 2008. It was not until the last 3 months of 2008 that Respondent was able to start making duct drawings at BIMC. Respondent had completed the majority of the duct installation at BIMC by the end of March 2009, but Respondent did not complete its work at BIMC until the summer of 2009.

In about December 2008, Respondent made an estimate of the number of man hours necessary to fabricate ductwork for the MIM and BIMC jobs.⁴⁰ The estimate indicated that it would take 43 fabrication employees to create the ductwork for the two jobs. There was also ongoing fabrication work for Respondent's jobs at Mayo Hospital and General Dynamics during the January to March 2009 time period.

In January 2009, Respondent contracted with a duct making company named Omni Duct Systems (Omni) to fabricate duct for the MIM and BIMC jobs because Respondent's fabrication shop did not have the capacity to perform all the work required at Respondent's various jobs. As early as November 3, 2008, a memo⁴¹ from Respondent's executive vice president, Petty, reflects that Respondent's shop did not have the capacity to handle the duct requirements of both MIM and BIMC.

In a March 2, 2009 memo,⁴² Petty indicated that fabrication work for the BIMC had dropped significantly, that peak demand for labor at BIMC would be reached in late March 2009 with a reduction in work force by early April, that at MIM outsourcing of duct fabrication would continue due to scheduling requirements and that manpower needs at the MIM would remain static until May 2009. Respondent maintains that it continued to subcontract ductwork to Omni after the BIMC duct requirements had dropped significantly in March 2009 because Omni had a short turn around time for delivering duct. Invoices⁴³ to Omni reflect that there was a 2- to 10-day delay from the time Omni quoted a price to Respondent until the ducts were delivered. However, Petty explained that it took an additional 2 weeks from the time Respondent gave Omni the specifications for duct work until Omni provided the quote. Petty said Respondent needed 2 weeks lead time to fabricate sheet metal, about the same time Omni was given, and Respondent's fabrication shop could not have provided the sheet metal listed on Respondent's Exhibit 32 in the time frames listed there but did not explain why it could not. Petty admitted that Respondent's fabrication shop would not have the lag time waiting for a quote from Omni. Invoices reflect that ongoing sheet metal ductwork was being fabricated by Omni for the

³⁰ GC Exhs. 41–45.

³¹ GC Exh. 5.

³² GC Exh. 6.

³³ GC Exhs. 6–10.

³⁴ GC Exh. 11.

³⁵ Tr. 106, LL. 10–13.

³⁶ Tr. 105, LL. 7–22.

³⁷ R. Exh. 30.

³⁸ R. Exh. 31.

³⁹ R. Exh. 32.

⁴⁰ R. Exh. 29.

⁴¹ R. Exh. 21.

⁴² R. Exh. 25.

⁴³ R. Exh. 32.

MIM from March 16 to April 24, 2009, valued at \$191,819.⁴⁴ Omni fabricated ductwork for the BIMC job from March 25 to April 8, 2009, valued at \$2811.⁴⁵

B. The Analysis

For clarity of analysis I will discuss each allegation of the complaint in the order they appear in the complaint.

1. The 8(a)(1) allegations

The complaint allegations in paragraphs 5(a) through paragraph (k) accuse Respondent of engaging in conduct that violates Section 8(a)(1) of the Act. Respondent's alleged conduct includes interrogation, surveillance, threats to employees, overly broad and discriminatory no-solicitation rules, and statements of futility for engaging in protected activity.

a. The law

(1) Interrogation

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In *Westwood* the Board applied the totality of the circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.⁴⁶

The Board added:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.⁴⁷

(2) Surveillance

In *Promedica Health Systems*, 343 NLRB 1351, 1352 (2004), the Board reaffirmed long held Board law that an employer who creates the impression employees' protected/concerted activities are under surveillance violates Section 8(a)(1) of the Act.

The Board's test for determining if an employer has created an impression of surveillance is:

... whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance [citation omitted]. [*U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001).]

The Board has found that a supervisor's statement that "it's an open secret that you've joined the Union." *Daikichi Sushi*, 335 NLRB 622, 623 (2001); that she had "heard that there was a list circulating with 80 names," *Martech MDI*, 331 NLRB 487 fn. 4 (2000); that he had "heard" rumors about the employee's union activity; *Flex-steel Industries*, 311 NLRB 257 (1993); asking employee Barnes how the conversations went that he and other employees had had with union organizers on the roof at the Birney school earlier that day, *Fred'k Wallace & Son*, 331 NLRB 914 (2000); that "I know you are the one that is disbursing Union cards out." *U.S. Coachworks, Inc.*, 334 NLRB at 958, all created the impression employees' union activities were under surveillance in violation of Section 8(a)(1) of the Act.

(3) Threats

The Board's well-established test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). Employer conduct that violates Section 8(a)(1) of the Act includes threats to employees of discharge for engaging in protected activity [*NLRB v. Neuhoff Bros. Packers*, 375 F.2d 372 (5th Cir. 1967); *C. P. Associates, Inc.*, 336 NLRB 167 (2001); *Seton Co.*, 332 NLRB 979 (2000)], threats of plant closure in retaliation for engaging in union activity [*Mid-South Drywall Co.*, 339 NLRB 480 (2003); *Daikichi Sushi*, 335 NLRB at 623; *Crown Cork & Seal Co.*, 255 NLRB 14 (1981)], threats of unspecified reprisals for engaging in protected activity [*SKD Jonesville Division L.P.*, 340 NLRB 101 (2003)], statements that it is futile to organize [*Federated Logistics & Operations*, 340 NLRB 255 (2003); *Overnite Transportation Co.*, 296 NLRB 669 (1989)], directing employees to notify the employer of the union's presence on a jobsite [*Gold Shield Security & Investigations, Inc.* 306 NLRB 20, 22 (1992)], threats to exclude union agents from a jobsite [*Swardson Painting Co.*, 340 NLRB 179 (2003)], telling employees to disclose union activity of other employees [*Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003); *Tawas Industries*, 336 NLRB 318, 322 (2001)], threats to call police [*Labor Ready, Inc.*, 327 NLRB 1055, 1057-1058. (1999)], and telling employees to quit in retaliation for engaging in protected activity [*Equipment Trucking Co.*, 336 NLRB 277 (2001); *Eby-Brown Co. L.P.*, 328 NLRB 496 (1999)].

(4) Overly broad no-solicitation rules

For over 65 years the Supreme Court⁴⁸ and the Board⁴⁹ have recognized employee rights to solicit on behalf of a labor organization during nonwork time on an employer's premises. The Board has drawn a distinction between oral solicitation and

⁴⁴ GC Exh. 12, p. 1.

⁴⁵ Id. at 2.

⁴⁶ *Westwood*, supra at 939.

⁴⁷ Id. at 940.

⁴⁸ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁴⁹ *Peyton Packing Co.*, 49 NLRB 828 (1943).

distribution and has permitted limitation on distribution of literature during working time and in working places.⁵⁰ However, 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 lunchtimes. *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), enfd. mem. 261 F.3d 493 (3d Cir. 2001). A clarification of an ambiguous rule or a narrowed interpretation of an overly-broad 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, Inc.*, 333 NLRB 402, 403 (2001), citing *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

Counsel for the General Counsel cites *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003), and *Teledyne Advanced Materials*, 332 NLRB 539 (2000), for the proposition that an employer may not ban mere talking about the union. For three reasons, the General Counsel’s reliance on these cases is misplaced. First, the Board has held that an employer may forbid employees from talking about a union during work times. *Jensen Enterprises, Inc.*, supra at 878. Second, these cases involved discriminatory application of no talking rules. Third, both of these cases are pre *Register-Guard*, 351 NLRB 1110 (2007).

In *Register-Guard*, supra, a majority of Chairman Battista and Members Kirsanow and Schaumber with Members Liebman and Walsh dissenting reversed a long line of Board cases dealing with discriminatory enforcement of work rules. Citing two Seventh Circuit decisions⁵¹ the Board adopted a new standard for determining if an employer’s discriminatory enforcement of work rules violates Section 8(a)(1) of the Act. The Board held it would no longer be sufficient to show that an employer merely disparately enforced its rules but it must be shown that

[U]nlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present case and in future cases.”⁵²

In an attempt to define what constitutes similar activities the Board elaborated:

For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solici-

tations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non business-related use.⁵³

b. The complaint allegations

- (1) Complaint paragraph 5(a), the alleged December 2, 2008 Carrillo interrogation of employees about their union sentiments.

At the hearing I granted counsel for the General Counsel’s motion to amend to the complaint deleting allegation 5(a).

- (2) Complaint paragraph 5(b)(1), the alleged December 9, 2008 Hartranft surveillance.
- (3) Complaint paragraph 5(b)(2), the alleged December 9, 2008 Hartranft interrogation.

