

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

ECCLES PAINTING, INC.,

and

Cases 19-CA-69324
19-CA-72568

PAINTERS DISTRICT COUNCIL 5,
Affiliated with INTERNATIONAL UNION
OF PAINTERS AND ALLIED TRADES

Irene H. Botero, Esq. and Richard C. Fiol, Esq.,
for the Acting General Counsel
*Art Eccles, in pro se*¹,
for the Respondent
Omar Rubi, field representative, in pro se,
for the Charging Party

DECISION

STATEMENT OF THE CASE

Gerald M. Etchingham, Administrative Law Judge. This case was tried in Seattle, Washington, on June 25-28, 2012. The Painters District Council 5, affiliated with the International Union of Painters and Allied Trades (the Union) filed the initial charge in Case 19-CA-69324, on November 21, 2011², which was amended subsequently on March 27, 2012, and a second charge in Case 19-CA-72568, was filed on January 13, 2012. The Regional Director for Region 19 issued the consolidated complaint (the complaint) on April 26, 2012. The complaint alleges that Eccles Painting, Inc. (Respondent or Eccles Painting) has violated Section 8(a)(1) and (3) of the Act by creating an impression among employees that their union activities were under surveillance, by interrogating, and by threatening employees that they would be terminated for their union activities and/or sympathies. The complaint further alleges that at various times

¹ On June 11, 2012, Mr. Eccles, in *pro se* for Respondent, was served a form Letter to Pro Se Party which informed Mr. Eccles what basic procedures he could expect for presenting evidence at trial and suggested that Respondent should continue its efforts to retain a lawyer to represent it in this case. The very next day, Respondent became represented by Brian Holleran, Esq., of the Boise, Idaho, law firm of Meuleman Mollerup, LLP. On the eve of trial on June 22, 2012, Mr. Holleran withdrew as counsel for Respondent.

² All dates are in 2011 unless otherwise indicated.

from November 15 through December 11, Respondent terminated Luiz Deniz, David Bazan, Damon Danner, Aldo Gamas, Jose Alcantar Moreno, Omar Santillan, Adrian Santillan, Isaias Lopez, Irineo Lopez, Jaime Guevara, Gustav Gallardo, and Alfredo Frias Vargas because these employees signed the Union petition seeking representation, engaged in concerted activities, and because Respondent intended to discourage employees from engaging in these pro-union activities.

As the trial went forward to conclusion, counsel for the Acting General Counsel sought and I grant leave to further amend the complaint to better conform to the evidence presented, including the addition of the alleged act that on November 11, Sundquist acted unlawfully, when he stood guard at a distance over the employees signing the Union petition and created the impression that they were being surveilled. (Tr. 11³, 13-15, 150, 210, 227-228, 240-241, 254, 401; GC Br. 13, fn. 11, GC Br. 16, fn. 12; GC Exh. 1(g).)

Applying the Board's standard set forth in *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003), I grant this request, as the proposed amendments do not materially prejudice the Respondent; the amendments involved new factual matters but included much of the same evidence put forth at trial as was required to litigate the matters arising from the original complaint and as such I find that Respondent had adequate time to properly defend the new factual allegation.

Post-trial briefs were filed on August 2, 2012, by Respondent and Acting General Counsel and have been carefully considered. On the entire record⁴, including my observation of the demeanor of the witnesses and my evaluation of the reliability of their testimony, for the reasons set forth below, I find that Respondent violated the Act as alleged.

Findings of Fact

I. Jurisdiction

The Respondent is an Idaho corporation with an office and place of business in Boise, Idaho, and with projects in Idaho and the State of Washington. The Respondent is engaged in the painting and finishing of residential and commercial buildings. Respondent admits and I find that during the 12-month period ending on April 1, 2012, it provided services valued in excess of \$50,000 and derived gross revenues in excess of \$5,000. See Tr. 13; GC Exhs. 14 and 15. See also *Pioneer Concrete Co.*, 241 NLRB 264, 265 (1979), *enfd.* 637 F.2d 698 (9th Cir. 1981). I

³ For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s). Documentary evidence is referred to either as "GC Exh." for a General Counsel exhibit, or "R Exh." for a Respondent exhibit. References to post-trial briefs shall be either "GC Br." or "R Br." followed by the page numbers. Citing to specific evidence in the record is for emphasis and is not intended to preclude further evidentiary support elsewhere in the record.

⁴ I hereby correct the transcript as follows: Tr. 229, LL. 16-17: "You guys are [indiscernible] in the future." should be "You guys have problems in the future"; and Tr. 229, L. 20: "list" should be "lift."

further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act which regularly deals with employers about wages and rates of pay, and whose employees regularly participate in union meetings and elect union leadership. (Tr. 45-48; GC Exhs. 2-3.)

II. Alleged Unfair Labor Practices

A. Background

As stated above, the Respondent is an Idaho corporation engaged in the painting and finishing of residential and commercial buildings, and is owned by Arthur Eccles (Eccles). Eccles first started the business in spring of 2006, and since then has worked on a number of jobs, including projects outside of Idaho in Washington and Oregon. (Tr. 14, 287.) The present action is concerned with 2 projects that occurred in the Puget Sound area of the State of Washington beginning in 2011.

1. The PUD Project and the Wood Center Project

The first project that Respondent engaged in was at the Johns Prairie Operations Center in Shelton, Washington—also known as the Mason County Public Utility (the “PUD project”). The General Contractor at that site was Rushforth Construction, and on February 3, 2011, Eccles Painting subcontracted to complete all painting and finishing at the job. (GC Exh. 15; Tr. 130-31). The second project occurred in Seattle, Washington at the Seattle Central Community College’s Wood Center (the “Wood Center project”). The General Contractor at that project was Jody Miller, and on June 22, 2011, Eccles Painting subcontracted to work at that site. (GC Exh.14). While it remains unclear when each job actually began, the record has established that the jobs started roughly in the fall of 2011 and finished by early 2012.

It is important to note that at the beginning of these projects, Eccles Painting hired a sub-tier contractor called Merino’s Fine Finishes (Merino) to complete the work at both sites. (Tr. 68, 95-96). While it appears that early on Merino may have controlled the staffing and work at the jobs, Eccles Painting always held the official subcontract with the General Contractors on both projects. (GC Exhs. 14-15; Tr. 95, 168). According to a number of painting employees and foremen, Merino officially walked off of the jobs by early to mid-November, at which point Eccles Painting became the sole employer for all painting employees. (Tr. 172, 308, 411-412; GC Exh. 16.)

At each project, Eccles Painting also employed a number of foremen who were entrusted with the hiring, supervision, and control of the painting employees.⁵ At the PUD project, Aaron Key was the foreman, and testified without disagreement that he had the power to hire and

⁵ Most of the foremen testified that they were initially hired by, and worked for Merino. (Tr. 307, 397, 411). Once Merino left however, they were under the direct supervision and control of Eccles Painting. Nevertheless, because Eccles Painting held the subcontracts for both projects at all times, I find that these foremen were always under the ultimate control of Eccles Painting.

discharge employees as he saw necessary. (Tr. 470-471.) He also credibly testified that on at least one occasion Eccles had instructed him to lay off some employees. (Tr. 471.)

5 At the Wood Center project, Ken Sundquist (also know as “Moose” or “Ken Moose”) worked as a foreman and lead supervisor from October 25 through December 6. (Tr. 133, 276, 409.) Sundquist hired Deniz to work as a painter at the Wood Center project, gave many of Respondent’s employees their assignments, and occasionally inspected their work. Sundquist initially reported to Eric Moreno but by early November, Sundquist reported directly to Eccles.

10 On December 16, Joe Alvarado took over as the foreman and supervisor at the Wood Center project and continued on through early 2012.⁶ (Tr. 435.) Mike Lester also worked as a foreman at the Wood Center Project for Respondent alongside Sundquist beginning in mid November. (Tr. 276, 426.) Finally, although he did not testify, I find that Antonio Diaz (Diaz) 15 also worked as a foreman for Respondent at the Wood Center project. A number of Respondent’s employees testified that they witnessed Diaz being the boss in charge of supervising Respondent’s employees who also assigned work and inspected their work on multiple occasions. (Tr. 171, 202-203, 216, 238, 249, 276.)

20 *2. Omar Rubi and Painter’s District Council 5*

Omar Rubi (Rubi) is a field representative for the Union in Washington. The Union typically represents employees who work in painting, drywall, floor covering, glazing, glass, and maintenance. (Tr. 45.) Rubi’s job, as a field representative, is to organize nonunion workers, and, 25 at the time of trial, he had done this for approximately 4.5 years. (Tr. 45.) Rubi’s job includes soliciting workers to see if they are interested in union representation. (Tr. 137.)

Rubi first spoke with Eccles in July. (Tr. 49.) He contacted Eccles a number of times over the phone to discuss the benefits of being part of a union. (Tr. 50.) After his second call, the two 30 men agreed to meet. (Tr. 51.) During this same time, Rubi had gone out to several of the projects Eccles Painting was currently working on, and spoke with the employees there about joining the Union and assisting them with filing liens against Respondent for unpaid wages as Rubi and a number of Respondent’s employees believed that they were not being paid the prevailing wage rate. (Tr. 51-53.) A few days later, Rubi received a call from Eccles complaining that Rubi had 35 been trespassing on his jobs, and that Eccles did not want Rubi speaking to his employees about the Union. Nonetheless, the two still agreed to meet on July 19. (Tr. 53-54.)

Before their July 19 meeting, however, a number of events occurred. Sometime during the week before July 18, Rubi was present for a speakerphone conversation between Gustavo Garcia, the owner of Citivel⁷, and Eccles. (Tr. 55-56.) During this conversation, Rubi believably 40 testified that Eccles stated that, “he knew that Gustavo [Garcia] was tired of that union fucker [Rubi] that had been trespassing on his jobs and he was going to take care of the problem.” (Tr.

