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

DAVIES, INC. d/b/a DALLAS GLASS

and

INTERNATIONAL UNION OF PAINTERS AND ALLLIED TRADES, DISTRICT COUNCIL #5

Case: 19–CA–078239

*Helena A. Fiorianti, Esq.,*
for the Acting General Counsel.
*Richard VanCleave, Esq.*
for the Respondent.

# DECISION

## STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This case was tried in Portland, Oregon on December 18, 2012. The International Union of Painters and Allied Trades, District Council #5 (the Charging Party or Union) filed the charge on April 6, 2012,[1] and the General Counsel issued the complaint on August 30, 2012. Davies Inc., d/b/a Dallas Glass (the Respondent or Dallas Glass) filed a timely answer denying that it committed any unfair labor practices and contending that the complaint allegations are time-barred.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing to reinstate Mike James and Roman Ramos to their former positions or substantially equivalent positions since on or about November 14, 2011.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent is a residential and commercial glazing company in the construction industry in Salem, Oregon. During the past twelve months and at all material times it derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of

[1] All dates are in 2012 unless otherwise indicated.

$50,000 directly from points outside the state of Oregon. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

### A. Factual Background

The parties entered into stipulations regarding many of the relevant facts, which are incorporated throughout this decision. (Jt. Exh. 1).[2]

#### 1. The Respondent's Operations

The Respondent is a residential and commercial glazing company in Salem, Oregon. Brian Johnston (Johnston) has been part owner of Respondent since 2003, and is currently its Chief Executive Officer (CEO). Darrand Davies (Davies) has been part owner of Respondent since around 1991, and is currently its President. The Respondent's employees are not represented by a Union.

A number of the jobs the Respondent bids are classified by the Oregon Bureau of Labor and Industry (BOLI) as public works projects. These projects are often referred to as "prevailing wage rate" jobs because the workers' pay rate is mandated by BOLI. All employees performing glazing work receive the same wage rate for working on a public works project, regardless of the employees' experience or the specific tasks they perform. As of October 1, 2011, the basic hourly rate for such projects was $31.83, plus $15.36 in fringe benefits.

The State of Oregon has an apprenticeship program that lasts 4 years and requires a minimum of 144 related classroom hours per year and 8,000 on-the-job training hours. (R. Exh. 1). The Union also has an apprenticeship program that requires a general glazier apprentice to serve at least 4 years before becoming a journeyman. Union Apprentices must serve eight 6-month terms to earn prevailing journeyman glazier wages. (R. Exh. 2).

Dallas Glass uses a mix of journeyman glaziers, assistants, and laborers who are overseen by general foremen. Jobs are staffed with a combination of Dallas Glass' own employees as well as temporary employees from a temporary company. General foremen earned at least $22 per hour, journeyman glaziers earned $18–$25 per hour, and assistant glaziers earned $12–$18 per hour. (R. Exhs. 5, 12). Starting pay rates for laborers for non-prevailing wage rate jobs the Respondent hired through Express Employment Professionals, a temporary agency, were $10–$14 per hour as of December 2011. (R. Exh. 10). Some employees are classified as journeyman glaziers even though they have not completed the state's apprenticeship requirements. Johnston makes decisions on how to classify employees based on his assessment of their skill.

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[2] I granted the joint motion to enter into the stipulations.

Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "R. Exh." for Respondent's exhibit; and "GC Exh." for Acting General Counsel's exhibit. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record.

2. Respondent and the Alleged Discriminatees

On or about May 30, 2007, the Respondent hired Mike James (James) as a commercial journeyman glazier with a starting pay rate of $17 per hour. James has done glazing work since 1987 and has completed the state's apprenticeship program. On or about June 27, 2007, the Respondent hired Roman Ramos (Ramos) as a commercial journeyman glazier with a starting pay rate of $15 per hour. Ramos has done glazing work since 1994 and has completed the state's apprenticeship program.

James' work at Dallas Glass consisted of installing window frames, glass, and various other components at the Jefferson and Tualatin condominium projects and the WYMCA project. He also installed handrails at the River North condominium project. Ramos' work at Dallas Glass consisted of installing window frames, glass, and various other components at the River North project and at a foster home called Terwilliger. James and Ramos received their work instructions from the project foremen. They each frequently worked in pairs with other workers, with each partner performing essentially the same tasks regardless of experience or skill level.