Counsel for the General Counsel contends that Respondent’s sheet metal foreman on the MIM jobsite, Scott Hartranft, both created the impression employees’ union activities were under surveillance and engaged in interrogation about employees’ union activities on December 9, 2008, when he talked to employees by their parked cars and when he came to Jones’ car and asked Jones if he had seen or spoken to any union representatives. Respondent counters that there can be no surveillance where the employees engage in open and public activity.

The employees Hartranft spoke to were in their cars on a public street. There is no evidence of what Hartranft said to other employees and I will not draw an inference that he said the same thing to the other employees that he said to Jones. Under such circumstances and considering Hartranft’s statement to Jones, I do not find that Jones would reasonably assume that his union activities had been placed under surveillance. I will dismiss complaint paragraph 5(b)(1).

On the other hand, it is clear that Hartranft’s statements to Jones constituted unlawful interrogation about his union activities as alleged in complaint paragraph 5(b)(2). *Westwood Healthcare Center*, 330 NLRB 935 (2000).

- (4) Complaint paragraph 5(b)(3), the alleged December 9, 2008 overly-broad rule prohibiting employees from speaking with union agents during nonworking hours.
- (5) Complaint paragraph 5(b)(4), the alleged December 9, 2008 Hartranft threat to employees to notify Respondent of the Union’s presence on the jobsite.
- (6) Complaint paragraph 5(b)(5), the alleged December 9, 2008 Hartranft threat to employees that union representatives would be excluded from the jobsite.

No evidence was adduced concerning this allegation and it will be dismissed.

- (7) Complaint paragraph 5(b)(6), the alleged December 9, 2008 overly-broad rule prohibiting employees from talking to union representatives on company time.
- (8) Complaint paragraph 5(c)(1), the alleged December 10, 2008 Hartranft reaffirmation of the overly-broad rule prohibiting employees from discussing the Union with other employees on company time.

⁵⁰ *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

⁵¹ 349 F.3d 968 (2003), and 49 F.3d 317 (1995).

⁵² 351 NLRB at 1118.

⁵³ *Id.* at 1118.

- (9) Complaint paragraph 5(c)(2), the alleged December 10, 2008 Hartranft threats of discharge.

The record is devoid of any violative conduct by Hartranft on December 9, 2008, other than the surveillance and interrogation discussed above. However, the evidence adduced reflects that on December 10, 2008, Hartranft engaged in the conduct set forth in complaint allegations 5(b)(3) through (6).⁵⁴

Counsel for the General Counsel takes the position that Hartranft's December 10, 2008 statements to employees that if Union Agent Montroy happened to come on a jobsite that the employees were not to speak to him and were to notify Hartranft immediately if he showed up on the jobsite and Hartranft's later reaffirmation that the employees were not allowed to speak to Montroy on company time and that if employees were caught speaking to him they would probably be fired violated Section 8(a)(1) of the Act by promulgating an overly-broad and discriminatory rules against speaking with the Union's representatives or with each other about the Union on company time; by threatening employees by requiring them to inform management of union activities; by threatening them that union agents would be discriminatorily excluded from the jobsite; and by threatening discharge if they spoke with union agents.

Respondent contends that Hartranft was simply enforcing the general contractor's requirements prohibiting unauthorized visitors on the jobsite. Respondent argues that no evidence was submitted in support of complaint paragraph 5(c)(2).

Hartranft's admonition to employees that they could not speak to Union Agent Montroy on the jobsite during company time clearly violated longstanding Board law that the limitation to "company time" ambiguously may confuse employees into believing that they cannot engage in union activity or solicitation from the time they come to work until the time they leave. Such a rule violates Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(b)(3), (6), and 5(c)(1). *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000).

Hartranft's direction that employees should tell him if union agents appeared on the jobsite likewise violated Section 8(a)(1) of the Act as it tended to prevent Montroy from speaking to employees and, thus, threatened, restrained, and coerced employees in the exercise of their Section 7 rights as alleged in complaint paragraph 5(b)(4). *Gold Shield Security & Investigations, Inc.* 306 NLRB 20, 22 (1992).

Finally, Hartranft's threat to enforce the overly broad no-solicitation rule by threat of discharge was designed to restrain employees in the exercise of their Section 7 rights to engage in union activity as alleged in complaint paragraph 5(c)(2). *C.P. Associates, Inc.*, 336 NLRB 167 (2001).

Respondent's defense that Hartranft was simply enforcing the general contractor's policy to exclude unauthorized visitors to the jobsite is without merit. There is no evidence that Montroy was an unauthorized visitor. Moreover, it was not established that Respondent or the general contractor had an exclu-

sionary property interest, justifying its exclusion of Montroy from the jobsite. *Swardson Painting Co.*, 340 NLRB 179 (2003).

- (10) Complaint Paragraph 5(d)(1) the alleged December 15, 2008 Carrillo threats of discharge.
- (11) Complaint Paragraph 5(d)(2) the alleged December 15, 2008 Carrillo impression of surveillance.
- (12) Complaint Paragraph 5(d)(3) the alleged December 15, 2008 Carrillo threat to employees who supported the Union.
- (13) Complaint Paragraph 5(d)(4) the alleged December 15, 2008 Carrillo threat to close the facility.
- (14) Complaint Paragraph 5(d)(5) the alleged December 15, 2008 Carrillo threat to close the sheetmetal side of the facility.
- (15) Complaint Paragraph 5(d)(6) the alleged December 15, 2008 overly-broad rule prohibiting employees from discussing the Union.
- (16) Complaint Paragraph 5(d)(7) the alleged December 15, 2008 Carrillo threat to employees to quit if they supported the Union.
- (17) Complaint Paragraph 5(d)(8) the alleged December 15, 2008 Carrillo statement that it would be futile to support the Union.

A finding that Carrillo's statements violated Section 8(a)(1) of the Act depends upon whether he is a supervisor within the meaning of the Act.

Carrillo reported to Sheet Metal Shop Foreman Davies, who Respondent admitted is a supervisor within the meaning of the Act. 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 Davies as to which employees to hire. Carrillo's recommendations were usually followed. Shop employee Jarrod Retzlaff was interviewed by Carrillo over the phone in August 2008 and told he was hired. Shop employee Pedro Chavez was hired by Carrillo to work in the shop in December 2008. Employee Terrence Nielsen interviewed solely with Carrillo and Carrillo hired him in October 2008. Carrillo issued discipline to employees during the period December 13, 2008, to January 10, 2009. During the period October to December 7, 2008, while Davies was on medical leave, Carrillo filled Davies' job.

Section 2(11) of the Act provides that a supervisor is:

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). One who can effectively to recommend the actions described in

⁵⁴ Since the matter was fully litigated, I will consider the conduct which occurred on December 10, 2008, as supporting the allegations contained in complaint pars. 5(b)(3) through (6). *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

Section 2(11) are supervisors. *Sun Refining Co.*, 301 NLRB 642, 649–650 (1991).

It is clear that during Davies' absence from work from October to December 7, 2008, Carrillo functioned as a statutory supervisor. However, the evidence also shows that when Davies was at work Carrillo effectively recommended hiring and discipline that Davies invariably followed. Thus, Carrillo is a supervisor within the meaning of the Act.

Counsel for the General Counsel contends that Carrillo's December 2008 statements that employees would need to "pack their shit" and leave, that they would no longer have jobs, that Respondent would close its doors, that employees would need to be replaced, and if employees' signed union cards, they would no longer have jobs, Respondent violated Section 8(a)(1) of the Act. Respondent contends that Carrillo's statements were not threatening.

Contrary to Respondent's contention, in the context of a union agent recently visiting Respondent's shop, Carrillo's threats that employees would be fired for engaging in union activity, that Respondent would close its doors before they went union, that employees should pack their shit and leave, and that employees would no longer have jobs reasonably interfered with the free exercise of employees' rights under the Act and violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(d)(1), (3), (4), (5), and (7). *C.P. Associates, Inc.*, supra; *Seton Co.*, 332 NLRB 979 (2000); *Mid-South Drywall Co.*, 339 NLRB 480 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001); *SKD Jonesville Division L.P.*, 340 NLRB 101 (2003); *Equipment Trucking Co.*, 336 NLRB 277 (2001); and *Eby-Brown Co. L.P.*, 328 NLRB 496 (1999).

Counsel for the General Counsel argues that Carrillo's statement that he was aware a union agent had been to the shop and that cards were being passed around violates Section 8(a)(1) of the Act by creating the impression employees' union activities were under surveillance.

Clearly, from Carrillo's statements the shop employees would reasonably assume that Respondent had placed their union activities under surveillance. *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001). This conduct violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(d)(2).