⁶ Respondent admitted and I find that both Sundquist and Alvarado were supervisors for Respondent under Section 2(11) of the Act in November and December. Tr. 16-17.

⁷ Rubi testified that Eccles Painting held the subcontract for the Tyee Middle School project, but had further subcontracted the job to another painting company called Citivel.

57.) Rubi also overheard Eccles tell Garcia that Respondent had 3 big jobs going on that Garcia and his painters would get to work if they met and the workers signed lien releases. (Tr. 56-57.) Eccles further tried to convince Garcia that it would be in his and his employees' best interests if they would accept less money in wages than what Respondent really owed them. *Id.*

At the end of the discussion, Garcia and Eccles decided to meet on Monday, July 18 at Tyee Middle School—one of the sites where Eccles Painting and Citivel employees were presently working. (Tr. 58.) Citivel had recently signed a contract with the Union, however, so Rubi decided he would attend the meeting as well. *Id.*

When Rubi arrived that morning at Tyee Middle School, he stated with confidence that he overheard Eccles telling various employees that, “I know you’re talking to that fucking union guy [Rubi]. If you listen to him, I [Eccles] will fight you. I will get a lawyer and I will fight you and it will take 1 or 2 years before you see any money.” (Tr. 59.) After his speech, Eccles then approached Rubi and the two discussed the various liens for nonpayment of overtime and prevailing wages that Citivel’s employees had filed against Eccles Painting. (Tr. 61.)

The next day, on July 19, Rubi and Eccles met at the Union office as planned (Tr. 61-62.) Rubi believably recalled that Eccles was initially hostile, saying things like “My father’s a millionaire; I am going to fight you, fight the Union.” (Tr. 62.) Eventually though, as the two discussed the Union’s apprenticeship program, Eccles began to come around to the idea of the Union, and even expressed before he left that he was interested in doing some future projects with the Union. *Id.* A few days later in a phone conversation, however, Eccles conveyed to Rubi that he was not interested in working with the Union after all. (Tr. 63).⁸

B. Eccles Painting Employees Sign the Union Petition

By late October 2011, Rubi learned of two new jobs that Eccles Painting was working on in the Seattle area: the Shelton PUD project approximately 60 miles outside Seattle and the Wood Center trade school project in Seattle. (Tr. 66-67.) As part of an organizing drive, Rubi encouraged several painters he knew—Aldo Gamas, Jose Alcantar, and Luis Deniz—to apply for work at the Wood Center project. (Tr. 70.) Eventually, on November 9, Rubi went out to the Wood Center project to discuss the Union with Eccles Painting employees during their breaks from work. (Tr. 71, 145, 253.) That day, Rubi parked his truck and met with the employees in a parking lot across the street from the job site. (Tr. 71; GC Exhs. 5a and 5b.)

⁸ Rubi testified that after this last conversation, Eccles again contacted him complaining about liens that his employees had filed against Eccles Painting. (Tr. 64). The issue of wage claims and liens having been filed against Eccles Painting was a recurring topic at the hearing; however, because I find that these liens have general value to show that Eccles Painting’s employees were being unfairly underpaid for at least a portion of the wages owed by Eccles Painting, I do not discuss the liens in detail.

5 The first person that Rubi met with was Damon Danner. The two had a brief conversation in the parking lot that morning, during Danner's break, concerning the employees' missed wage payments from Eccles Painting. Danner then informed Rubi that the other employees would all be in the parking lot during lunch that day. (Tr. 72.)

10 At lunch that day, approximately 8 or 9 employees met with Rubi in the same parking lot area near the Bank of America branch. (Tr. 145-146, 221; GC Exhs. 5a and 5b.) Rubi told the employees that he had heard about the missed wages payments at Eccles Painting's projects and that the Union could help the employees attempt to get fully paid with lien filings against the Respondent. Rubi then stated that he would be back in a couple of days with a Union petition. (Tr. 73.) Rubi later discovered that one of the employees listening to his speech that day was Diaz—a foreman for Respondent who Rubi saw mocking what he was saying, rolling his eyes and making insulting noises. (Tr. 73-74, 221-222.)

15 Two days later on November 11, Rubi returned with the Union petition for union representation (the Union petition) and met again with Eccles Painting employees in the parking lot across the street during their break. (Tr. 74-75, 225-227, 239, 250-251, 277; GC Exh. 4; GC Exhs. 5a and 5b; GC Exh. 8.) The employees who signed the petition that day were Damon
20 Danner (Danner), David Bazan (Bazan), Aldo Gamas (Gamas), Luiz Deniz (Deniz), Jose Alcanter Moreno (Moreno), Jaime Guevara (Guevara), Gustavo Gallardo (Gallardo), and Alfredo Frias Vargas (Vargas). Id. A number of these employees testified that they first observed Diaz and, soon thereafter, Sundquist watching them as they signed the petition. (Tr. 150, 210, 227-228, 240-241, 254.) Sundquist confirmed at the hearing that he saw employees meet with
25 Rubi and sign the Union petition. (Tr. 401.)

30 On November 17, Rubi visited the PUD project and obtained the signatures of other Eccles Painting employees, including Omar Santillan (Omar), Adrian Santillan (Adrian), Isaias Lopez (Isaias), and Irineo Lopez (Irineo). (Tr. 82-83, 309-310, 326; GC Exh. 4; GC Exh. 8.) Rubi collected the signatures during the employees' morning and lunch breaks. (Tr. 82, 310).

35 The following day, November 18, Rubi and another Union field representative named David O'Meara visited the Wood Center project and presented the petition to Sundquist inside the premises. (Tr. 83-84, 245-246, 339.) Upon showing Sundquist the petition, Rubi asked him if he would recognize the Union. Sundquist responded -- no, that the Union had never done anything for him. (Tr. 339.) When Rubi moved the Union petition closer to Sundquist's face, Sundquist read the names on it. (Tr. 84-85, 339-340.)

40 After this brief exchange, Sundquist told Rubi and O'Meara that they should not be there, and told them to go to the project trailer. (Tr. 86.) Inside the trailer, one of Jody Miller's superintendants was present, and after having a conversation about the payroll with Sundquist, the superintendant asked Rubi and O'Meara to come back another time. (Tr. 87.)

45 On November 21 and 22, Rubi sent Eccles via certified mailed and email copies of the signed Union petitions along with a demand for Union recognition letter and they were delivered to him on November 25. (Tr. 97-100; GC Exhs. 9 and 10.)

On November 28, Eccles telephoned Rubi and wanted to try and work things out with Rubi and the Union because Eccles Painting had quite a bit of painting work remaining and Eccles needed to move past his labor problems. (Tr. 106-107.) The two agreed to meet or talk in early December to discuss further. Id.

On November 29, Rubi was at the Wood Center project, and met with Gamas offsite in the parking lot during his morning break and noticed that Sundquist was watching the two meet from approximately 30-40 feet away. (Tr. 107-108.) Later that day in the afternoon, Gamas was fired by Eccles Painting. (Tr. 108.)

Rubi telephoned Eccles when he learned of Gamas' employment termination and Rubi told him that he could not fire people who had signed the Union petition. (Tr. 108-09.) Eccles responded by saying that Eccles Painting was "his fucking company and that he could do whatever the fuck he wanted." (Tr. 109.) Eccles next accused Rubi of interfering with Eccles Painting's employees on the job during work hours which Rubi denied and the conversation concluded with Eccles threatening to layoff the rest of the Union petition signers within the next 5 days.⁹ (Tr. 53-54, 109, 116-120.)

C. Eccles Painting Employees are Threatened and Fired

1. Luiz Deniz

In the afternoon on November 11, Deniz went back to work in the basement at the Wood Center project. (Tr. 147, 152.) According to Deniz, there were 8-12 painters at the Wood Center project at this time. Prior to this job, Deniz had 2 years' experience as a painter and 12 years' experience as a drywall finisher in the Seattle area.

Without hesitation, Deniz credibly testified that as he was working, Sundquist and Diaz came in and were saying to each other that they were going to fire the people who had signed the Union petition. (Tr. 142.) Later that day, after the last break, Deniz also overheard Diaz and Vargas talking about 10 feet away. He and Vargas recalled that he heard Diaz tell Vargas that "everybody that signed the paper [the Union petition] was going to get fired." (Tr. 153, 279.) Diaz then approached Deniz and told him the same thing. (Tr. 154.)

On November 15, Deniz was painting a room in the lobby of the Wood Center, and he estimated without hesitation that there remained approximately 4 or 5 months of work for

⁹ Rubi convincingly explained that because there were already other trades represented by his union at the Wood Center and PUD projects, Rubi was properly onsite at various times observing working conditions for the other trades people such as the tapers, glass contractors, glazers, mudders, and people laying the floor. Tr. 118-120, 129-130. While Rubi admitted being instructed by someone with general contractor Jody Miller not to bother Eccles Painting workers while working at the Wood Center project, Rubi credibly denied bothering or pulling painters off scaffolding to solicit their representation at Wood Center and PUD projects. Tr. 116-121, 132-133. At all relevant times in November and December, Eccles was in Idaho and not onsite at these projects.

completion at that time. (Tr. 154.) That afternoon, Sundquist asked the employees to sign a paper that said Eccles Painting had paid them a check—despite no such payment actually occurring. (Tr. 154-155.) Deniz refused to sign the form, however, because he claimed he did not understand what it was. *Id.* Afterwards, Deniz saw Rubi and O’Meara come to the site and speak with Sundquist. Approximately 5 to 20 minutes after this, Sundquist approached Deniz and told him that he was fired because he was working slowly and because he had signed the Union petition. (Tr. 155-156.) Prior to this day, Sundquist had never told Deniz that he was doing bad work, and had said that his work was fine. (Tr. 156.)