At all times relevant to this decision James and Ramos also worked for the Union as field organizers. They continued to receive wages from the Union at rate 10 percent higher than the contract journeyman wage, along with benefits. James worked for the Union from April 2007 through June 2012. At the time of the hearing, Ramos, still employed by the Union, had served almost six years.

On or about July 23, 2007, Ramos went on strike. His pay rate at the time was $19 per hour. On or about July 24, 2007, James went on strike. His pay rate at the time was $24 per hour.

On July 25, 2007, the Union filed unfair labor practice charges against the Respondents in Cases 36–CA–10145 and 36–CA–10146.

On September 7, 2007, James and Ramos submitted unconditional offers to return to work, which the Respondent accepted. James and Ramos returned to work on or about September 12, 2007. They both went on strike again on September 21, 2007, to protest wages the Respondent was paying its employees. On or about September 26, 2007, the Union filed additional unfair labor practice charges against Respondent in Case Nos. 36–CA–10178, 36–CA–10179, 36–CA–10180, 36–CA–10181 and 36–CA–10182, some of which the Union withdrew on November 5, 2007. A settlement agreement approved on November 6, 2007, resolved all remaining July charges and the September charges in Case 36–CA–10182.

The Respondent replaced James with William Austin (Austin) on October 18, 2007, during James' and Ramos' second strike. (R. Exhs. 3, 4). Aaron Davis (Davis) replaced Ramos that same day. (R. Exh. 4). James and Ramos had been engaged in economic strikes, and therefore replacing them was lawful. Austin was subsequently laid off from Dallas Glass and has not been recalled. Davies still works for Dallas Glass.

On November 13, 2007, James and Ramos submitted unconditional offers to return to work. The Respondent told them their positions were no longer available and they would be

placed on a preferential hiring list based on seniority for the next available jobs for which they respectively qualified.

On January 11, 2008, James and Ramos picketed at a number of the Respondent's jobsites. On April 23, 2008, they sent letters to the Respondent requesting current guidelines and rules regarding the preferential hiring list on which they had been placed in November 2007. On May 12, 2008, the Respondent sent a letter to James and Ramos informing them they had been placed on a preferential hiring list for reinstatement based upon length of service for the next available job vacancy in their former positions or one that is substantially equivalent. Under the terms set forth in this letter, James and Ramos did not need to reapply for openings; instead, the Respondent would notify them if their former position or a substantially equivalent position became available.

In July 2008, James saw Johnston in the parking lot outside his office and asked if the Respondent was bidding for work. Johnston replied that it was slow, but they were always bidding work.

Ramos and James approached Johnston on October 3, 2008, and James stated he and Ramos wanted to go back to work. Johnston asked if they still had the same contact information and stated the Respondent would contact them if there was work available.

In early 2009, James saw Johnston outside his office. Johnston told James that from now on, if he wanted to talk, he would need to schedule a meeting with him.

In May 2009, the Respondent laid off journeyman glazier James Terault, and he has not been replaced. (R. Exh. 5).

In August 2009, Ramos and James saw Davies at Salem Hospital, and they inquired about work. Davies responded that things were slow, but they had a project coming up. Ramos stated he wanted to go back to work, and Davies said he would contact him. (Tr. 28–31). Also in August 2009, James and Davies had a discussion in Davies' office about apprenticeships and manpower for the Salem mental facility. Davies informed James that Johnston makes all the business decisions. In mid-September 2009, James met with Johnston and another person at a Starbucks, and they discussed the Union and prevailing wage rate work.

On June 30, 2010, the Region dismissed charges in case 36–CA–10658 alleging that the Respondent discriminated against James and Ramos by failing to hire them. The Region found that the Respondent had not hired any employees into positions substantially equivalent to the positions Ramos and James held, and noted that it had laid off two additional journeyman glaziers. (R. Exh. 7). The Union appealed, and on August 20, 2010 the Office of the General Counsel upheld the Region's dismissal of case 36–CA–10658 and partial dismissal of case 36–CA–10639.[3] (R. Exh. 8).

[3] Case 36–CA–10639 also involved challenges to the Respondent's handbook which were found to have merit. The Region issued a complaint and the parties settled.

James sent Johnston a letter on October 28, 2010, stating that he would accept any appropriate return to work offer, and providing supplemental contact information. (GC Exh. 3). He followed up with a similar letter on November 20, 2010. (GC Ehx. 4).