The only evidence adduced by counsel for the General Counsel to support the allegation in complaint paragraph 5(d)(6) was Pedro Chavez' testimony that Carrillo told a group of shop employees "he didn't want nobody signing any—talking to the sheet—the Union guys." As noted above, I have not credited Chavez. Thus, there is no credible evidence to support the allegations contained in complaint paragraph 5(d)(6) and I will dismiss this allegation.

Carrillo's statements that employees should not expect to go Union and if the employees wanted a union job to pack your shit right now and go down to the hall because it was never going to happen also violated Section 8(a)(1) of the Act by suggesting it would be futile to support the Union as alleged in complaint paragraph 5(d)(8). *Federated Logistics & Operations*, 340 NLRB 255 (2003).

(18) Complaint Paragraph 5(e)(1) the alleged December 18, 2008⁵⁵ Carrillo impression of surveillance.

Counsel for the General Counsel contends that Carrillo's observation of employee conversations in the shop area after December 15, 2008, and by asking shop employee Weimann in late December 2008 or early January 2009 if he was having another union meeting, created the impression employee's union activities were under surveillance.

Under the *U.S. Coachworks, Inc.*, supra, test, I find Carrillo's statements to Weimann created the impression his union activities were under surveillance as alleged in complaint paragraph 5(e)(1).

(19) Complaint Paragraph 5(e)(2) the alleged December 18, 2008 Carrillo isolation of employees who supported the Union.

No evidence was adduced to support this complaint allegation and it will be dismissed.

(20) Complaint Paragraph 5(f)(1) the alleged January 5, 2009⁵⁶ Hartranft overly-broad rule prohibiting employees from speaking with Union agents during non-working hours.

(21) Complaint Paragraph 5(f)(2) the alleged January 5, 2009 Hartranft threat that employees must tell Respondent if Union agents are at the jobsite.

There was no evidence to support this allegation and it will be dismissed.

(22) Complaint Paragraph 5(f)(3) the alleged January 5, 2009 Hartranft threat that Union agents would be excluded from the jobsite.

There was no evidence adduced to support this allegation and it will be dismissed.

(23) Complaint Paragraph 5(f)(4) the alleged January 5, 2009 Hartranft overly-broad rule prohibiting employees from speaking with Union agents on company time.

(24) Complaint Paragraph 5(f)(5) the alleged January 5, 2009 Hartranft threat to discharge employees who sign Union cards or speak to Union agents.

There was no evidence to establish this allegation and it will be dismissed.

(25) Complaint Paragraph 5(f)(6) the alleged January 5, 2009 Hartranft threat to replace employees who talk to Union agents on company time.

⁵⁵ Since the matter was fully litigated, I will consider the conduct which occurred in late December 2008 or early January 2009, support the allegations contained in complaint par. 5(e)(1). *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

⁵⁶ In her brief, counsel for the General Counsel moved to amend the allegations of complaint pars. 5(f)(1) through (8) to reflect that the events took place on December 15, 2008, as reflected in the record. Since the matter was fully litigated, and there being no opposition, I will grant the motion. *Hi-Tech Cable Corp.*, supra.

There was no evidence produced to support this allegation and it will be dismissed.

(26) Complaint Paragraph 5(f)(7) the alleged January 5, 2009 Hartranft threat to close the plant.

(27) Complaint Paragraph 5(f)(8) the alleged January 5, 2009 Hartranft threat of reprisals for employees who talk to Union agents on company time.

As previously found above on December 10, 2008, Hartranft unlawfully told Respondent's sheet metal employees that if Montroy came on a jobsite the employees were not to speak to him and were to notify Hartranft immediately. Hartranft said the employees were not allowed to speak to Montroy about the Union on company time and that if employees were caught speaking to him they would probably be fired.

Later on December 15, 2008, Hartranft again told about four of Respondent's sheet metal employees that if Montroy showed up at the jobsite they could not speak to him. Hartranft said that the employees could only talk to Montroy or about the Union was on their 30-minute lunchbreak and not on their 15-minute breaks as that was company time. Hartranft also said that Respondent's sheet metal superintendent, Shawn Bowser, said Respondent would close the doors if they went Union.

Counsel for the General Counsel argues that Hartranft's above statements somehow restated his December 10, 2008 threats to employees that if employees were caught speaking to Montroy they would probably be fired. This contention is not supported by the evidence. This is simply not what Hartranft said and no reasonable interpretation of his December 15 statements could encompass a threat of reprisals for employees who spoke with Montroy. Complaint paragraph 5(f)(8) will be dismissed.

On the other hand, Hartranft's statement that Sheet Metal Superintendent Bowser said Respondent would close the doors if they went Union is clearly a threat designed to interfere with employees' free exercise of their Section 7 rights and violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(f)(7). *Mid-South Drywall Co.*, 339 NLRB 480 (2003).

Further, Hartranft's limitation on employees speaking with Montroy at the jobsite or discussing the Union with fellow employees to their 30-minute lunchbreak but not on their 15-minute breaks was an overly broad limitation on employees' rights to engage in union activity as it unlawfully restricted employees' use of break time as alleged in complaint paragraphs 5(f)(1) and (4). *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000).

(28) Complaint Paragraph 5(g)(1) the alleged January 8, 2009⁵⁷ Carrillo interrogation.

⁵⁷ It appears from the record that the events alleged in complaint allegations 5(g)(1) through (4) occurred sometime in December 2008, a short time after Duffy was hired on December 15, 2008. Since the matter was fully litigated, I will consider the conduct which occurred in December 2008, supports the allegations contained in complaint pars. 5(g)(1) through (3). *Hi-Tech Cable Corp.*, supra.

(29) (29) Complaint Paragraph 5(g)(2) the alleged January 8, 2009 Carrillo informing employees it was futile to support the Union.

(30) Complaint Paragraph 5(g)(3) the alleged January 8, 2009 Carrillo threat to employees.

(31) Complaint Paragraph 5(g)(4) the alleged January 8, 2009 Carrillo threat to discharge employees who talk about the Union.

There was no evidence adduced to support this complaint allegation and it will be dismissed.

Counsel for the General Counsel contends that Carrillo's statements constitute unlawful interrogation, a statement that it is futile to support the Union, a threat of unspecified reprisal and a threat to discharge union supporters. Respondent contends Carrillo is not a supervisor and thus his statements cannot be attributed to Respondent.

Clearly, Carrillo's December 2008 statements violate Section 8(a)(1) of the Act. They occur in the context of multiple prior unlawful threats by Carrillo and Hartranft. The statement that Respondent would close before they became a union shop is the ultimate threat designed to chill employees in the exercise of their Section 7 rights to engage in union activity. Carrillo's suggestion that employees quit if they want to go Union is a further threat to employees who wished to engage in protected activity. Finally, Carrillo essentially told employees to stop engaging in union activity because Respondent would never go union. This statement of the futility of engaging in union activity was directed to further discourage employees from engaging in Section 7 activity. All of this conduct violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(g)(1), (2), and (3).

(32) Complaint Paragraph 5(h)(1) the alleged January 20, 2009 Patterson, DeWitt and Bowser interrogation of applicants.

(33) Complaint Paragraph 5(h)(2) the alleged January 20, 2009 Patterson, DeWitt and Bowser direction of employees to call 911.

Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) of the Act in the Bowser interrogations of Latham and Jamison and by DeWitt, in the presence of applicants, telling Patterson to call 911.

Respondent counters that Bowser's comment to Latham was merely Bowser's recognition of Latham who he had met in the past. Respondent contends that DeWitt's direction to call 911 was not directed at union applicants but rather to Patterson's fear of being threatened.

Bowser questioned both Union Business Agent Latham and applicant Jameson. Bowser approached Latham, one of the two applicants still inside the office filling out applications, and asked if he was Don. Latham replied he was. Bowser walked away for a few minutes and later returned and asked Latham, "Hey, you're with the Union, right?" and Latham responded that he was. Bowser also asked Jameson, the other applicant in the office, "if I was part of the Local 359." Jameson replied that he was not.

Applying the *Rossmore House* test, it appears that Bowser's questions to both Latham and Jameson were coercive. Bowser is one of Respondent's high-management officials, responsible for hiring Respondent's field sheet metal employees. Bowser's questions to Latham and Jameson occurred after they had observed DeWitt's direction to call the police in response to the union applicants' attempts to fill out applications and after they saw Respondent's small front office filled with Respondent's male employees in response to the union applicant's attempts to be hired. Nothing in Bowser's statements to Latham or Jameson suggests he was simply stating that he knew Latham or Jameson. Rather, the nature of the information sought could have been used to deny these individuals jobs on the basis of their union affiliations. These statements were part of a larger history of Respondent's threats and interrogations of its employees. I find Bowser's interrogation of Latham and Jameson violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(h)(1).