2. Damon Danner

Danner worked initially at the PUD project and then transferred over to the Wood Center project on November 2. (Tr. 169-170.) At both job sites he encountered problems with delayed and underpaid wage payments from Eccles Painting. (Tr. 172.) Both Aaron Key and, later, Sundquist required Danner to sign an “unconditional waiver” before he could receive his paychecks from Respondent. Danner signed the waivers with a note that the signings were “under duress” as he believed it was “ridiculous” to be forced to sign a waiver in order to receive his earned wages. Eventually, Danner filed wage claim liens against Eccles Painting sometime in early to mid-November for his unpaid wages at the two projects. (Tr. 180; GC Exhs. 6a, 6b, and 7.) Danner described the paychecks he received from Respondent as being non-typical as there were no taxes or FICA withheld and he also did not receive proper overtime pay so that in all Danner estimated that Eccles Painting would pay him less than half of the wages owed to him for hours worked.

On November 18, Danner worked a full day, and as he was leaving, Sundquist was passing out paychecks. Danner waited for his check but never received one, and instead was handed a piece of paper with Eccles’ phone number on it. Sundquist told Danner, “You are being laid off. Art [Eccles] wants you to call him.” (Tr. 181.) Danner testified that he was “flabbergasted” by this because he believed he was the most experienced painter on the job and estimated that there remained at least 6 weeks work with approximately 15 painters on the job when Danner was laid off.¹⁰ (Tr. 168-169, 181.)

As Danner was walking back to his car, he saw Rubi and told him that he had just been laid off. Danner then called Eccles with Rubi still present. (Tr. 182.) During the conversation, Eccles told Danner that he was being laid off because work was getting slow. Danner disagreed with Eccles and told him his explanation of slowing work was “BS” and further stated to Eccles that he believed Eccles was laying him off instead because Danner had signed the Union petition against Eccles Painting along with liens for unpaid wages. (Tr. 182-183.)

In response, Danner convincingly recalled that Eccles told him: “That is what you fucking get for listening to the fucking Union. The Union doesn’t give a shit about you.” (Tr. 183.)

¹⁰ Danner had worked as a lead painter with Respondent, understood and spoke English, and performed the specialized skills of painting air ducts, pipes while using a paint sprayer.

By this point, Danner switched the conversation to speakerphone so that Rubi could hear. Rubi confirmed this conversation in detail during his own testimony. *See* Tr. 90-91. When Danner asked when he would get the money that Eccles Painting owed him, Eccles replied, “You get your money when the lien goes away. Might be a couple of years.” (Tr. 183.) Both Rubi and Danner testified that at this point Rubi got on the phone and told Eccles that his workers want union representation. (Tr. 90, 184.)

Eccles responded to Rubi saying -- “Fuck you . . . I fired them for fucking listening to you [Rubi] and filing liens you Motherfucker. All you do is follow me around and fuck with me. You fucking trespass on my jobs, you Motherfucker.” (Tr. 91).

Next, Danner told Eccles: “You laid David [Bazan] and myself off . . . [and] I don’t get it...I was one of the more experienced guys [painters] . . .” and Bazan was spraying hollow metal door jambs which is very difficult and requires much experience using a sprayer with a specialized technique that not every painter has. (Tr. 183-184.) Danner credibly recollected that Eccles’ immediate response to this was: “You guys shouldn’t have listened to the damn Union.” (Tr. 184.)

Finally, Danner recalled that Rubi got onto the speakerphone at this point with Eccles and asked him once more if Eccles Painting accepted the Union as a representative of the painter employees at the Wood Center project and Eccles responded with numerous profanities along with his statement that Eccles Painting was rejecting the Union’s representation. (Tr. 184.)

On the morning of November 22, Danner engaged in picketing at the Wood Center project with Rubi, Bazan, and Deniz. (Tr. 185-186, 229-230, 257; GC Exh. 5a.) Diaz saw the picketers and instructed another supervisor’s brother to tell the picketer to “get out of here . . . This mother fucker [Diaz will] kick his ass.” (Tr. 230.)

Just prior to Thanksgiving, Danner called Eccles and asked when he was going to get the wages owed to him by Eccles Painting? (Tr. 192.) Eccles responded once again that it would not be until the liens went away. *Id.* At this point the conversation got more heated and Danner told Eccles, “I am going to get my money pretty soon. I know where you live . . . [and I will] kick your ass.” (Tr. 110-111, 193.) Eccles then asked if Danner was threatening him, and told Danner he was going to call the police. Danner replied that he had been to prison before and that it didn’t scare him. *Id.* At that point, Danner hung up.

Later sometime in December, Eccles recalled his earlier conversation with Danner and mentioned it to Rubi. (Tr. 110-111.) Eccles explained to Rubi the reason behind Danner’s threat had to do with the money Eccles Painting owed Danner. *Id.* Eccles also accused Rubi of vandalizing the Wood Center jobsite which Rubi convincingly denied. (Tr. 111.)

On December 5, Eccles contacted Danner offering him work at the Wood Center project. (Tr. 194.) Danner laughed at Eccles and told him that he would work for him when Respondent paid him the back wages it owed him. Eccles responded that he would get his money when the liens went away. *Id.*

3. David Bazan

5 David Bazan had 6.5 years painting experience going into his work for Respondent at the Wood Center project. Respondent supplied Bazan with painting sprayer and other equipment for the job. He testified that the week after he signed the Union petition on November 11, he was working in the basement of the Wood Center project when he overheard Sundquist and Diaz talking in English. (Tr. 211-212.) Specifically, he stated with confidence and no hesitation that Diaz said to Sundquist, “If those guys, they put their name on the petition, you fire them. They go home.” Sundquist then agreed by responding: “Yeah, those guys [who sign the Union petition will be] fired.” (Tr. 212.)

15 On November 18, just after noon, and shortly after Rubi and O’Meara had shown Sundquist the Union petition, Sundquist came into the room where Bazan was working on a ladder and said, “David [Bazan], you are fired.” (Tr. 213.) Bazan then came down from the ladder and asked Sundquist “why?” The two then went outside and Sundquist told Bazan, “You put your signature on the [Union] petition, so you are fired. Go home.” *Id.* Afterwards, Bazan contacted Rubi on the phone. *Id.* When Bazan left the Wood Center project on November 18, he estimated that there remained 2 to 3 months painting work at the site.

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4. Jose Alcantar Moreno

Moreno had 16 years painting experience before he worked at the Wood Center project as a painter for Respondent from approximately the first week of November until November 29. Moreno was hired with Gamas by Respondent through a referral by Rubi for Gamas and Moreno to see Sundquist who told them to call Eccles directly for a job. (Tr. 218-219.) Eccles told Gamas that he and Moreno should see Sundquist for work with Respondent. (Tr. 219.)

30 Moreno noted that when he started in early November there were 6 or 7 other painters working the Wood Center project with him and that number increased to 8-10 painters in week 2 and further to 13-14 painters by the third week of November. (Tr. 220.) When he was laid off on November 29, Moreno estimated that there were 3 weeks to one month left to finish the project. (Tr. 233.)

35 Moreno recalled a conversation Sundquist had with Gamas and him a few days after he signed the Union petition. (Tr. 229.) Sundquist approached Moreno when he was masking in some pipes by the ceiling with Gamas and Sundquist asked them to come down from the scissor lift. *Id.* Next, Sundquist asked them if they were for the union or union members. Gamas denied they were, Moreno stayed quiet, and Sundquist responded that he had seen both of their names on the Union petition and if they signed the Union petition or were union members, they will have problems in the future. *Id.*

40

45 On November 29, Moreno had a problem closing his car trunk and since that is where he kept his tools, he did not want to leave the truck open. (Tr. 230-231.) Moreno discussed with and showed Sundquist his car trunk problem and asked if he could miss work that day to take his car to a mechanic to fix the trunk problem. *Id.* Sundquist responded to Moreno’s question by agreeing that it was fine for Moreno to take the day off to fix his car problem and for Moreno to come back early the next day to resume his painting work at Respondent. *Id.* Moreno had his car

5 repaired on November 29 and at 7 a.m. on November 30; Moreno arrived at work at met with Sundquist for his day's assignment. (Tr. 231-233; GC Exh. 13.) Sundquist responded: "What? You quit yesterday. I can't give you any more work. I don't have anything to do with you. Get out of here." (Tr. 232.)

5. *Aldo Gamas*

10 Gamas had 10 years of experience as a painter before he started work at Respondent's Wood Center project. (Tr. 236.) He was a journeyman painter and a member of the Union. Id. Gamas was hired by Eccles and Sundquist in early November with Moreno in the manner described above by Moreno.

15 A few days after signing the Union petition at the Wood Center project, Gamas was approached by Sundquist while working. (Tr. 341.) Gamas testified that Sundquist told him that he was going to be in trouble if he signed the Union petition. Sundquist then left. Id.

20 On November 29, at around 3 in the afternoon, Sundquist again approached Gamas while he was working, and this time told him that he was being laid off. (Tr. 242.) Sundquist said specifically, "Thank you for your service. We don't need you anymore." (Tr. 107, 242-243.) When asked for an estimate at the hearing of how much work was left to be done as of November 29, Gamas convincingly estimated that more than half of the painting remained to be completed that included many walls and almost all of the school buildings' ceilings as well as a lot of wood and stairwells. (Tr. 243.)

25 6. *Gustav Gallardo and Jaime Guevara*

30 Gallardo, another painter who had signed the Union petition, worked for Respondent as a painter at the Wood Center project from November 7 through December 15 when he was fired by Lester who had replaced Sundquist as lead foreman and supervisor for Eccles Painting. (Tr. 248.) When Gallardo started in November, he estimated that there were between 14-18 painters at the Wood Center project. (Tr. 249.) Sundquist and Diaz had complimented Gallardo on the quality of his painting work once or twice before Sundquist left the job. (Tr. 264.) Sundquist, Diaz, and Lester never complained about the quality of Gallardo's work at the Wood Center project. Id.