James spoke with Johnston and Davies on several occasions between July and October 2009, and from October 2011 through March 2012, about recognizing the Union and signing an agreement pursuant to Section 8(f) of the Act. Johnston told James more than once that the Union did not appeal to him, it had done a lot of bad things to his company, and it was not in his business plan.

On May 14 and 28, June 3, 10, and 17, July 21, 22, 29, and 30, and other dates between August and September 2010, James and Ramos resumed picketing Respondent's shop and construction site locations. They wore signs and neck placards stating "on strike." On April 20, 2011, the Region dismissed charges that the Respondent failed to hire Ramos and James as of June or July 2010, finding that they had gone back on strike on the various dates between May and September 2010, and had not thereafter submitted unconditional offers to return to work.[4] (GC Exh. 7).

On December 3, 2010, Ramos sent Johnston a letter stating that he was not on strike despite having picketed the Respondent while wearing an "on-strike" logo. He reiterated his unconditional offer to return to work. (GC Exh. 2). James sent a similar letter the same day. (GC Exh. 5).

3. The Sandy High School Project and Hiring of Additional Workers

In the fall of 2011, the Respondent had a project performing glazing work at Sandy High School, which was a brand new building with more than 300 storefront windows. Sandy High School was a prevailing wage rate project. Prior to the time the Respondent started work on the project, James called Johnston to tell him that Dallas Glass had bid way too low and another Union contractor had bid significantly higher. Johnston recalled the difference as $400,000; James thought it was closer to $1,000,000. Johnston replied that it was an aggressive bid and the Respondent needed the work.

Another subcontractor at Sandy High School pulled its workers from the job to finish up one of its other projects. The contractor asked the Respondent to cover the work, which resulted in Johnston hiring additional labor. He began hiring in September and hired workers with some experience, but no crew leaders or journeyman glaziers. Two existing commercial journeyman glaziers, Brian Freeson and Adam Lewis, were assigned to the project. Residential journeyman glazier Adam Person was moved to the project, as well as some assistant glaziers and laborers. (R. Exh. 9).

Jeffrey Mashos (Mashos) worked as a glazier for Dallas Glass for about a month starting in November 2011, and again from March to August 2012.[5] He applied for the job through

[4] The Region did not explicitly find that the 2010 strikes were economic, but the dismissal characterizes them as a resumption of the prior economic strikes. In any event, resolution of the nature of the strikes is not material to my findings herein.

[5] Mashos left after about a month because of a pre-planned vacation.

Express Employment Professionals after Johnston, who has been Mashos' friends for 10 years, called him and told him he needed some temporary assistance.[6] Mashos worked at Sandy High School doing various jobs related to glazing, clean-up, and "punch list" items., i.e. things the customer wanted repaired or replaced. Mashos had no prior experience installing commercial window systems, but had experience with residential building because he had owned a home-building business. He perceived that he had less experience glazing than others with whom he worked. On April 4, 2012, he became a temporary full-time employee of Dallas Glass and worked at various jobsites. Mashos held the position of assistant glazier through August. He left Dallas Glass voluntarily for personal reasons. At the Sandy High School project, Mashos was paid the prevailing wage rate which, as of April 1, 2012, was $31.83 per hour, plus $15.36 per hour in fringe benefits. For non-prevailing wage rate jobs he started at $14 and was subsequently raised to $18 per hour. (R. Exhs. 10, 11; GC Exh. 6). His work on other projects involved tasks similar to the work at Sandy High School. Mashos understood he was hired as a temporary employee, though the Respondent did not provide a set time for his employment to end.

Samuel Holt (Holt), a friend of Johnston and Mashos, began working for Dallas Glass in November 2011. He applied through Express Employment Professionals at Johnston's direction. He worked at Sandy High School doing essentially the same work as Mashos and had no prior commercial glazing experience. Holt is a journeyman carpenter and is a member of the Carpenters' Union. Like Mashos, Holt became a temporary full-time Dallas Glass employee on April 4, 2012, and worked at various jobsites. He was listed as a project foreman as of April 2012, and was still working for Dallas Glass at the time of the hearing. He testified that he is a glazier in the Respondent's commercial division and has never directed any work. At the Sandy High School project, Holt was paid the prevailing wage rate, which, as of April 1, 2012, was $31.83 per hour, plus $15.36 per hour in fringe benefits. For non-prevailing wage rate jobs, Holt started at $14 per hour, and at the time of the hearing earned $21 per hour. (R. Exhs. 10, 11; GC Exh. 6; Tr. 118). His work on other projects was similar to what he did at Sandy High School. James understood he was hired as a temporary employee, though there is not a set time for his employment to end.