Whether DeWitt's 911 comments were motivated by his concern for Patterson, is irrelevant. A violation of Section 8(a)(1) of the Act is based on an objective standard. The issue is whether the two job applicants who were in Respondent's office or the five other applicants as potential employees would feel threatened, coerced, or restrained in the exercise of their Section 7 rights. A job applicant for employment is an employee under Section 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1951). In this case, DeWitt went into the office and in the presence of both job applicants Latham and Jameson 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 the guys away for a couple of hours. Take them to jail." Statements that threaten union job applicants with arrest unlawfully discourage them from engaging in protected and concerted activities in violation of Section 8(a)(1). I find as alleged in complaint paragraph 5(h)(2), DeWitt's statement violated Section 8(a)(1) of the Act. *Labor Ready, Inc.*, 327 NLRB 1055, 1057-1058. (1999).

- (34) Complaint Paragraph 5(i)(1) the alleged March 6, 2009 McNally, Longley and Hartranft asking employees to disclose the union activities of other employees.
- (35) Complaint Paragraph 5(i)(2) the alleged March 6, 2009 McNally, Longley and Hartranft overly-broad rule prohibiting employees from soliciting other employees for the Union while on the clock.
- (36) Complaint Paragraph 5(i)(3) the alleged March 6, 2009 McNally, Longley and Hartranft threat to discharge employees who solicited for the Union.
- (37) Complaint Paragraph 5(i)(4) the alleged March 6, 2009 McNally, Longley and Hartranft rule permitting only certain union agents on the jobsite.

No evidence was adduced to support this allegation and it will be dismissed.

Counsel for the General Counsel argues that by reading McNally's letter, a letter that admonishes Plumbers union members not to support any organizing effort in any way while

"on the clock," and reading it to employees to whom the letter was not addressed, Respondent promulgated an overly-broad and discriminatory rule against talking about the Union while on-the-clock. Further, it is argued that Longley threatened sheet metal employees with reprisals and other discipline if they showed support for the union organizing campaign or if they had any discussions between plumbers and sheet metal employees about the Union.

Respondent takes the position that in reading the letter Longley made no threat but was simply enforcing Respondent's no-solicitation policy. Moreover, there was no reference in the letter to termination of sheet metal employees.

A rule which prohibits solicitation for union activities while on-the-clock violates Section 8(a)(1) of the Act. *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), enf. mem. 261 F.3d 493 (3d Cir. 2001). Further, clarification of an ambiguous rule or a narrowed interpretation of an overly-broad 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). While the letter Longley read was written by Plumbers Union Local 469 Business Manager Phil McNally and addressed to Local 469 members, the sheet metal employees Longley addressed would have assumed it was directed to them. After Longley read the letter to Respondent's sheet metal employees, his explanation to them that they were not allowed to discuss organizing during company hours but only on an employees' lunch hour or on an employees' time or after hours was ineffective to cure the overly-broad rule prohibiting union solicitation on the clock. Longley again misstated permissible limitations on solicitation by telling employees they could discuss the union during company time but only on lunchbreaks or on employees' time or after hours. Respondent, through Longley, violated Section 8(a)(1) of the Act in promulgating an overly broad no-solicitation rule as alleged in complaint paragraph 5(i)(2).

Longleys' statement that if a plumber walked up and talked to them about the Union, they were to report it to Longley or Hartranft is a direction to report the union activities of other employees to Respondent. Longley's further statement that there would be disciplinary action taken if the Union was discussed on company time is a threat to enforce the above overly-broad no-solicitation rule. Both statements violate Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(i)(1) and (3). *Bloomington-Normal Seating Co.* 339 NLRB 191, 193 (2003).

Respondent's contention that no sheet metal employees were threatened with discipline for violating the no-solicitation rule is not supported by the record. While the letter Longley read was addressed to plumbers, there were no plumbers in attendance when the letter was read to the sheet metal employees. Clearly, the effect of reading the letter was to tell sheet metal employees they could not organize while on-the-clock or they would face discipline.

(38) Complaint Paragraph 5(j) the alleged March 23, 2009⁵⁸ Van Kuren, Dempsey and Bowser discriminatory rule prohibiting solicitation and distribution of union materials and paraphernalia during working hours.

(39) Complaint Paragraph 5(k) the alleged March 23, 2009 Dempsey enforcement of the discriminatory rule prohibiting solicitation and distribution of union materials and paraphernalia during working hours.

Counsel for the General Counsel contends that Bowser's order to Jones that he was not allowed to organize, solicit for, or speak about the Union during company time, only on breaktime and after hours, violated the Act by promulgating and discriminatorily enforcing an overly-broad no-solicitation rule and by issuing the rule in response to employees' union activities.

On the other hand, Respondent contends that it was enforcing its valid no-solicitation/no-distribution rule.⁵⁹

I find that Bowser's March 27, 2009 edict to Jones that he was not allowed to organize, solicit for, or speak about the Union during company time, only on breaktime and after hours was an overly-broad no-solicitation rule in that it prohibited Jones from engaging in protected activity on his lunchtime. While Respondent's no-solicitation/no-distribution rule may have been valid on its face, Bowser's promulgation and enforcement of Respondent's no-solicitation rule was too broad. *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), enf. mem. 261 F.3d 493 (3d Cir. 2001). This rule violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(j).

Later, on March 27, 2009, when Bowser issued a written warning to Jones for violating Respondent's no-solicitation/no-distribution rule by handing out a union T-shirt, counsel for the General Counsel contends that Respondent violated Section 8(a)(1) of the Act.

The Board and the courts have drawn a distinction between employer limits on union solicitation and distribution of protected materials. Thus, an employer may limit distribution of union materials at all times and in all places in a nondiscriminatory manner. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

Here, the record reflects that Respondent's foreman has brought flyers for charity motorcycle runs for his motorcycle club and posted the flyers on the Conex at the MIM jobsite. These flyers solicited employees to come to a picnic and give money to a charity. Longley would ask employees to bring food in for a food drive while employees were in safety meetings. Finally, Respondent also has allowed union stickers from the Plumbers Union to be put on gang boxes.

It appears that Respondent has not evenly enforced its no-distribution rule with respect to unions. It has permitted the distribution of Plumbers union stickers while disciplining Jones for distributing a Sheetmetal Workers' T-shirt. Even under a *Register Guard* analysis disciplining Jones for distributing a

union T-shirt was a discriminatory enforcement of its no distribution rule in violation Section 8(a)(1) of the Act as alleged in complaint paragraph 5(k).

2. The 8(a)(3) and (4) allegations

Complaint paragraphs 6(a) through (m) allege Respondent's actions that violated Sections 8(a)(3) and (4) of the Act.

a. The law

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."⁶⁰

In 8(a)(3) cases the employer's motivation is frequently in issue, therefore, the Board applies a causation test to resolve such questions. *Wright Line*, 251 NLRB 1083, 1088 (1980). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. "The critical elements of discrimination cases are protected activity known to the employer and hostility toward the protected activity." *Western Plant Services*, 322 NLRB 183, 194 (1996). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. *Id.* at 194. In dual motivation cases, once the General Counsel has established a prima facie case the burden shifts to Respondent to show that it would have disciplined the employee even in the absence of protected activity.

Section 8(a)(4) of the Act makes it unlawful "to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act." The Board also applies a *Wright Line* test to 8(a)(4) discrimination. *Verizon*, 350 NLRB 542 (2007).

b. The complaint allegations

- (1) Complaint Paragraph 6(a) the alleged December 12, 2008, delay in hiring applicants.
- (2) Complaint Paragraph 6(b) the alleged January 8, 2009⁶¹[61], discipline of Weimann.
- (3) Complaint Paragraph 6(c) the alleged January 8, 2009, discharge of Weimann.

Weimann was employed by Respondent in its fabrication shop as a sheetmetal worker from December 12, 2008, until January 12, 2009. Weimann replied to a newspaper ad Respondent had placed for sheetmetal workers. Weimann was interviewed by both Carrillo and Shop Foreman Trevor Davies. Carrillo asked the questions and asked Weimann if he was in the Union. Weimann said he had been a member for 5 years. A week later, Carrillo offered Weimann a job in the shop.

Counsel for the General Counsel takes the position that in its 1-week delay in hiring Weimann, in issuing Weimann a written warning, and in terminating Weimann Respondent violated Section 8(a)(3) of the Act.