35 Gallardo had 10 years painting experience before coming to work for Respondent. (Tr. 263.) While on the job at Wood Center, Diaz would occasionally talk to Gallardo and tell him things that Diaz and Sundquist talked about such as who the two of them would lay off the job. (Tr. 250.) Gallardo recalled that Diaz warned him on approximately November 9 not to sign the Union petition because those workers who sign would be fired and without a job. (Tr. 254.)

45 Gallardo and Vargas met with Sundquist and Diaz approximately 2 days after signing the Union petition and Diaz asked them both whether they had signed the Union petition. (Tr. 255.) Gallardo admitted signing the petition and Diaz responded by telling Gallardo that he would be fired by Eccles Painting. Id. Vargas denied signing the Union petition though Gallardo knew he was lying because he saw Vargas sign the same petition Gallardo signed on November 11. (Tr. 255-256.)

5 About 2-3 weeks into the job, Gallardo and others at the Wood Center project complained to Sundquist that they had not been paid wages on time by Eccles Painting. (Tr. 256.) Sundquist responded by telling the workers that Eccles Painting's paychecks come in late. Id.

10 Gallardo was unexpectedly fired by Lester and Diaz at the same time on December 15 as Vargas and Guevara. (Tr. 258-259, 281-282.) The group went to the worksite trailer of the general contractor Jody Miller. Lester explained that the three employees were fired for complaining too much about not being paid to Eccles Painting. (Tr. 260-261, 282.) At the time of their layoffs, Gallardo estimated that approximately 30 percent to 40 percent of the painting work remained undone at the project. Id. As they were leaving the worksite, Gallardo and Vargas noticed that Respondent hired 2 new painters at the Wood Center project, one of them was Diaz' son and another painter Gallardo recalled by the name was Luciano. (Tr. 261-263, 283.)

15 In January 2012, Joe Alvarado called Gallardo to see if he would return to work at the Wood Center project. (Tr. 265-266.) When Gallardo returned to the project, he noted that there were painters on the job including Lester, Alvarado, Diaz, Diaz' son, Lucian, Guevara, Vargas, and some painters Gallardo had never seen before. (Tr. 266-267, 283-284.)

20 Gallardo only worked 2 days in January 2012 when Diaz told him that Diaz had spoken to Eccles and while Eccles admitted owing Gallardo a lot of money for unpaid hours worked before January 2012, Eccles Painting was not going to pay the wages owed to Gallardo. (Tr. 268.) The last payment that Gallardo received from Eccles Painting was in early December and that Eccles Painting still owed unpaid wages to Gallardo for work performed in 2011. Diaz concluded by telling Gallardo that Eccles told him to tell Gallardo that if Gallardo wanted to work the job in January 2012, he could but without being paid for his services. Id. Gallardo responded to Diaz by telling him that he would leave under those conditions. Id.

25 30 Gallardo estimated that when he left the job in January 2012, there was approximately 20 percent of the work remaining. Gallardo went back to the site twice later and both times Alvarado told Gallardo that there was no paycheck for Gallardo from Eccles Painting. (Tr. 269-270.) Soon thereafter, the Union filed a wage claim for Gallardo against Eccles Painting. (Tr. 270.)

35 *7. Alfredo Frias Vargas*

40 Vargas confirmed much of Gallardo's testimony as to events that occurred to him at the Wood Center project in November through January 2012. Before working for the Respondent, Vargas had been painting for 20 years in Washington. (Tr. 274.) He first began painting for the Respondent on November 3 at the Wood Center project and worked there until he was fired on December 15. (Tr. 274-275, 281.) Vargas recalled that when he first started working the Wood Center project, he and Deniz were the first 2 painters on the job. (Tr. 276.)

45 Vargas remembered overhearing Sundquist and Diaz talking at the Wood Center project first floor at approximately 2 p.m. one day in November and Sundquist saying that if the painter employees want to sign the Union petition, they know that what will happen is that they will be

fired. (Tr. 279-280.) In late November or early December, Vargas told Diaz that he had signed the Union petition. (Tr. 280-281.)

5 8. *Omar Santillan, Adrian Santillan, Isaias Lopez, and Irineo Lopez*

Omar and his brother Adrian worked at the PUD project first for Merino beginning on September 20 through the middle of November and then for Eccles Painting until December 7. (Tr. 306-308, 317-318, 322.) The Lopez brothers, Isaias and Irineo worked the PUD project from the beginning of October also through December 7. (Tr. 311, 322.) Before this work, Omar had 4 years of experience as a painter and Adrian had 2 years of experience. (Tr. 307, 317.)

On or about November 29, Adrian called Diaz who Omar and Adrian knew from working together at the PUD project before Diaz left to work the Wood Center project for the Respondent. (Tr. 320-321.) Adrian called Diaz to see if he was receiving paychecks from Eccles Painting on a timely basis because the Santillans were not receiving their correct wages for their work at PUD. (Tr. 321-322.)

Adrian also told Diaz not to speak badly about the union because it could file charges against him. Id. Diaz responded to Adrian and said “that jerk [Rubi] won’t do anything to me.” (Tr. 322.) Later in the conversation, Diaz told Adrian that “they [Diaz and Sundquist] had spilled some paint inside the building [at Wood Center] and that they had broken a propane gas line ...” in an attempt to make it look like Rubi and the union members who signed the Union petition were responsible for vandalism so they could be fired by Eccles Painting. Id.

On December 7, Omar had a conversation in English with his project manager in charge at the PUD project, Aaron Key (Key), at approximately 8 a.m. (Tr. 308, 310-311.) Key did not speak Spanish. (Tr. 315.) Key told Omar that he had to fire 4 painters that day and fired Omar, Adrian, Isaias, and Irineo. (Tr. 310-311, 313-315.) Adrian recalled overhearing the same conversation between Key and Omar and remembered hearing Key tell Omar that Eccles had called Key earlier that morning and gave Key the names of 4 painters “that need to leave” – Omar, Adrian, Isaias and Irineo. (Tr. 323, 325, 471.) Key did not really understand why Eccles was forcing Key to fire the 4 especially since they were doing a really good job at the project. Id.

At the end of the day on December 7 in the parking lot, Key told Omar that he really hated to fire the brothers and that Key really appreciated their hard work at the PUD project. (Tr. 312, 323-324.) Key further told Omar and Adrian “You guys are hard workers but I have to do it. I just follow orders from Mr. Eccles.” Id.

Omar asked Key if he knew why they were being fired and Omar asked Key if the firing had anything to do with their signing the Union petition. (Tr. 312, 323-324.) Omar and Adrian believed that Key was surprised and that he did not know they had signed the Union petition. Id. Key responded to Omar and Adrian and said: “maybe ... or probably ... that’s the reason you guys get fired because I receive orders from Mr. Eccles this morning. I got to fire you and your brother and the other two guys [Isaias and Irineo].” Id. Key concluded by telling Omar and Adrian: “Maybe next week, all of us going to get fired because Eccles is going to bring more guys to get done the job.” Id.

Omar and Adrian noted that 4 or 5 new painters arrived on the PUD project approximately one week before they were fired and remained on the project through the December 7 firings. (Tr. 312-313, 324.) Adrian estimated that there were 15 painters at the PUD project when he and his brother left on December 7. (Tr. 324-325.)

Analysis

10 *A. Credibility*

My credibility resolutions have been formed by my consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear in those situations that I perceived to be of particular significance.

20 The testimony concerning the material events in 2011 and the Respondent's reasons for terminating the employment of 12 of its employees contain sharp conflicts. Evidence contradicting the findings, particularly testimony from Eccles, Sundquist, and Lester, has been considered but has not been credited except to the extent it is consistent with more reliable witness testimony.

25 Danner was most credible when he explained that he and Bazan were very good painters with specialized painting skills, much experience, and leadership qualities who would not be expected for layoff until the very last moment but for their signing the Union petition. Also, Danner, Bazan, Gamas, Gallardo, Vargas, and Moreno were believable and confirmed Rubi's 30 testimony that Rubi did not solicit painters while they were working on the job and Rubi did not take painters off the job at any time or interfere with painters while working. I give substantial weight to the consistent testimony from the numerous employees here that their signing the Union petition directly resulted in Respondent firing them. The Santillans were also very credible and testified effortlessly and with confidence that they were also very good painters who 35 Key did not want to let go but for Eccles' specific instructions to fire them despite there being more work and Respondent's hiring of 3-4 new painters just prior to the December 7 firings of these 4 painters who had signed the Union petition.

40 No reliable evidence was ever presented that Rubi was trespassing and disruptive on Respondent's Wood Center or PUD jobs. (Tr. 342-344.) Rubi was believable when he denied causing any disruption at the Wood Center or PUD jobs. (Tr. 53-54, 109, 116-120, 485.) He also convinced me that he had a legitimate right to be onsite due to his showing Sundquist the signed Union petition with Mr. O'Meara on one occasion and the key fact that Rubi was there to observe other union crafts and monitor safety standards as the Union represented other 45 companies (Colchuck Glass) and there were other crafts (tapers, drywallers, mudders, glazers, glass company.) besides the painters at both jobs. (Tr. 118-119, 341.)

Also, Eccles was not present onsite in November and December as he managed his company's jobs in the Puget Sound area in the State of Washington from his corporate headquarters in Boise, Idaho. In addition, Sundquist recalled a couple of times he thought Rubi was interfering with the painters during work hours when, in fact, I find that one time was when the Union petition was being signed offsite in the parking lot during lunch on November 11 and another time Rubi was speaking to men while on break. (Tr. 150, 210, 227-228, 240-241, 254, 418.) Lester did not recognize Rubi and I find him to be biased in favor of the Respondent as he was working for Eccles at the time of trial. Consequently, I give little weight to Lester's testimony as to Rubi's presence at the Wood Center job as it is biased and unreliable. (Tr. 429-432.) Consequently, Eccles was forced to rely on the less reliable second-hand views of his biased anti-union foremen and supervisors who openly admitted they did want a union at their projects and would and did fire anyone who signed the Union petition.