## B. Decision and Analysis

### 1. The Respondent's Section 10(b) Timeliness Argument

I will first address the Respondent's argument that the charges were not timely filed. Section 10(b) of the Act requires charges to be filed within six months of the alleged unfair labor practice(s). The complaint alleges that, since around November 2011, the Respondent has unlawfully refused to reinstate James and Ramos to their former or substantially equivalent positions. The Union filed the charge on April 5, 2012. The Respondent asserted its section 10(b) affirmative defense in the answer to the Complaint, and I therefore find it was timely raised. *Pub. Serv. Co.*, 312 NLRB 459, 461 (1993).

The burden to prove an affirmative defense rests with the party asserting it. *Chinese Am. Planning Council, Inc.*, 307 NLRB 410 (1992). The Respondent argues that the Union knew

[6] Express Employment Professionals did not have a presence at any of the Respondent's jobsites and did not direct any work.

other employees had been hired for the Sandy High School project and other prevailing wage rate projects as early as June 2010. This was the subject of a previous claim that the region dismissed based on and James' and Ramos' concurrent strike activity, as detailed above. The time period relevant to the instant case, however, concerns hiring after James and Ramos submitted their respective December 3, 2010, unconditional offers to return to work.

James testified he had new hire information about the Sandy High School project as of June 20, 2011, and he provided information about new hires to the Board agent for the week of September 28, 2011.[7] This does not render the charge untimely, however, because the Respondent did not meet its burden to demonstrate that the Union had "clear and unequivocal notice" that any of these new hires were journeymen glaziers or held a substantially equivalent position. No light was shed on what specific information James had regarding the Sandy High School project in June 2011. Likewise, no light was shed on the specifics of the new hire information James obtained for the week of September 18, 2011, or when James received this information. In any event, September 18, 2011 is less than 6 months prior to the April 5, 2012 charge. Finally, the information regarding the Respondent's hiring of James and Mashos, obtained in November 11, 2011, is the basis for a timely charge regardless of what occurred before.

Accordingly, I find the Respondent failed to prove the charge was untimely, and the complaint is not time-barred under Section 10(b).

2. Employee Status of Alleged Discriminatees

The Respondent, citing *Toering Elec. Co*., 351 NLRB 225, 229 (2007), further asserts that James and Mashos, "salts" who were employed and paid by the Union at all relevant times, were not "genuinely interested in seeking to establish an employment relationship with the employer" and therefore are not protected by the Act.[8] Salts generally are considered to be employees within the meaning of Section 2(3) of the Act. *NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85 (1995).[9] The Board in *Toering Electric* held, however, that "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity."[10] *Id.* at 231.

*Toering Electric* arose in the context of an alleged discriminatory failure to hire analyzed under the framework set forth in *FES*, 331 NLRB 9 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Though logically the analysis in *Toering* seems well

[7] In its brief, the Respondent asserts these dates were in 2010, but this is inconsistent with record testimony and neither party has submitted a motion to correct the transcript.

[8] The Respondent did not plead either lack of employee status or unlawfulness of the strikes in its answer. During opening statements at the hearing, however, counsel for the Respondent clearly raised and argued these defenses, and I therefore find they have not been waived. See *Strand Theatre of Shreveport Corp*., 346 NLRB 523, 539 (2006), enfd. 493 F.3d 515 (5th Cir. 2007).

[9] The Respondent also cites to *WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999), where the Board held that unpaid volunteers are not employees. In light of *Town and Country,* however, reliance on *WBAI* is misplaced.

[10] In *In re W.D.D.W*., 335 NLRB 260 (2001), the Board, reversing the administrative law judge, found that the Union's salting activities, partially aimed at tying the Respondents up in costly litigation, did not deprive the salts of employee status under a "disabling conflict" defense.

suited to cases involving alleged discriminatory failure to recall and reinstate from a preferential hiring list, I could find no Board caselaw extending it beyond a *FES* failure to hire scenario. The focus in *Toering* is on the definition of "applicant" which does not precisely characterize James and Ramos. For this reason, and because, in my view, the genuineness of the alleged discriminatees' interest in working for the Respondent ties into the legitimacy of the strikes they engaged in, I will address it in my analysis of the strikes directly below.