⁵⁸ It appears from the record that the events alleged in complaint allegations 5(j) and (k) occurred on March 27, 2009. Since the matter was fully litigated, I will consider the conduct which occurred in on March 27, 2009, supports the allegations contained in complaint pars. 5(j) and (k). *Hi-Tech Cable Corp.*, supra.

⁵⁹ R. Exh. 11, p. 15

⁶⁰ 29 U.S.C. § 158(a)(3).

⁶¹ At the hearing counsel for the General Counsel moved to amend complaint pars. 6(b) and (c) to January 12, 2009. The motion was granted.

Respondent contends that Weimann quit voluntarily and that there is no evidence to support complaint paragraph 6(a).

Respondent's hiring of Weimann flies in the face of the General Counsel's allegation that the delay in the week between Weimann's interview and his hire was discriminatory, particularly in view of Respondent's knowledge prior to his hire that Weimann had been a union member for 5 years. I find no evidence to support an inference that the week delay was discriminatory as alleged in complaint paragraph 6(a). I will dismiss this allegation.

On December 13, 2008, after Weimann's job interview, Respondent discovered that the Union had reinstated its organizing campaign when Montroy went to Respondent's shop to meet employees. After Weimann was hired on December 17, 2008, Weimann engaged in union activities by speaking with shop employees about the Union in the work area, including Leadman Dennis Kupiec and Shop Manager Davies' son Jeremy and by signing an authorization card in December 2008. Respondent was aware of Weimann's union activities as Carrillo acknowledged when he came up to Weimann and asked if he was having another union meeting each time he saw Weimann speaking with another shop employee.

Respondent has demonstrated its hostility to its employees' union activities as detailed by the numerous threats discussed above. On January 12, 2009, Carrillo clearly demonstrated his hostility toward Weimann by saying: "If that's your attitude I don't need people in here like you stirring up trouble." Statements identifying a union supporter as someone who has been "stirring up trouble" are hallmarks identifying an individual as a union supporter.

Based upon the above factors, counsel for the General Counsel has established a prima facie case that Weimann's termination violated Section 8(a)(3) of the Act. *Western Plant*, supra. The burden now shifts to Respondent to show it would have fired Weimann even in the absence of his union activity. *Wright Line*, 251 NLRB at 1088.

Respondent contends in the alternative that Weimann quit his job or was fired because of his poor work performance. It is curious to note that in Weimann's written termination notice no mention is made that he quit rather than poor performance is documented. It is clear from Carrillo's statements that he fired Weimann. In telling Weimann "I don't need people like your kind in here stirring up trouble;" and "You need to pack your shit and get the fuck out right now;" Carrillo left no doubt that Weimann did not quit but was fired. By not firing Weimann's co-worker Wilson who worked on the same piece of improperly fabricated sheetmetal, Respondent demonstrated that its motivation in firing Weimann was not poor work performance but Weimann's "stirring up trouble." I find that in warning and firing Weimann Respondent violated Section 8(a)(3) of the Act as alleged in complaint paragraphs 6(b) and (c).

- (4) Complaint Paragraph 6(d) the alleged January 12, 2009, discharge of Cardenas.

At the hearing, counsel for the General Counsel moved to amend the complaint to delete this allegation. The motion was granted.

- (5) Complaint Paragraph 6(e) the alleged January 20, 2009, imposition of more onerous working conditions by restricting break times and relocating break areas.

- (6) Complaint Paragraph 6(f) the alleged January 20, 2009, imposition of more onerous working conditions by increasing the price of items in vending machines.

Counsel for the General Counsel contends that Respondent restricted break access to limit employees' ability to communicate with the union agents on their breaktime and increased vending prices in violation of Section 8(a)(3) of the Act.

Respondent counters that it locked gates for security reasons as a result of recent thefts and to ensure that break areas were equal and to ensure that each department took breaks in their own area. Respondent also contends that there was no difference in prices of the vending machines and that if there was it was corrected within a few days.

While Respondent restricted its shop employees' use of the front office break area and put its front parking area off limits to breaks after the Union began its organizing campaign in November 2008, its security issues have existed at its facility since at least 2005. The timing of the access restrictions coincides with various union organizing activities including the attempt to file applications by union members and organizers on January 20, 2009, and the union drive by with prounion signs later in January 2009.

At the time Respondent began limiting shop employees access, it was aware that its shop employees were engaged in union activities and it had demonstrated its hostility toward those activities.

Counsel for the General Counsel has established a prima facie case that Respondent's segregation of its shop employees by limiting their access to the public and hence to the Union violated Section 8(a)(3) of the Act.

Respondent contends that its limitation of shop employees' access to the public was not motivated by antiunion animus but was a response to secure its facilities from unsavory individuals who had entered its facility. I find that this defense is a pretext. The record reflects that for over 3 years Respondent was aware it had a security problem. It was not until the Union attempted to organize Respondent's employees by making direct appeals to them at the workplace that Respondent decided to solve its "security" problem which conveniently cut off the Union's direct appeals to those employees. The timing of the implementation of Respondent's security measures creates the inference that they were designed to limit its employees' union activities and violated Section 8(a)(3) of the Act as alleged in complaint paragraph 6(e).

- (7) Complaint Paragraph 6(g) the alleged January 20, 2009, imposition of more onerous working conditions by enforcing the overly broad rule prohibiting employees from speaking with Union agents on company time.

Complaint paragraph 6(g) alleges that on January 20, 2009, Respondent enforced the overly-broad rule prohibiting employees from speaking with union agents on company time promul-

gated by Hartranft on December 15, 2008. No evidence was adduced to support this allegation and it will be dismissed.

- (8) Complaint Paragraph 6(h)(1) the alleged January 20, 2009, denial of access to Respondent's application process to Union supporters.
- (9) Complaint Paragraph 6(h)(2) the alleged January 20, 2009, failure to consider for hire of applicants Montroy, Jamison, Latham, Molina, Rico, Osteros and Lebron.

Counsel for the General Counsel, citing *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.2d 83 (3d Cir. 2002), and *Toering Electric Co.*, 351 NLRB 225 (2007), contends it has shown that Respondent violated Section 8(a)(3) of the Act in denying access to its application process and by failing to consider and failing to hire the seven union job applicants.

Respondent contends that the applicants were not genuinely interested in obtaining jobs that the applicants were given an opportunity to fill out applications, that there were other qualified applicants already on file, and that these applicants were over qualified which would have caused an overrun on labor costs.

In *FES*, supra, the Board promulgated a test to establish a discriminatory refusal to hire. The General Counsel must show:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that 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 has 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. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. [*FES*. Supra at 12.]

The employer has the burden of proof to show that the applicant did not meet its criteria for the position, was unqualified for the position or was not as qualified as others who were hired. *FES*, supra at 12.

In refusal to consider for hire cases the Board in *FES* established the following test:

- To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. [*FES*, supra at 15.]

In *Quality Mechanical Insulation, Inc.*, 340 NLRB 798 (2003), and *Brandt Construction Co.*, 336 NLRB 733 (2001), hiring policies similar to Respondent's were found to be lawful.

In *Toering Electric Co.*, 351 NLRB 225, 225 (2007), the Board majority of Chairman Battista and Members Schaumber and Kirsanow, with Members Liebman and Walsh dissenting, limited the statutory protections developed in *FES* to job applicants, ". . . genuinely interested in seeking to establish an employment relationship with the employer." In addition, the Board imposed on the General Counsel the burden of proving that an alleged discriminatee met its definition of a statutory employee.

In *Toering*, supra at 233, the majority explained that its requirement to meet the definition of an employee applicant entitled to the Act's protection consists of two parts:

- (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so, on his or her behalf. In the latter instance, agency must be shown. As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. . . . Consequently, once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.

Initially an analysis of failure to hire or consider for hire under *FES* must determine if the applicants meet the *Toering* test of statutory employee. The record reflects that all seven of the applicants filled out job applications on January 20, 2009. The record also reflects that they were all given permission from the Union to apply for work and work if hired by Respondent. The record also establishes that all applicants would work for Respondent if offered employment. The union representatives said that they would have worked for Respondent in order to try organizing Respondent's employees, a legitimate reason for seeking employment with Respondent. The General Counsel has satisfied its burden under *Toering* of establishing the applicants genuinely sought an employment relationship with Respondent.

However, only five of the applicants submitted their applications to Respondent. Union Representatives Montroy and Molina did not fill out applications because they felt intimi-

dated by the appearance of Respondent's male managers in the front office. I find this explanation incredible. Montroy and Molina are experienced union agents who have been involved in organizing and other encounters with various employers. Respondent's managers in the front office made no threats to Molina, Montroy, or the other applicants that would have created a reasonable impression that they were in any danger. Accordingly, I find that the failure of Montroy and Molina to submit their applications to Respondent was not justified. Thus, neither Montroy nor Molina satisfied the *Toering* requirement that an application be filed.