Eccles was also not credible or put forward evidence that did not help his defense here. He firmly held the unreasonable belief that the business risk that he and Eccles Painting took on under various painting contracts, including projects at PUD and Wood Center, was shared equally with his employees. Therefore, according to Eccles, if Eccles Painting ran into financial difficulties, timely payment of full wages would be delayed indefinitely and his employees would simply just have to wait and see if he could work the problems out before they would receive their proper wages and benefits including overtime. I also do not believe that Eccles' position that delayed payments to his company alone caused a delay in his employees being paid their proper wages. Instead, as referenced above, Respondent delayed payments to various employees primarily because of their union activities including the fact that they signed the Union petition. Wage payments were also unlawfully delayed to get them to release their wage liens ahead of full wage payments. As a result, I find that all of Respondent's evidence of events taking place in 2012 *after* the termination of the 12 employees is irrelevant. *See*, i.e. Tr. 361-392; R Exhs. R0-R14, R22-29, and R48-49.¹¹

In addition, Eccles' demeanor at trial and in a pre-trial conference call with Eccles, his lawyer, and others, made it apparent that he did not like Rubi and often used profanities directed at Rubi though, incredibly, Eccles denied this. (Tr. 112.) Eccles did not come forward with reliable testimony from Garcia or any other witness that backed Eccles' version of the facts.

Sundquist was credible when he admitted laying off several of the employees involved in this case but his explanation for the layoffs was very vague and non-believable. (Tr. 406.) For example, he put forth a variety of reasons for some layoffs which are contradicted by the vast majority of other witnesses who credibly explained that much of the work remained unfinished through the middle of December and that Respondent was still hiring new workers throughout this time. Sundquist failed to provide justifiable reasons for his "layoff[s]" of Deniz, Bazan,

¹¹ If a compliance case follows, Eccles also did not understand that a partial wage payment did not take away Respondent's unlawful conduct for failing to pay back wages when a full payment at the prevailing wage rate including overtime plus interest was necessary to make the terminated employee whole. *See*, i.e. Tr. 486; R Exhs. R15-R21.

Danner, Moreno, or Gamas. As a result, I give little weight to his testimony. In addition, at trial he appeared disinterested and generally he did not have specific memory of key events in November or December. As a result, I discredit his occasional recall for events favorable to Respondent and in direct conflict with the consistent testimony from practically all of the fired employees as to anti-union statements attributed to Sundquist, Diaz, and Eccles. These non-credible statements by Sundquist include his statements that he was never instructed by Eccles to lay off workers because they signed the Union petition. Again, this is in direct conflict with the overwhelmingly consistent and more credible testimony from the terminated workers and Sundquist's own admissions as to his watching the employees in the parking lot on November 11 and his reading the names of the employees who signed the Union petition. It is also in conflict with Diaz' statements to him and the overall company anti-union animus attributed to numerous statements from Eccles, Sundquist, Diaz, Lester, and Alvarado. Only Key was surprised by hearing about the signed Union petition and Eccles' instruction to terminate the hard-working Santillan and Lopez brothers just after the arrival of newly hired workers.

Key, however, was not credible when he denied that any laid-off or fired employees at the PUD project ever mentioned a union petition as he laid them off or fired them. This denial is in direct contradiction to the very believable testimony from Omar and Adrian Santillon who convincingly recalled that Key seemed surprised when Omar told him that they had signed the Union petition in relation to Eccles' instruction for Key to fire them despite the fact that work remained to be done at the project and these were very good workers. Key credibly acknowledged that the real reason for their firings might or probably related to their signing the Union petition. (Tr. 312, 323-24.)

B. Supervisory or Agent Status of Sundquist, Diaz, Alvarado, Lester, and Key

1. Sundquist, Diaz, Lester, Key, and Alvarado are supervisors of Respondent

Respondent readily admits and I find that Sundquist and Alvarado were Respondent's supervisors at all material times within the meaning of Section 2(11) of the Act, respectively. Respondent challenges, however, the supervisor status for Diaz and Lester.

Under Section 2(11) of the Act a supervisor is any person:

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 such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Each of these criteria need not be satisfied for an employee to be classified as supervisor under Section 2(11).¹² However, to be classified as a supervisor the employee must (1) have authority, (2) to use independent judgment (3) in performing such supervisory functions, and (4)

¹² *National Welders Supply Co.*, 129 NLRB 514 (1960). Moreover, the Supreme Court has suggested that an employee may be classified as a supervisor if he meets any one of the 12 criteria. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

in the interest of management.¹³ However, making routine assignments without the use of independent judgment has been found to be insufficient to meet the requirements of a statutory supervisor.¹⁴

5

Diaz fits several of the Act's enumerated criteria including using independent judgment in hiring, training, and assigning and directing their work. The preponderance of evidence shows that Diaz, as one of the only Spanish speaking managers of Respondent, provided necessary management and supervisory skills to Respondent. I find that Diaz assigned the work at the PUD and the Wood Center projects, communicated with many of the Spanish speaking employees. Diaz also reviewed the work of Respondent's employees, inspected the work and decided whether the work needed correction or to be re-done. Moreover, painters were required to follow Diaz' assignments under threat of discipline or termination.

10

15

Diaz reported directly to Sundquist, the lead supervisor, and the 2 were the primary supervisors at the Wood Center project until Sundquist left on December 6 and was replaced with Lester and then Alvarado.

20

In addition to the primary supervisory status criteria, Diaz also meets many of the secondary criteria the Board has developed including employees' perception that Diaz was the "boss." See *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Many of the painters testified that they believed Diaz to be a supervisor and treated him as such. It was clear from Diaz' relationship with Sundquist that Diaz was in charge and had authority over the Spanish speaking painters.

25

30

Lester also fit a key factor for supervisor status under the Act including using independent judgment in firing Gallardo, Guevara, and Vargas on December 15. (Tr. 248.) The preponderance of evidence shows that Lester provided necessary management and supervisory skills to Respondent. I find that Lester took Sundquist's place with Respondent as foreman and supervisor with authority to fire workers as he did on December 15. Lester reported directly to Eccles, the company's owner in Idaho.

35

Key also fit a key factor for supervisor status under the Act as he was Respondent's foreman at the PUD project and he testified that he had the authority to hire, fire, and lay off employees. (Tr. 471.)

40

Despite Respondent's claims that Diaz and Lester did not have any authority over the painter employees, it is clear that they each did have actual control and authority over these employees and that they each directly supervised them. The record is rife with examples of how Diaz exerted that control. Also there is no dispute that Lester followed Sundquist as foreman and supervisor and fired three employees on December 15. As such, I find that Diaz and Lester are each supervisors within the meaning of Section 2(11) because they were each clearly vested with authority to hire and train Eccles Painting employees, assign and direct their work, and, along with Eccles, Sundquist, and Alvarado, discipline and fire Respondent's employees.

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¹³ *NLRB v. Healthcare & Ret. Corp of Am.*, 511 U.S. 571 (1994).

¹⁴ *Stanford Hotel*, 344 NLRB 558 (2005).

2. Diaz and Key are agents of Respondent

Section 2(13) of the Act creates the test for whether an employee is an agent of the
5 employer:

In determining whether any person is acting as an “agent” of another person so as
to make such other person responsible for his acts, the question of whether the
specific acts performed were actually authorized or subsequently ratified shall not
10 be controlling.

The Board applies common law principles of agency to determine whether an individual
possesses actual or apparent authority to act for an employer, and the burden of proving the
agency relationship is on the party who asserts its existence. See *Pan-Oston Co.*, 336 NLRB
15 305, 305–306 (2001).¹⁵ In *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106, 106 (1997),¹⁶
the Board stated that “it is well established that the apparent authority results from a
manifestation by the principal to a third party that creates a reasonable basis for that party to
believe that the principal has authorized the alleged agent to perform the acts in question.”¹⁷

Moreover, under the common law of agency, a principal may be responsible for its
20 agent’s actions if the agent reasonably believed from the principal’s manifestations to the agent
that the principal wished the agent to undertake those actions. See Restatement 2d, Agency, § 33.
Id.

Applying these principles here, it is manifestly clear that Diaz was the Respondent’s
25 agent. At no time did Diaz act on his own as employer of the Eccles Painting workers. Once
Eccles Painting took over from subcontractor Moreno in early to mid-November, Diaz became
Eccles Painting’s surrogate as its only Spanish speaking foreman. The Respondent used Diaz to
relay owner Eccles and lead supervisor Sundquist’s directions to the employees. Diaz would
30 meet Sundquist the start of each workday at 7 a.m. to discuss and determine assignments for the

¹⁵ *Contra Ready Mix, Inc.*, 337 NLRB 1189 (2002) (employee was not an agent where he was temporarily assigned the duties of a field representative and even though he made representations that he had authority over the other workers there was no evidence that the employer conferred such authority on him or “cloaked him with apparent authority to act as its agent”).

¹⁶ In *Zimmerman*, the Board found both apparent and actual authority where foremen “acted as the conduits for relaying and enforcing the Respondent’s decisions, directions, policies and views . . . participated in monthly management meetings . . . were privy to the Respondent’s policies and objectives . . . [and therefore] it was reasonable for the rank-and-file employees to believe that these foremen were reflecting company policy and acting for management when they engaged in the conduct found to be unlawful.” 325 NLRB at 106.

¹⁷ See also *Waterbed World*, 286 NLRB 425, 426–427 (1987) (the test for whether statements or actions taken by individuals are attributable to the employer is whether the employees “would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management”); see also *Southern Bag Corp.*, 315 NLRB 725 (1994).

day. Diaz would then communicate these assignment to the employees and direct their work, review it, and, if necessary, ask them to re-do the painting.