3. Protection of the Strike Activity

In turn, the Respondent argues that James' and Mashos' strike activity was not protected by the Act, and they therefore had no preferential hiring rights upon submitting unconditional offers to return to work. I find merit to this argument.

It is well established that employees may not be discharged or otherwise discriminated against for engaging in protected concerted work stoppages to protest working conditions. See *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). The scope of protected activity, however, is not unlimited. The Board has held that employees who participate in certain intermittent work stoppages are not protected. *Pac. Tel. & Tel. Co*., 107 NLRB 1547, 1548 (1954)(multiple "hit and run" stoppages intended to "harass the company into a state of confusion" not protected). The Respondent has the burden of showing a strike is unprotected. *See, e.g., Silver State Disposal Serv.* 326 NLRB 84, 85 (1998).

In *Farley Candy Co*., 300 NLRB 849, 849 (1990), the Board characterized an intermittent strike as "a plan to strike, return to work, and strike again." A single sequence of events where employees strike, return to work, then change their minds and resume striking would not generally violate the Act. Instead, the Board and Courts of Appeals have referred to "repeated" or "recurrent or intermittent" refusals to work when describing statutorily-unprotected intermittent strikes. See, e.g., *Graphic Arts Local 13-B (Western Pub. Co.)*, 252 NLRB 936, 938 (1980); *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). A work stoppage becomes an intermittent strike when "the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." *Polytech, Inc*., 195 N.L.R.B. 695, 696 (1972).

The Board has not articulated a rigid framework for analyzing whether a series of strikes constitute unlawful intermittent strikes. Instead, it has looked at a number of factors including: frequency and timing, whether the strikes were part of a common plan, whether there was Union involvement, whether the strikes were intended to harass the employer into a state of chaos, whether the strikes were for distinct acts of the employer, and whether the alleged discriminatees intended to "reap the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike. . . ." See *Westpak Elec., Inc*. 321 NLRB 1322, 1360 (1996) and cases cited therein; *Swope Ridge Geriatric Ctr.,* 350 NLRB 64 (2007); *Blades Mfg. Corp*., 144 NLRB 561, 566 (1963), enforcement denied, 344 F.2d 998 (8th Cir. 1965); See also Haas & Lockwood, The Elusive Law of Intermittent Strikes, 14 Lab. Law. 9, at 102. A common element of these factors is the strikers' intent.

To begin with, I note there is not even a suggestion that James and Ramos attempted to organize the Respondent's employees prior to their first strike, which occurred less than two

months after James began work and less than a month after Ramos began work. Nor is there evidence of organizing attempts between Ramos' and James' return to work and their second strike 9 days later. After they were permanently replaced, Ramos and James engaged in a series of recurring strikes from May to September 2010. Throughout this time, there was no attempt at "traditional, lawful organizing activity." *M.J. Mech. Serv.,* 324 NLRB 812 (1997);[11] *Toering, supra* at 230 ("Although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize coworkers on behalf of a union, other salts clearly have no such interest."). In *M.J. Mechanical*, the Board noted that even if salting is intended to in part to provoke unfair labor practices, this would not deprive the employees of the Act's protection. It found, however, that the evidence failed to show the Union's salting activities, which included organizing employees, were "a subterfuge used to further any purpose unrelated to organizing."[12] 324 NLRB at 814. By contrast, there is no evidence of an organizing campaign in the instant case. Likewise, there is no evidence that James and Ramos were seeking to redress employee complaints (other than their own) about wages or working conditions, as the record is devoid of evidence that other employees took issue with the wages or other working conditions at any point. *U.S. Serv. Indus.*, 315 NLRB 285 (1994)(strikes protected where no evidence they were for "any purpose other than to protest and seek redress for what employees considered to be unjust working conditions").