As to the five applicants who submitted applications, Respondent has failed to contest the genuineness of the applications. None of the applicants had refused work with Respondent in the recent past. None of the applicants displayed belligerent or offensive comments in their applications. Contrary to Respondent's contention, the record, and particularly the tape recording of the entire application incident, disclosed that none of the applicants engaged in disruptive, insulting, or antagonistic behavior during the application process. However, Respondent contends that two applicants failed to truthfully or completely fill out the applications and one applicant was a felon.

I find this rationale to be pretext since Respondent accepted applications from and hired sheet metal employees after January 20, 2009, who failed to complete their applications and who were convicted of felonies. I find that applicants Jamison, Latham, Rico, Osteros, and Lebron were applicant employees entitled to the protections of the Act under *Toering*.

As to the failure to hire or consider for hire, it is clear that Respondent hired sheet metal employees after January 20, 2009. Thus, after January 20, 2009, Respondent hired 28 sheet metal employees in addition to temporary labor.

As found above, each of the seven applicants were well qualified to work for Respondent as sheet metal workers.

Finally, the record is replete with Respondent's antiunion animus both before and after January 20, 2009.

The General Counsel has met the *FES* test for discriminatory refusal to hire and the burden shifts to Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Respondent contends that it had a sufficient list of qualified applicants for sheet metal jobs already on file, and that the seven union applicants were over qualified which would have caused an overrun on labor costs.

Nothing in the applications of the employees hired by Respondent after January 20, 2009, reflects that they were more qualified than the five union applicants. As the Board stated in *FES* at page 12:

If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or 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.

Here, Respondent failed to establish that the five applicants lacked qualifications for the positions it filled after January 20,

2009. Moreover, Respondent failed to prove that those it hired had superior qualifications to the union applicants. Respondent's argument that the union applicants were overqualified and would cause a cost overrun in its labor budget fails since Respondent did not offer any evidence as to how its labor costs were allocated nor did it explain why none of the five was offered employment at a wage within Respondent's budget.

I find that Respondent violated Section 8(a)(3) of the Act in failing to hire Jamison, Latham, Rico, Osteros, and Lebron as alleged in complaint paragraph 6(h)(2).

However, I find no merit in the allegation that Respondent denied the seven union applicants access to its hiring process. While Respondent's receptionist, Ruth Patterson, initially told the applicants that Respondent was not hiring, and denied them access to the interior of Respondent's facility, Union Representative Montroy's persistence succeeded in persuading Respondent to allow the union applicants to fill out and submit job applications to Respondent on January 20, 2009. I will dismiss complaint allegation 6(h)(1).

- (10) Complaint Paragraph 6(i) the alleged March 16, 2009, use of temporary employees rather than Retzlaff, Brimie, Chavez, Duffy, and Nielson, Laid-off employees.
- (11) Complaint Paragraph 6(j) the alleged March 16, 2009 discharge of Retzlaff, Brimie, Chavez, Duffy, and Nielson.

Counsel for the General Counsel takes the position that Respondent's use of temporary employees rather than the laid-off shop employees violated Section 8(a)(3) of the Act and that its discharge of the shop employees violated Sections 8(a)(3) and (4) of the Act.

On the other hand, Respondent contends it had no knowledge of its employees' union activities, it was not its normal practice to transfer employees from the shop to the field, its practice was to use contract labor for short-term jobsite needs, the laid-off shop employees were not qualified to perform field work, there was no longer a need for as much fabrication work, and the need for field employees existed before the shop employees were available.

The record reflects that shop employees Retzlaff, Brimie, Chavez, Duffy, and Nielson all engaged in union activities. However, it has been established that Respondent was aware of only Retzlaff's union activities. It can be inferred that Respondent was aware of Brimie's union activities from his conspicuous display of union insignia on his truck and toolbox. While there is no evidence that Respondent specifically knew that Chavez, Duffy, or Nielsen engaged in union activity, it is clear that Respondent was aware that its shop employees were engaged in union activities. As a result of his meeting with Montroy at the union hall on November 26, 2008, Carrillo knew the Union was trying to organize his shop employees. Carrillo's threats that the employees should not expect to go Union, that Respondent would never go Union, that he knew there were cards that had been floating around, that anybody caught signing the card would be gone, that Respondent would close the doors on the Company before they went Union and the employees would all be out of work clearly establishes that Re-

spondent was aware of its shop employees' union activities. In addition, Carrillo's statements support a finding that Respondent harbored animosity toward its shop employees' union activities. I find that the General Counsel has established a prima facie case that Respondent discriminatorily discharged its five shop employees in retaliation for their union activity.

Respondent's proffered explanation that it made the decision to hire temporary employees before it fired its shop employees on March 16, 2009, is belied by the evidence that it began using CLP Resources for temporary sheet metal workers on March 22, 2009. The fact that only 3 days elapsed between Respondent's use of Allied Forces for temporary sheet metal workers at the BIMC jobsite on March 13 and the March 16, 2009 discharge of its shop employees renders suspect Respondent's contention that it did not know its shop employees would be available for field work. Respondent's contention that it did not transfer shop employees to the field is contrary to the evidence that in February 2009 Carrillo sent Brimie to work in the field as a sheet metal worker. Respondent's position that the shop employees were not qualified to perform field installation work is also unsupported as Retzlaff, Brimie, Chavez, and Duffy all had field experience installing sheet metal. Moreover, Respondent had adequate fabrication work for its shop employees well after March 16, 2009.

On March 11, 2009, the Union filed a petition for an election with Region 28 seeking to represent a unit of Respondent's sheet metal employees and on March 12, 2009, the Region faxed Respondent copies of the petition. There is no coincidence that the five sheet metal employees were fired 4 days after Respondent learned that the Union had filed a petition for election among its sheet metal employees. Respondent's hostility toward its employees protected activities by March 12, 2009, is well established. Finally, Respondent's rationale for firing the shop employees had been discredited. Accordingly, an inference may be drawn that the shop employees were discharged in part in retaliation due to the filing of the representation petition as alleged in complaint paragraph 6(j).

I conclude that Respondent has failed to establish that it would have discharged Retzlaff, Brimie, Chavez, Nielsen, and Duffy in the absence of their union activities in violation of Section 8(a)(3) and (4) of the Act as alleged in complaint paragraph 6(j).

I also find Respondent subcontracted its work to temporary sheet metal installers rather than using extant shop employees in retaliation for the shop employees union activities in violation of Section 8(a)(3) of the Act as alleged in complaint paragraph 6(i).

- (12) Complaint Paragraph 6(k) the alleged March 27, 2009 discipline of Jones.

Counsel for the General Counsel contends that the discipline issued to Jones for violating the overly-broad no-solicitation/no distribution rule violated Section 8(a)(3) of the Act.

To the contrary, Respondent argues its discipline of Jones was valid enforcement of its no-solicitation policy.

Having found that that Bowser's March 27, 2009 edict to Jones that he was not allowed to organize, solicit for, or speak about the Union during company time, only on breaktime and

after hours was an overly-broad no-solicitation rule that violated Section 8(a)(1) of the Act it follows that Bowser's discipline of Jones for violating this rule violated Section 8(a)(3) of the Act as alleged in complaint paragraph 6(k) in that Jones was disciplined for engaging in union activities.

- (13) Complaint Paragraph 6(l) the alleged March 2009 outsourcing of fabrication work to Omni.

The General Counsel posits that Respondent's ongoing March 2009 outsourcing of fabrication work to Omni Duct violated Section 8(a)(3) and (4) of the Act.

Respondent counters that it decided to subcontract duct work to Omni in October 2008 well before it was aware of any union activity and that after March 2009 its shop could not meet the time requirements for fabrication of duct at the MIM.

Respondent's knowledge of and animus toward its employees' union activities has been well documented. While Respondent's initial decision to subcontract duct fabrication to Omni Duct may have been justified in December 2008 due to the large volume of ducts needed at its various jobs, by March 2009, Respondent could have relied on its own fabrication shop to produce sufficient ductwork to fulfill its worksite needs. Further, the record establishes that continued use of Omni created up to a 5-day delay in production of duct that would not have occurred if Respondent's fabrication shop made the ductwork. Respondent's rationale for continuing to use Omni is not supported by the evidence. Respondent's continued outsourcing of ductwork rather than a lack of fabrication work led to the shop layoffs. I find that Respondent's continued subcontracting of its duct fabrication work to Omni Duct after March 16, 2009, rather than using its own shop employees was done to reduce the available work to its shop employees in retaliation for their union activities and in retaliation for filing the representation petition with Region 28 in violation of Section 8(a)(3) and (4) of the Act as alleged in complaint paragraph 6(l).