5 Diaz also began relaying messages about how Eccles Painting intended to terminate workers who had signed the Union petition. As such, Diaz acted as a conduit between the employees and management—Eccles and Sundquist. Moreover, The Respondent’s employees reasonably believed that Diaz was acting for management as Vargas forcefully recalled that employees were fired when Diaz was unsatisfied with their work. (Tr. 275.) Diaz was directed in
10 what to tell the painters and is an agent of Respondent within the meaning of Section 2(13) of the Act.

Applying these same principles to Key, I further find that he was also the Respondent’s agent. Specifically with regard to the December 7 firings of the Santillan and Lopez brothers,
15 Key became Eccles Painting’s surrogate as he directly followed Eccles’ order to fire the 4 employees without asking any questions and despite Key’s opinion that the Santillan brothers, in particular, were very good workers. The Respondent used Key to relay owner Eccles’ directions to these 4 employees. Under these circumstances, I find that the Respondent placed Key in a position where employees such as the Santillan and Lopez brothers and others would reasonably
20 believe he was speaking and acting on the Respondent’s and/or Eccles’ behalf. As such, Key is also an agent of Respondent within the meaning of Section 2(13) of the Act.

C. Independent 8(a)(1) Allegations

25 1. Surveillance

Acting General Counsel alleges under paragraphs 6(a), 8, and 9 of the complaint that on November 11, the Respondent unlawfully surveilled Eccles Painting workers who signed the Union petition. I find that Eccles Painting engaged in unlawful surveillance. On November 11,
30 Sundquist and Diaz observed a number of employees offsite as they signed the Union petition with Rubi.

An employer violates Section 8(a)(1), when it “surveils employees engaged in Section 7 activity by observing them in a way that is ‘out of the ordinary’ and therefore coercive.” *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the “duration of the observation, the employer’s distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.” *Id.*

Both Diaz and Sundquist observed union organizer Rubi present the Union petition to
40 Eccles Painting employees offsite in an adjacent parking lot on November 11 for their signatures. Their observations lasted several minutes, took place from a close vantage point, was out of the ordinary, and likely dissuaded several employees from interacting with Rubi, out of fear of reprisal. Moreno convincingly described Sundquist watching the group from about a half block away when the Union petition was signed as acting “nervous and he [Sundquist] was looking at
45 us in a very demanding way, and I thought he seemed nervous because he was smoking and smoking.” (Tr. 210, 227-228.) Moreover, Deniz and Gamas credibly feared for their jobs and intentionally kept their backs to Sundquist so they would not be seen signing the Union petition. (Tr. 150-151, 240-241.)

The Respondent does not contend that any violence or invasion of its property occurred or was threatened, and it therefore had no legitimate interest in observing the group sign their Union petition in the offsite parking lot adjacent to the Wood Center project. Consequently, I
 5 find that Diaz and Sundquist unlawfully surveilled by observing the employees while they signed the Union petition on November 11 and violated Section 8(a)(1) of the Act.

2. Impression of Surveillance

10 As stated above, I grant Acting General Counsel request to amend her complaint to add another alleged unlawful act attributable to Respondent under Section 8(a)(1) of the Act for creating the impression of surveillance. (GC Br. At 13, fn. 11.) Specifically, Acting General
 15 Counsel alleges that Sundquist's November 11 surveillance, together with the threat that he made later that day that he would fire those workers who signed the Union petition created an impression of surveillance. See *United Charter Service*, 306 NLRB No. 31 at 150, 151 (1992).

In determining whether an employer has unlawfully created the impression of
 20 surveillance of employees' union activities, the test is whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of
 Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). The essential focus has always been on the
 25 *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities. *Id.* As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard. *Id.*

I find that the Eccles Painting workers' activities at lunch on November 11 were not
 30 conducted openly as they occurred offsite in the parking lot adjacent to the Wood Center project. (GC Exhs. 5(a) and 5(b).) Sundquist made his first comment that he would fire the people who signed the Union petition later that same day before Rubi had shown him the signed Union
 35 petition and the Respondent did not explain to the workers or put forth any evidence at trial that explained that any information about who actually signed the Union petition was voluntarily given or that Respondent had lawfully obtained a copy of the signed Union petition before November 18 when Rubi presented it to Sundquist. Therefore, Sundquist's statement on
 40 November 11 that those workers who signed the Union petition would be fired reasonably suggested to the workers that the Respondent was closely monitoring the degree and extent of their organizing efforts and activities. See *Emerson Electric Co.*, 287 NLRB 1065 (1988).
 Consequently, I find that Sundquist's statement on November 11 created the impression that the workers' activities were under surveillance and violated Section 8(a)(1) of the Act.

3. Interrogation and Threats

Acting General Counsel alleges under paragraphs 6(b), 6(c), 6(e), 6(f), 6(g), 8, and 9 of
 45 the complaint that the Respondent unlawfully interrogated employees about whether they had signed the Union petition, and, later, unlawfully threatened Eccles Painting workers with termination for signing the Union petition.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

- 5 (a) The background, i.e. is there a history of employer hostility and discrimination?
- (b) 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?
- (c) The identity of the questioner, i.e. how high was he or she in the company hierarchy?
- 10 (d) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (e) Truthfulness of the reply.

15 Id. At 939. In applying these factors, the Board incorporates its objective standard from *Rossmore House*, 269 NLRB 1176-1178, fn.20 (1984), *aff'd sub nom. UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), to ask: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Id. at 940.

20 For several reasons, I find that Sundquist and Diaz committed unlawful interrogations. First, there is the extensive history of the Respondent's Union hostility, as demonstrated from Eccles' statements in July throughout November along with Diaz's and Sundquist's stated positions against the Union that anyone who signed the Union petition would be fired. Second, on November 13, both Sundquist and Diaz asked Gallardo and Vargas whether they had signed the Union petition and on November 14, Sundquist also asked Moreno and Gamas if they were 25 for the union or were union members. Both Sundquist and Diaz did not know these workers' union sympathies at the time of their interrogations. Vargas denied signing the Union petition and Gamas denied he was a union member and Moreno remained quiet. These questions were for Sundquist and Diaz to determine whether or not to fire these workers for their union activity 30 signing the Union petition. Third, in the absence of owner Eccles onsite (he was in Boise, Idaho), Sundquist and Diaz represent Respondent's highest level onsite managers who were higher in the Respondent's company hierarchy than the interrogated employees. Fourth, the interrogation took place outside the presence of others but where the workers were painting which amplified the intimidation level by being separate from other employees. Lastly, 3 of the 4 employees asked 35 did not affirmatively respond truthfully. Under the totality of the circumstances, I find that the November 13 and 14 interrogations by Sundquist and/or Diaz coercive and in violation of Section 8(a)(1) of the Act.

40 A statement is an unlawful threat under Section 8(a)(1), when it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. Sec. 158(a). The complaint alleges that Respondent violated Section 8(a)(1) of the Act several times in November when Sundquist and/or Diaz: (1) threatened employee Deniz on November 11 by saying to each other that they were going to fire the people who had signed the Union petition (Tr. 142.); (2) later on November 11, Diaz told Vargas and Deniz again that "everyone who signed the paper 45 [the Union petition] was going to get fired." (Tr. 153, 279-280.); (3) later in the week of November 11, Bazan overheard Diaz say to Sundquist that "If those guys put their name on the petition, you fire them. They go home." Sundquist responded: "Yeah, those guys [who sign the Union petition will be] fired." (Tr. 211-212.); (4) on November 14, Sundquist threatened Moreno

and Gamas that if they had signed the Union petition or were union members, they will have problems in the future. (Tr. 229, 341.); and (5) on November 9, Diaz threatened Gallardo that he should not sign the Union petition because those workers who sign would be fired and without a job. (Tr. 254.).

Sundquist testified at trial but he did not testify as to his alleged threats or interrogation. I draw an adverse inference from Respondent's failure to question its own witness about matters which would normally be thought reasonable where such an omission does not appear unintentional. See *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977). I also draw an adverse inference from the fact that Diaz did not testify to corroborate Eccles' and Respondent's supervisors' versions of the facts. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge"). Similarly, I discredit Lester's and Key's testimonies and draw the same adverse inferences for the same reasons as to Lester's and Key's unquestioned explanations for purportedly laying off Gallardo, Guevara, and Vargas, and the 4 Santillan and Lopez bothers, respectively.

Cumulatively, these statements are alleged to unlawfully threaten Deniz, Vargas, Bazan, Moreno, Gamas, Gallardo, and other pro-union employees with the loss of their employment should they choose the Union as their collective-bargaining agent and sign the Union petition. The lead case on this subject, and others, is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), where the Court stated:

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities, and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Based on my factual findings set forth above, I find merit in all of the complaint allegations concerning the November threats by Diaz and Sundquist. The conversations involving one or both of these Respondent supervisors and various pro-union employees contained Diaz's and Sundquist's threats that by signing the Union petition or being a union member, Deniz, Vargas, Bazan, Moreno, Gamas, Gallardo, and other pro-union employees will lose their jobs at Respondent. In the context of Respondent's other contemporaneous unfair practices, it is apparent that the job terminations would be caused by Respondent's reaction to the union campaign and the signing of the Union petition.

Thus, Diaz's and Sundquist's November threats amounted to unlawful threats of reprisal not made on the basis of objective fact. See *Patsy Bee, Inc.*, 249 NLRB 976, 977 (1980) (Finding

violation where employer had no indication from union that it would make demands which would cause economic hardship, let alone plant closure; nor did he have evidence that his customers might even pull their contracts.). Under the totality of the circumstances, I find that the November threats by Diaz and Sundquist violated Section 8(a)(1) of the Act.

4. Eccles Unlawful Telephone Conversations with Rubi and Employees Linking Employees' Pay to Union Support

Acting General Counsel alleges under paragraphs 6(d)(ii)-(v)¹⁸, 8, and 9 of the complaint that the Respondent made unlawful statements to Eccles Painting workers via the telephone on various dates.