The only explicitly stated reason for taking action, asserted in connection with the second strike, was to protest employee wages. Nothing changed with regard to employee wages from 2007 to the time of the hearing. (R. Exhs. 5, 8). The recurrent strikes in the interim, therefore, were not even ostensibly in response to discrete employer actions. I find this case similar to *Swope Ridge, supra*, where there Union announced and implemented two work stoppages in a short period in furtherance of contract demands during an ongoing bargaining dispute. The Board found that "because the bargaining dispute continued with no evident changed purpose, there was a reasonable basis for finding that the pattern would continue." *Id.* at fn. 3. The same rationale applies here; the Respondent's wages did not change, and there is no reason to believe the alleged discriminatees' pattern of conduct of intermittent work stoppages until they achieved their goal of union recognition and/or area standards pay and benefits. The absence of discrete employment factors and, relatedly, evidence that the strikes were part of a plan by the Union, weigh against protection.

Finally, there is evidence the strikes were calculated actions aimed at harassing the Respondent. It is clear James' and Ramos' tactics were not geared to "harass the company into a state of confusion" as in *Pacific Telephone & Telegraph* or the ilk of cases involving mass "slow downs" "sit-ins" or partial strikes. *See, e.g., Elec. Data Sys. Corp*., 331 NLRB 343 (2000); *Phelps Dodge Copper Prods. Corp*., 101 NLRB 360 (1952). They acted together yet alone,

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[11] The administrative law judge in *M.J. Mechanical* had relied on *Godsell Contracting, Inc*., 320 NLRB 871 (1996), which the Board summarily affirmed. The administrative law judge's analysis on this point stated, "To the extent that it might be inferred that one of the purposes of the 'salting' program was to provoke nonunion employers to commit unfair labor practices, I conclude that even if true, it would not be a defense to Respondent's conduct." *Id.* at 874.

[12] Member Higgins, concurring with the Board's conclusions on the lawfulness of the alleged discriminatees' activities, found there was no evidence of a design to provoke unfair labor practice charges. He declined to pass on whether activities designed in part to provoke an unfair labor practice are protected by Section 7 of the Act.

apparently without the support other employees.[13] This begs the question of their true intent. Their actions of picketing with "on strike" signs and placards on numerous occasions between March and August 2010, while claiming they were available for work and the Respondent's refusal to hire them was unlawful, provides useful insight in this regard. Such antagonistic simultaneous actions, by seasoned Union employees, lead me to conclude that the charges filed during this time were disingenuous, and were aimed solely at harassing the Respondent. This distinguishes the instant case from *M.J. Mechanical*, where the Board found "nothing in the record to support a finding that the 'salting' . . . was a subterfuge used to further any purpose unrelated to organizing."[14] Though the method employed here was different and was geared toward a different direct impact on the Respondent than in *Pacific Telephone*, the common and compelling factor is that the alleged discriminatees intended neither to work for the Respondent nor to persist with a legitimate strike. *Pacific Tel. & Tel.*. 107 NLRB at 1549 (Union's intent was "to bring about a condition that was neither strike nor work").

Based on the foregoing, I find the alleged discriminatees engaged in unprotected intermittent strikes. As such, they were not entitled to reinstatement to their prior positions or substantially equivalent positions.[15]

## CONCLUSIONS OF LAW

The Respondent's actions of failing to reinstate the alleged discriminatees into their former positions or substantially equivalent positions did not violate Section 8(a)(1) and (3) of the Act.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire stipulated record, I issue the following recommended [16]

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[13] According to a March 31, 2011 Advice Memorandum in reference to cases 36-CA-10639 and 36-CA-10704, they were joined by non-employee, Union-paid organizers. Though the advice memo is not part of the record, the Board may take administrative notice of it. *Farmer Bros. Co*., 303 NLRB 638 fn. 1 (1991).

[14] Another difference is the conduct at issue in *M.J. Mechanical* was the strikers' attempt to provoke unfair labor practices, whereas here it is filing unfair labor practice charges disingenuously.

[15] Though there was testimony that James and Ramos inquired about work, there is no allegation that any application for employment, outside of the context of reinstatement to their former positions or a substantially equivalent position following the strikes, was rejected.

To the extent a reviewing authority disagrees with my evaluation of the strikes and/or finds the defense was not adequately pled, I find Holt's position, upon being hired directly by Dallas Glass in April 2012, was substantially equivalent to the alleged discriminatees' based on his rate of pay, his testimony that he worked as a glazier, and the Respondents' classification of him as a foreman despite the fact he did not direct work. I do not find Mashos' position was substantially equivalent, as he was classified as an assistant glazier, his pay consistent with that classification, and his work was intermittent. Witness credibility does not factor into these findings.

[16] 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.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 26, 2013.

Eleanor Laws
Administrative Law Judge