IV. SUMMARY

I have found the following complaint paragraphs and subparagraphs were sustained and will be remedied, below. Complaint paragraphs 5(b)(2), (3), (4), and (6); 5(c)(1), (2); 5(d)(1), (2), (3), (4), (5), (7), and (8); 5(e)(1); 5(f)(1), (4), and (7); 5(g)(1), (2), and (3); 5(h)(1) and (2); 5(i)(1), (2), and (3); 5(j); 5(k); 6(b), (c), and (e); 6(h)(2); and 6(j), (i), (k), and (l).

I have found the following complaint paragraphs and subparagraphs were not sustained and will be dismissed. Complaint paragraphs: 5(b)(1) and (5); 5(d)(6); 5(e)(2); 5(f)(2), (3), (5), (6), and (8); 5(g)(4); 5(i)(4); and 6(a), (f), (g), and (h)(1).

V. THE OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

The Union filed a petition with the Board on March 11, 2009, in Case 28-RC-6650. Pursuant to a Stipulated Election Agreement in Case 28-RC-6650 approved by the Regional Director for Region 28 on March 19, 2009, the parties agreed that the appropriate bargaining unit consisted of all full-time and part-time employees, engaged in the fabrication or installation of HVAC systems, including sheet metal workers, sheet metal tradesperson, sheet metal apprentices, sheet metal helpers, and sheet metal journeymen, at the Employer's facility;

and located at contracted jobsites within the State of Arizona; excluding all jobbers, plumbers, pipefitters, carpenters, electricians, maintenance personnel, clerical employees, tool room employees, cleaning employees, office staff, dispatchers, managers, truckdrivers, guards, and supervisors as defined in the Act.

On April 16, 2009, an election by secret ballot was conducted. The tally of ballots served on the parties at the conclusion of the election showed that of approximately 66 eligible voters, 8 cast ballots for, and 47 against the Petitioner. There were no void ballots and 9 challenged ballots which were insufficient in number to affect the results of the election.

On April 21, 2009, the Petitioner filed 41 timely objections to the election which the Regional Director consolidated with the instant unfair labor practice charges.

Petitioner's objections state the following:

1. The Employer acted (sic) through its officers and agents surveyed (sic) employees engaged in union activities.
2. The Employer acted through its officer and agents interrogated Business Union Agents about Union activities pertaining to the Employer's employees.
3. The Employer acted through its officers and agents interrogated employees about their union sentiments and their union activities.
4. The Employer acted through its officers and agents promulgated an overly broad and discriminatory rules during the union campaign by:
 - a) Prohibiting employees from engaging in union activities during nonworking hours.
 - b) Prohibiting employees from speaking with Union Agents on the jobsite property during non-working hours.
5. The Employer acted through its officers and agent threatened to terminate employees who violated the overly broad and discriminatory rules in paragraph 4(a) and 4(b).
6. The Employer acted through its officers and agents threatened to terminate employees who engage in union activities in non-working areas during nonworking hours.
7. The Employer acted through its officers and agents made veiled threats to employees; this conduct have been directly attributed to Shawn Bowser, that the Employer would shut the Employer's doors if employees voted for the Union.
8. The Employer acted through its officers and agents interrogated applicants about their membership in the Union.
9. The Employer acted through its officers and agents delayed in hiring qualified applicants because of their membership affiliation to the Union.
10. The Employer acted through its officers and agents discharged employees because they have engaged in activities in support of the Union.
11. The Employer acted through its officers and agents created the impression that their activities on behalf of the Union were under surveillance by the Employer's Representatives.
12. The Employer acted through its officers and agents invited employees who support the Union to quit.
13. The Employer acted through its officers and agents threatened employees who support the Union with termination.
14. The Employer acted through its officers and agents informed employees that it would be futile of them to support the Union.
15. The Employer acted through its officers and agents imposed more onerous working conditions on the employees in retaliation for their union and concerted activities.
16. The Employer isolated those employees who engaged in Union activities away from the other employees.
17. The Employer through its officers and agents have continuously interrogated employees about their union activities.
18. The Employer through its officers and agents threaten to discharge employees who signed Union Authorization cards or spoke with Union Agent.
19. The Employer through its officers and agents threaten employees with discharge; if they continue to engage in Union Activities.
20. The Employer through its officers and agents enforced the Employer's overly-broad discriminatory rules of paragraph 4(a) and paragraph 4(b).
21. The Employer through its officers and agents threaten to terminate employees who violated the overly-broad and discriminatory rules in paragraph 4(a) and paragraph 4(b).
22. The Employer through its officers and agents informed the employees that the Employer already had replacements for those employees who engaged in Union Activities.
23. The Employer through its officers and agents had disparaged the Union.
24. The Employer through its officers and agents discriminatorily applied its discipline policy when they terminated Nathan Weimann and Michael Cardenas because they engaged in concerted and Union activities.
25. The Employer through its officers and agents have promulgated an overly broad and discriminatory rule prohibiting employees from discussing the union in working areas, while allowing employees to discuss other non-work related matters in working areas.
26. The Employer through its officers and agents misrepresented and misled who overtly displaced their union affiliation about the employer's hiring plans.
27. The Employer through its officers and agents failed to hire applicants who overtly supported the Union.
28. The Employer through its officers and agents failed to consider for hire, applicants who overtly disclosed their union affiliations.
29. The Employer through its officers and agents applied the Employer's application procedure discriminatorily to applicants who overtly disclosed their union affiliations.
30. The Employer through its officers and agents directed its employees to call 911 and report a threat the next time

- applicants who overtly disclosed their union affiliations asked for applications of employment.
31. The Employer through its officers and agents interrogated applicants for employment about their union sentiments.
 32. The Employer through its officers and agents interfered with, restrained and coerced its employees in the exercise of its rights guaranteed under the Act by discharging Mr. Jarrod Rentzlaff, because he engaged in activities in support of a Labor organization.
 33. The Employer through its officers and agents interfered with, restrained and coerced its employees in the exercise of its rights guaranteed under the Act by discharging Mr. Charles Duffy, because he engaged in activities in support of a Labor organization.
 34. The Employer through its officers and agents interfered with, restrained and coerced its employees in the exercise of its rights guaranteed under the Act by discharging Mr. Paul Brimie, because he engaged in activities in support of a Labor organization.
 35. The Employer through its officers and agents interfered with, restrained and coerced its employees in the exercise of its rights guaranteed under the Act by discharging Mr. Pedro Chavez, because he engaged in activities in support of a Labor organization.
 36. The Employer through its officers and agents interfered with, restrained and coerced its employees in the exercise of its rights guaranteed under the Act by discharging Mr. Terrance Nielson, because he engaged in activities in support of a Labor organization.
 37. The Employer through its officers and agents provided an inaccurate Excelsior list.
 38. The Employer through its officers and agents gave free Company Polo shirts to encourage its employees to vote against the Union.
 39. The Employer through its officers and agents disciplined pro-union employees for participating in protected union solicitation, while allowing anti-union employees to engage in the same activities.
 40. By all the above conducts as well as other similar conduct the Employer through its officers and agents engaged in conduct that affected the outcome of the election.
 41. The Employer acted through its officers and agents and constructively discharged Robert Jones because he engaged in union and concerted activities.

Having concluded in the unfair labor practice portion of this case that Respondent, between the date of the petition on March 13, 2009, and the date of the election on April 16, 2009, promulgated an overly-broad no-solicitation/no-distribution rule, enforced an overly-broad no-solicitation/no-distribution rule by issuing an employee discipline, discharged employees in violation of Section 8(a)(3) and (4) of the Act, hired temporary employees and continued subcontracting work in violation of Section 8(a)(3) and (4) of the Act, I recommend that Objections 4, 5, 6, 10, 20, 24, 25, 32–36, and 39 be sustained. The evidence concerning Objections 1, 7, 8, 11–15, 17–19, 21, 23, and

26–31 occurred outside the critical period and I recommend that these objections be dismissed. No evidence was submitted or the evidence was insufficient to sustain Objections 2, 9, 16, 22, 37, 38, 40, and 41 and I recommend that they be dismissed.

Respondent's acts constitute objectionable conduct which interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. *American Safety Equipment*, 234 NLRB 501 (1978); *Dayton Tire & Rubber*, 234 NLRB 504 (1978). I, therefore, recommend that the election be set aside and the case be remanded to the Regional Director to conduct a new election.⁶²

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct

(a) Engaging in surveillance and creating the impression that its employees' union activities were under surveillance.

(b) Promulgating overly broad no solicitation rules prohibiting employees from speaking with Union agents or with other employees about the Union during nonworking time.