A statement is an unlawful threat under Section 8(a)(1), when it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. Sec. 158(a). The complaint alleges that Respondent violated Section 8(a)(1) of the Act several times in November when Eccles spoke via telephone and: (1) threatened Rubi on November 29 that Eccles would lay off the rest of the Union petition signers within the next 5 days (Tr. 53-54, 109, 116-120.); (2) responded to Danner: “that is what you fucking get for listening to the fucking union” (Tr. 183) when Danner told Eccles that it was “BS” that he was fired by Eccles because Danner’s work was getting slow rather than for his signing the Union petition; (3) in response to Danner asking when he would be paid his unpaid wages Eccles said: “you get your money when the lien goes away; might be a couple of years” (Tr. 183); (4) in response to Danner telling him that Danner and Bazan were valuable painters who should not have been fired, Eccles responds: “you guys shouldn’t have listened to the damn Union ... it is going to take 2 years for you to receive your pay because you listened to the fucking union” (Tr. 91, 183); and (5) in response to Rubi telling him that the workers just want union representation, Eccles responds by saying that he fired the employees for listening to Rubi and filing their wage liens (Tr. 91). The Respondent did not present any evidence to rebut these statements by Eccles.

An employer may not tell employees that it would be futile for them to attempt to unionize. There is no doubt that the workers’ attempt to unionize at Eccles Painting in November is protected concerted activity. See *Meyers Industries*, 281 NLRB 882, 885 (1986), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1986), cert. denied 487 U.S. 1205 (1988). Eccles’ words referenced above amounted to unlawful statements under the Act that it would be futile for Respondent’s employees to engage in future concerted protected activity, which includes union activities, because Eccles had fired them for their union activities (signing the Union petition and picketing the worksite with Rubi) and workers could expect a long delay of up to 2 years to receive their back pay wages because they listened to the union and tried to unionize Eccles Painting. See *Goya Foods*, 347 NLRB 1118, 1128–1129, 1132 (2006), *enfd.* 525 F.3d 1117 (11th Cir. 2008); *Wellstream Corp.*, 313 NLRB 698, 706 (1994)), and *Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc.*, 355 NLRB No. 96, slip op. at 9–10 (2010)(Examples of unlawful statements of futility include advising employees that the employer

¹⁸ Acting General Counsel dismissed her allegations at paragraph 6(d)(i) of the complaint in her closing brief. GC Br. 16, fn. 12.

will never permit its workplace to be unionized.) Under the totality of the circumstances, I further find that the November threats by Eccles violated Section 8(a)(1) of the Act.

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D. Section 8(a)(3) Allegations

1. The General *Wright Line* Standard.

10 Acting General Counsel alleges under paragraphs 5, 7, and 9 of the complaint that the Respondent violated Section 8(a)(3) of the Act by firing Deniz and 11 other Eccles Painting workers for assisting the Union and/or engaging in protected concerted activities and to discourage others from engaging in these and other protected concerted activities. I find that Eccles Painting violated Section 8(a)(3) by terminating the employment of Deniz and 11 other employees for their signing the Union petition and participating in other protected concerted activities as discussed hereafter.

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20 The standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) is appropriately applied here. Under *Wright Line*, the general counsel bears the initial burden to show that the employee's union activity was a substantial or motivating factor in the discharge. See *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3 (2011). The general counsel satisfies this initial burden by showing union or protected concerted activity by the employee, the employer had knowledge of the activity, and the employer bore animus toward the union or protected activity. See, e.g., *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 4 (2011). The burden then shifts to the respondent to demonstrate that the same adverse action would have occurred even in the absence of the union activity. See *Wright Line*, supra at 1089.

25

30 Generally the general counsel relies on evidence¹⁹ such as the timing of the employer's action,²⁰ pretextual motives²¹, inconsistent treatment of employees,²² and shifting explanations provided by the employer.²³ *Flour Daniel, Inc.*, 311 NLRB 498 (1993). "Since motive is critical to a finding of an 8(a)(3) violation, but since direct evidence of motive is rare, one must look to all of the attendant circumstances to determine whether the respondent acted improperly or not." *Keller Mfg. Co.*, 237 NLRB 712, 734 (1978). See also *Atlantic Metal Products, Inc.*, 161 NLRB 919, 922 (1966). Moreover, where the employer's "given reason for termination is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive." *Keller Manufacturing Co.*, citing *Capital Records, Inc.*, 232 NLRB 228 (1977). See also *J. S. Troup*

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¹⁹ See also *Association Hospital del Maestro*, 291 NLRB 198 (1988) (finding that the employee's union activities were widespread and known to the employer and that there was companywide union animus); *White-Evans Service Co.*, 285 NLRB 81 (1987) (animus found where employer fired two of the most outspoken union supporters and refused to rehire them even though they continued seeking employees).

²⁰ *Bay State Ambulance & Hosp. Rental*, 280 NLRB 1079 (1986).

²¹ *Abbey Island Park Manor*, 267 NLRB 163 (1983).

²² *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998).

²³ *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263 (7th Cir. 1987).

Electric, 344 NLRB 1009 (2005) (Board will infer an unlawful motive if the employer’s action is “baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive”).

5 In other words, under *Wright Line*,

an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employ, but must show by a preponderance of the evidence that the action would have taken place even with the protected conduct.

10 *North Carolina License Plate Agency*, 346 NLRB 293, 294 (2006). If the evidence produced by the employer is found to be pretextual, the inference of wrongful motive established by the general counsel is left intact. *Frank Black Mechanical*, 271 NLRB 1302 (1984); *Limestone Apparel Corp.*, 225 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminate absent his or her (protected) union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

20 2. The 12 Employees’ Discharges Violated Section 8(a)(3) and (1)

The Acting General Counsel asserts that Danner, Bazan, Gamas, Deniz, Moreno, Guevara, Gallardo, Omar, Adrian, Isaias, Irineo, and Vargas were terminated for engaging in union and protected concerted activities and that the Respondent’s actions violated Section 8(a)(3) and (1). The *Wright Line* burden-shifting analysis set forth above is applicable to these 12 terminations. Therefore, the Acting General Counsel must establish that all 12 employees were engaged in protected conduct, that Respondent knew about this protected conduct and that union animus was a motivating factor in Respondent’s decision to terminate the 12 employees.

30 On this record, the Acting General Counsel has met her initial burden of proving that the Respondent fired each of the 12 employees at the Respondent in November and December, all 12 employees signed the Union petition and also because some of the employees, with the Union’s assistance, filed wage liens against the Respondent. Each fired employee clearly engaged in protected union activities by signing the Union petition on November 11 or 17 and others also participated in protected concerted activities when they filed wage liens against the Respondent. (See GC Exhs. 4, 6(a), 6(b), 7-10.)

40 The act of signing the Union petition, in particular, is an obvious protected union activity. In addition, the wage liens raised protected concerns about wages, work hours, and other terms and conditions of employment and alerted the Respondent about its unpaid wages to its employees. Moreover, the Respondent, through supervisors/agents Sundquist and Diaz between November 11 - 18, and Eccles, no later than November 25, were aware of those protected or union activities. See *Clark & Wilkins Industries*, 290 NLRB 106, 106 (1988), enfd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990) (imputing supervisor’s knowledge to employer where supervisor observed organizing campaign in small shop). Sundquist admitted seeing employees meeting with Rubi and signing the Union petition on November 11. (Tr. 401.) Eccles also received the signed Union petition in late November. (Tr. 97-100; GC Exhs. 9-10.)

I find that the Respondent's animus against the Union was a substantial motivating factor in Respondent's actions against the 12 fired employees and is shown, as stated above, by Eccles' profane and disparaging remarks against the Union several times in July with Rubi and again on November 18 in a telephone call heard by Danner and Rubi. Besides Diaz threatening to kick the ass of a Union picketer on November 22 at Respondent's Wood Center project, numerous times Diaz and Sundquist threatened that they would fire employees who had signed the Union petition. Diaz also exhibited animus in his statements to Adrian on November 29 calling Rubi a "jerk" and confessing to vandalism at the Wood Center project in a weak attempt to set-up Rubi and the Union to take the fall. Furthermore, Sundquist demonstrated anti-union animus in statements to Rubi on November 18. I also note that animus can be gleaned from the close timing between the November 11 signing of the Union petition and the November 15 and 18 discharges of Deniz, Danner and Bazan as well as the complaints for non-payment of wages by Adrian in late November and the December 7 firings of the Santillan and Lopez brothers. See *Adco Electric*, 307 NLRB 11113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993)(suspicious timing supports inference of animus). Finally, Respondent's animus against the Union is further shown by the independent 8(a)(1) violations I have found as described above. In these circumstances, the Acting General Counsel has met her burden of showing improper anti-union animus for the job terminations of all 12 employees at Respondent's projects in November and December.

I conclude that the Acting General Counsel has presented a strong case in meeting her burden under *Wright Line*. Where, as here, the Acting General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, 355 NLRB No. 218, slip. op. at 3 (2010). I find that, on this record, Respondent has not overcome that substantial burden and persuasively shown that it would have fired these 12 employees absent their union and protected activities.

Furthermore, it is well settled that evidence of false reasons given in defense and tolerance of behavior for which the alleged discriminates were fired, disparate treatment of the discharged employees, and reassignments of a pro-union from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems, Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Services Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Bonta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medric One, Inc.*, 331 NLRB 464 (2000).

On November 15, Sundquist falsely told Deniz that he was fired because he was working slowly when, in fact, Sundquist also disclosed the true reason Deniz was fired – he had signed the Union petition. (Tr. 155-56.) On November 18, Danner was falsely told by Eccles that he was being laid off because work was getting slow when, in fact, a large portion of work remained and Eccles fired Danner because he signed the Union petition and had filed wages liens against the Respondent. (Tr. 168-69, 181-183; GC Exhs. 6(a) and 7.) On November 30, Sundquist falsely told Moreno that Moreno had "quit" on November 29 when, in fact, Moreno had car trouble and Sundquist agreed Moreno could miss work on November 29 to repair his car and Sundquist fired

Moreno for signing the Union petition. (Tr. 229-232; GC Exh. 13.) Also on November 29, Sundquist falsely told Gamas that he was laid off for lack of work when, in fact, much painting remained and Sundquist fired Gamas for signing the Union petition.

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As stated above as an example of animus, Diaz also confessed to Adrian that he and Sundquist themselves had vandalized the Wood Center project to try to set up Rubi by falsely claiming he was responsible for the vandalism. This is another example of the Respondent's false statements. (Tr. 53-54, 109, 116-120, 322, 485.) On December 7, the Santillan and Lopez brothers were laid off with the inference being that there was no more work at the PUD project which was false as Eccles decided to fire the 4 through Key for signing the Union petition and complaining to Diaz on November 29 about nonpayment of wages when 4-5 new replacement workers came to the PUD project the week before. (Tr. 306-325.) Finally, on December 15, Vargas, Gallardo, and Guevara were told by Lester they were being laid off for lack of work and complaining about not being paid. While the statement involving their wage complaints is true and unlawful, Lester's statement that there was no work is false and contradicted by the fired employees' estimates about what work remained and the fact that by December 15 Respondent had hired new replacement workers who had not signed the Union petition. The Respondent has not shown that it would have terminated any of the 12 employees in the absence of their union or protected concerted activity including their signing the Union petition.

For the reasons stated above, the Respondent's proffered justification for the terminations of the 12 workers are false and pretextual and support a finding of unlawful motivation and precludes a *Wright Line* defense. See *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). I find that the 12 employees, Danner, Bazan, Gamas, Deniz, Moreno, Guevara, Gallardo, Omar, Adrian, Isaias, Irineo, and Vargas, were unlawfully terminated by Respondent for engaging in union or protected concerted activities.

30

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Eccles, Sundquist, Diaz, Key, Alvarado, and Lester are supervisors within the meaning of Section 2(11) of the Act.
4. Diaz and Key are agents within the meaning of Section 2(13) of the Act.
5. By terminating employees Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Ireneo Lopez, Adrian Santillan, and Omar Santillan on specific dates referenced here from November 15 through December 15, 2011, because they signed the Union petition, support the Union or engage in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

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6. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act:

(a) By surveilling employees on November 11, 2011 at the Wood Center project.

5 (b) By creating an impression of surveillance of employees' union activities on November 11, 2011.

(c) By threatening employees with termination for signing the Union petition at various times from November 11 through December 15, 2011.

(d) By telling employees that they would not be paid wages due to their support of the Union.

10 (e) By telling employees that payment of their earned wages would be delayed due to their support of the Union.

(f) By telling employees that they would lose their jobs because of their support of the Union.

15 (g) By telling employees that they would be paid their back pay wages once they released their wage lien(s) against Respondent.

(h) By interrogating employees at various times from November 11 through December 7, 2011 whether they had signed the Union petition.

20 7. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The above violations are unfair labor practices within the meaning of the Act.

Remedy

25 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

30 Having found that Respondent unlawfully laid off or terminated employees Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan, I shall order it to offer them full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions within the Puget Sound area, without prejudice to their seniority or any other rights and privileges previously enjoyed, displacing any
35 other newly hired or reassigned employees, and in the event an insufficient number of positions exist to accommodate all the discriminates, establish a preferential hiring list for such employees, and offer, in a nondiscriminatory manner, priority employment exclusively from that list as job openings occur, as well as specifying that the offers are to be made in writing. In addition, Respondent will also make each of the 12 discriminates whole for any loss of earnings and other
40 benefits suffered as a result of the discrimination against them. The Respondent shall also be required to remove from its files any and all references to the unlawful layoffs or terminations,

and to notify employees Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan in writing that this has been done and that such adverse actions will not be used against them in any way.

The amount of the make-whole remedy applicable to violations of Section 8(a)(3) shall be calculated according to the formula of *F.W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *KLB Indus. Inc.*, 357 NLRB No. 8 (2011); *R.E. Dietz Co.*, 311 NLRB 1259, 1268 (1993). Interest shall be compounded daily as described in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), set aside by 647 F.3d 1137 (D.C. Cir. 2011). E.g., *KLB*, 357 NLRB No. 8.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its members and/or employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). The posting of the paper notice by the Respondent shall occur at all places where notices to employees are customarily posted.

Acting General Counsel also requests that the notice to employees in this case shall be in both Spanish and English as many of the terminated employees cannot read or understand English. I also find that Mr. Eccles, as Respondent's president, should be required to read the notice to his employees. As the Board has explained, the purpose of requiring a manager to read a notice aloud to employees is to better impress upon the employees the fact that the employer and its officials are bound by the Act. *Marquez Bros. Enters., Inc.*, 358 NLRB No. 61 (2012) (citing *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), *enfd.*, 400 F.3d 920 (D.C. Cir. 2005)). The Board explained that it will require a notice to be read aloud "where an employer's misconduct has been 'sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion.'" *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46 (2012) (quoting *HTH Corp.*, 356 NLRB No. 182 (2011)). In this case, the unfair labor practices occurred in an intentional and blatant attempt to ignore the Act. There is a dozen discriminates. Moreover, the unfair labor practices in this case were very serious. Even before engaging in the 2 projects primarily at issue in this case, the Respondent's president exhibited an extreme disregard for union activity and the Act's relevance over his business operations. Respondent, driven by antiunion animus, discriminated against members of the bargaining unit in assembling its workforce. This is tantamount to an effort to wholly dislodge the Union from its statutory role as bargaining representative of the employees. As a deliberate attempt to deprive the Union of its role as bargaining partner, it strikes at the heart of the national policy embodied in the Act, viz., "encouraging the practice and procedure of collective bargaining." Since Eccles made the illegal firing decisions in this case, he ought to be the one to read the notice. See *Planet Earth Landscape*, 356 NLRB No. 182 (requiring the individual who personally committed the unfair labor practices to read the notice).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²⁴

5

ORDER

The Respondent, Eccles Painting, Inc., of Boise, Idaho, its officers, agents, successors, and assigns, shall

10

1. Cease and desist from

(a) Unlawfully interrogating, surveilling, creating the impression of surveillance, and threatening employees for engaging in union and/or protected concerted activity;

(b) Unlawfully laying off, terminating, or otherwise discriminating against employees for engaging in union and/or protected concerted activity protected by the Act;

15

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

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

(a) Within 14 days from the date of this order, offer employees Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions in the Puget Sound area, along with their seniority and all other rights and privileges, displacing as necessary any other newly hired or reassigned employees, and in the event an insufficient number of positions exist to accommodate all the discriminates, establish a preferential hiring list for such employees, and offer, in a nondiscriminatory manner, priority employment exclusively from the list as job openings occur, as well as specifying that the offers are to be made in writing.

(b) Make employees Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this order, remove from its files any reference to the unlawful actions taken against Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Santillan, and Omar Santillan and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

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

10 (e) Within 14 days from the date of this Order, post at its jobsites in the Puget Sound area in all locations where employee notices are customarily posted, copies of the attached notice marked "Appendix" in English and Spanish.²⁵ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt by the Respondent and maintained for 15 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 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. In the event that, during the pendency of this proceeding, 20 Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice, and the approved Spanish translation, to all current and former employees who were working on the Seattle Central Community College Wood Center project and/or the Mason County Public Utility District project at any time since November 15, 2011, and to the employees referred to in 25 paragraph 2(a), at their last known addresses.

(f) Within 14 days from the date of this Order, Respondent, by its President Arthur Eccles, will read a copy of the notice to its employees at all jobsites in the Puget Sound area.

30 (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.

²⁵ 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."

5 (h) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" will be publicly read by the responsible corporate executive, Art Eccles, president, in both English and Spanish, in the presence of a Board agent, or at Respondent's option, by a Board agent in Mr. Eccles' presence.

Dated: Washington DC, September 25, 2012

10



Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT ask you about your or your fellow employees' support for a union.

WE WILL NOT create an impression that we are watching your union activities.

WE WILL NOT watch you in order to find out about your union activities.

WE WILL NOT threaten you with discharge or layoff if you choose to be represented by or support a union.

WE WILL NOT tell you we will delay the payment of your wages because of your union support and **WE WILL** pay your wages for all hours worked whether you have filed wage claims with other Local, County, or State agencies or not.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, reinstate Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan to their former positions or, if those positions no longer exist, to substantially equivalent painting jobs in the Puget Sound area, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing as necessary any other newly hired or reassigned employees, and in the event an insufficient number of positions exist to accommodate all the discriminates, establish a preferential hiring list for such employees, and offer, in a nondiscriminatory manner, priority employment exclusively from that list as job openings occur, as well as specifying that the offers are to be made in writing.

WE WILL pay Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan for the wages and other benefits owed to them and that they lost and make them whole for any loss of earnings and other benefits, including interest, suffered because we fired them.

WE WILL, within 14 days from the date of the Board's Order, rescind the layoffs or terminations of Damon Danner, David Bazan, Luiz Deniz, Also Gamas, Jose Moreno, Alfredo Vargas, Gustavo Gallardo, Jaime Guevara, Isaias Lopez, Irenio Lopez, Adrian Santillan, and Omar Santillan and expunge any reference to their lay off or termination from all our files and records and **WE WILL** within 3 days thereafter inform each of them in writing that this has been done and that these unlawful disciplinary actions will not be cited or used against them in any way in the future.

ECCLES PAINTING, INC.

(Employer)

Dated _____

By _____

(Art Eccles)

(President)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want Charging Party representation and it investigates and remedies unfair labor practices by employers and Charging Parties. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

915 Second Ave., 29th Floor

Seattle, Washington 98174

Hours: 8:15 a.m. to 4:45 p.m.

206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6300.