(c) Threatening employees that they must notify Respondent of the Union's presence on jobsites.

(d) Threatening employees with discharge for violating its overly-broad no-solicitation rules.

(e) Threatening employees with discharge for supporting the Union.

(f) Threatening to close Respondent's facilities if employees supported the Union.

(g) Threatening employees who support the Union by telling them to quit.

(h) Telling employees it is futile to support the Union.

(i) Directing employees to call 911 if employees who support the Union seek applications for jobs.

(j) Asking employees to disclose the union activities of other employees.

(k) Promulgating and enforcing an overly-broad no-solicitation/no-distribution rule that prohibits distribution of union paraphernalia and materials while allowing like distribution for other unions.

4. Respondents violated Section 8(a)(1) and (3) of the Act by

(a) Disciplining and discharging Nathaniel Weimann for engaging in union and other protected-concerted activity.

⁶² Any party may, within 14 days from the date of issuance of this recommended decision, file with the Board in Washington, D.C., an original and 8 copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. If no party files exceptions thereto, the Board may adopt the recommendations set forth herein.

(b) Imposing more onerous working conditions by limiting break areas in its fabrication shop.

(c) Failing to consider for hire or to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron due to their union and other concerted activity.

(d) Discharging Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen due to their union activities.

(e) Issuing a written warning to Robert Jones.

(f) Outsourcing its duct fabrication in order to discourage employees' union activities.

(g) Hiring temporary employees rather than its shop employees to discourage their union activities.

5. Respondents violated Section 8(a)(1) and (4) of the Act by

(a) Discharging Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen because its employees gave testimony or participated in a Board proceeding.

(b) Outsourcing its duct fabrication because its employees gave testimony or participated in a Board proceeding.

6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise violate the Act as alleged in the complaint and the remaining complaint allegations will be dismissed.

THE REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

As part of the remedy herein, counsel for the General Counsel seeks an order recommending that the Board adopt a policy that requires interest on monetary awards to be compounded on a quarterly basis. However, the two-member Board has made it clear as recently as 2008 that it is not prepared at this time to deviate from its current practice of assessing simple interest. *National Fabco Mfg.*, 352 NLRB 1 at fn. 4 (2008). It would be presumptive to recommend a change to the Board's longstanding policy of assessing simple interest without the full Board's authority.

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

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended⁶³

⁶³ 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 shall be waived for all purposes.

ORDER

The Respondent, W.D. Manor Mechanical Contractors, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees' union activities.

(b) Promulgating overly-broad no-solicitation rules prohibiting employees from speaking with union agents or with other employees about the Union during nonworking time.

(c) Threatening employees that they must notify Respondent of the Union's presence on jobsites.

(d) Threatening employees with discharge for violating its overly-broad no-solicitation rules.

(e) Threatening employees with discharge for supporting the Union.

(f) Threatening to close Respondent's facilities if employees supported the Union.

(g) Threatening employees who support the Union by telling them to quit.

(h) Telling employees it is futile to support the Union.

(i) Directing employees to call 911 if employees who support the Union seek applications for jobs.

(j) Asking employees to disclose the union activities of other employees.

(k) Promulgating and enforcing an overly-broad no-solicitation/no-distribution rule prohibiting distribution of union paraphernalia and materials while allowing like distribution for other unions.

(l) Disciplining and discharging Nathaniel Weimann for engaging in union and other protected-concerted activity.

(m) Imposing more onerous working conditions by limiting break areas in its fabrication shop.

(n) Failing to consider for hire or to hire Lance Jameson, Don Latham, Mahelio Rico, James Osteros, and Fernando Lebron due to their union and other concerted activity.

(o) Discharging Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen due to their union activities or for giving testimony or participating in a Board proceeding.

(p) Issuing a written warning to Robert Jones.

(q) Outsourcing its duct fabrication in order to discourage employees' union activities or for giving testimony or participating in a Board proceeding.

(r) Hiring temporary employees rather than its shop employees to discourage their union activities.

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

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

(a) Make Lance Jameson, Don Latham, Mahelio Rico, James Osteros, Fernando Lebron, Nathaniel Weimann, Jarrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Nathaniel

Weimann, Jerrod Retzlaff, Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Robert Jones Power dated March 27, 2009, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(d) Cease giving force and effect to the unlawful no-distribution/no-solicitation rules prohibiting employees from speaking with other employees and union representatives on nonworking time and from distributing union material and paraphernalia.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and papers, and all other records, including an electronic copy of such records if stored in electronic form necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."⁶⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since December 15, 2008.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. May 5, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

⁶⁴ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT discharge you because you support or engage in activities on behalf of Sheet Metal Workers International Association, Local No. 359, AFL-CIO-CLC.

WE WILL NOT ask you questions about your union support or activities or the union support and activities of other employees.

WE WILL NOT give you the impression that we are watching your union activities or the union activities of any employee.

WE WILL NOT threaten you for failing to immediately notify us of the Union's presence on the jobsite.

WE WILL NOT tell employees they cannot speak to union representatives on our jobsites during nonworking hours.

WE WILL NOT threaten you with discharge if you violate our rule that employees may not speak with union representatives on company time or on jobsites where we are working.

WE WILL NOT threaten you with discharge if you support or vote for the Union.

WE WILL NOT threaten you with unspecified reprisals if you associate with employees that engage in union or concerted activities.

WE WILL NOT threaten to close the facility if you support or vote for the Union.

WE WILL NOT invite you to quit your employment because you support or vote for the Union.

WE WILL NOT tell you that it is useless for you to support or vote for the Union.

WE WILL NOT threaten you with unspecified reprisals if you talk to union agents on company time.

WE WILL NOT tell our employees to call 911 and report a threat the next time applicants wearing union insignia arrive at our facility.

WE WILL NOT ask you to report to us the union activities of other employees.

WE WILL NOT issue you written warnings because you solicit for the Union.

WE WILL NOT tell you that you cannot solicit or distribute union-related materials while allowing solicitation and distribution of other materials during working time.

WE WILL NOT impose more onerous working conditions by restricting breaktime activities or relocating breaktime locations, or increasing the prices on vending machine items for sale for sheet metal employees because of their support for the Union.

WE WILL NOT impose more onerous working conditions on employees to enforce our oral rule forbidding employees from talking to union representatives on company time or on jobsites where the company is working.

WE WILL NOT refuse to hire, or refuse to consider for hire, applicants because of their support for or affiliation with the Union.

WE WILL NOT hire temporary employees instead of recalling laid-off sheet metal employees.

WE WILL NOT discharge you because of your support for or affiliation with the Union.

WE WILL NOT send fabrication work to other sheet metal shops in order to reduce the workload and cause the terminations of our sheet metal shop employees.

WE WILL NOT in any similar way frustrate your exercise of any of the rights stated above.

WE WILL immediately rescind and give no effect to the following oral and written policies and rules which would tend to interfere with your rights to engage in union or other concerted activities:

Employees may not speak with Union agents on the jobsite property during non-working hours;

Employees may not speak with Union representatives on company time.

Employees may not solicit for the Union while on the clock;

Employees may not solicit for the Union or distribute Union related materials and paraphernalia during working time.

WE WILL immediately offer Nathaniel Weimann (Weimann) reinstatement to his former position, and if that job no longer exists, to a substantially equivalent position, without any loss of seniority or any other privileges, and WE WILL immediately make Weimann whole with interest for the wages and benefits he lost because we discharged him.

WE WILL within 14 days, remove from our files, any and all records of our January 8, 2009 discharge of Weimann, and WE WILL, within 3 days thereafter, notify Weimann in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

WE WILL offer immediate and full reinstatement to Jarron Retzlaff (Retzlaff), Charles Duffy (Duffy), Pedro Chavez (Chavez), Paul Brimie (Brimie), and Terrance Neilson (Neilson) to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole with interest Retzlaff, Duffy, Chavez, Brimie, and Neilson for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them.

WE WILL remove from our files any reference to our unlawful refusal to reinstate the employees named above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to reinstate will not be used against them in any way.

WE WILL, within 14 days, remove from our files, any and all records of our March 16, 2009 discharges of the employees named above, and within 3 days thereafter, notify the employees named above, in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

WE WILL, within 14 days, offer Lance Jamison, (Jamison) Don Latham, (Latham), Mahielio Rico, (Rico), James Osteros, (Osteros), and Fernando Lebron, (Lebron), employment to sheet metal shop and field positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would enjoyed absent the discrimination against them.

WE WILL make whole with interest Jamison, Latham, Rico, Osteros, and Lebron, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days, expunge from our files all references to the unlawful failure to hire and to consider for hire Montroy, Jamison, Latham, Molina, Rico, Osteros, and Lebron and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.