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

OHIO INSULATION AND MANUFACTURING COMPANY

and Case 09–CA–087466

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS LOCAL UNION #50, COLUMBUS AND DAYTON, OHIO

Catherine Terrell, Esq.,
for the Acting General Counsel.
David Duwel, Esq.,
for the Respondent.
Steven D. Stone and *Leonard Sigall, Esqs.*,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Dayton, Ohio, on January 7, 2013. The International Association of Heat and Frost Insulators and Allied Workers Local Union #50, Columbus and Dayton, Ohio (the Union) filed the charge in this case on August 16, 2012, and the Acting General Counsel issued the complaint on October 30, 2012.[1] The complaint alleges that Ohio Insulation and Manufacturing Company (Respondent) violated Section 8(a)(3) and (1) of the Act by discharging employee Tony Sloan because he assisted the Union and engaged in union and protected concerted activities, and to discourage employees from engaging in those activities. Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Union and Respondent, I make the following

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

[2] I note that although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, a commercial and industrial insulating contractor with an office and place of business in Dayton, Ohio, annually performs services valued in excess of $50,000 in states other than the State of Ohio. 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. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Ohio Insulation and Manufacturing Company – Overview*

1. Management structure

Since 2009, Bruce Bottermuller has been the president and owner of Ohio Insulation and Manufacturing Company, a commercial and industrial insulation contractor based in Dayton, Ohio. (Transcript (Tr.) 296–297.) Dan Cross serves as one of the two project managers/estimators for the company, while William (Billy) Haager serves as the field superintendent and Terry Sharp serves as one of the company's two foremen. (Tr. 16–17, 317–318.)

2. Respondent's history with the Union

Respondent has operated for some time as a nonunion company. (Tr. 117.) In August 2011, newly selected Union President Daniel Poteet made an effort to get in touch with the nonunion contractors in the area, including Respondent. To that end, in late fall 2011, Poteet stopped by Bottermuller's office for an extended meeting. Although the conversation generally was cordial, at the end of the meeting, Bottermuller warned Poteet that if he caught Poteet trespassing on any of the company's jobs, he would have Poteet arrested.[3] (Tr. 211–212, 305–306.)

In spring 2012, some of Respondent's employees contacted Poteet to express interest in joining the Union. While the company remained nonunion, approximately 4–5 of Respondent's employees (including B.K.) joined the Union at that time. (Tr. 212–213, 321–322.)

3. Tony Sloan's employment with Respondent

Tony Sloan is an insulator, and has worked for Respondent for a total of 14 years (intermittently), with the most recent stint beginning in March 2011. (Tr. 16, 100, 102.) Sloan was one of two employees at the company to receive a raise in September 2011. (Tr. 313.)

[3] Bottermuller testified that his phrasing might have been less strident than what Poteet described, but Bottermuller could not swear to what that alternative phrasing might have been. (Tr. 307.)

Sloan was not a union member during the time that he worked for Respondent, but he had been a union member in 2010 when he worked for a union contractor in the area. (Tr. 27, 221, 244.)

B. *The Ferguson Middle School Project*

1. Project overview

In summer 2012, Respondent was performing insulation work at Ferguson Middle School, which had been cleared out to allow contractors to work on the school's HVAC system, floors, ceilings and windows. Danis was the general contractor for the Ferguson Middle School project, and Respondent was performing work for Apex Mechanical, one of the subcontractors on the project. (Tr. 41, 161, 264, 300.)

The school system required workers at the Ferguson Middle School project (including Respondent's employees) to have a badge that could only be obtained if the worker passed a criminal background check and a drug test. Since the badging process took 2–3 weeks, Respondent obtained badges for several employees (including Sloan) at the beginning of the project, even if those employees were assigned to other projects at the time. (Tr. 22, 252–255, 292–293.)

2. Respondent reassigns Sloan to the Ferguson Middle School project

By July 2012, several contractors (including Respondent) at the Ferguson Middle School project were running behind with their work. Since the school was scheduled to open in August, Respondent and the other contractors working on the project were under pressure to complete their work so the school could open on schedule. (Tr. 19, 105–106, 255, 314–315.)

As part of Respondent's efforts to catch up with its work at Ferguson Middle, and because Sloan already had a badge for the project, on July 26, Respondent's field superintendent Billy Haager notified Sloan that he (Sloan) would be reassigned from a project at the Veterans Administration (V.A.) building to Ferguson Middle for approximately two weeks. Sloan was not happy about the reassignment because it resulted in a pay cut, from $23.55/hour that Sloan was earning at the V.A. project (plus an additional $375 in pension benefits per paycheck) to $19/hour at Ferguson Middle (with no pension benefits).[4] (Tr. 17–19, 105–106, 251–252, 314.)

3. July 27 – Sloan complains about workers assigned to Ferguson Middle project

When Sloan reported to Ferguson Middle on July 27 (a Friday), he spoke with foreman Terry Sharp, who showed Sloan around the worksite. Sharp told Sloan that he (Sharp) was having trouble communicating with some of the other workers (Spanish speaking) that Respondent assigned to the project. Sharp also mentioned that some of those workers did not have Ferguson Middle badges, and thus were wearing badges that belonged to other employees. Sloan confirmed Sharp's report at lunchtime when he observed at least one worker wearing a

[4] The wages that Sloan received at the V.A. project were prevailing union wages. Respondent was required to pay prevailing wage at the V.A. project, even though Sloan was not a union member at the time. (Tr. 104.)

badge that belonged to a foreman who was not working at Ferguson Middle that day. (Tr. 20–21, 23–24.)

After lunch, Respondent's project manager Dan Cross learned from a Danis official that Danis would not be checking badges over the weekend, and thus Respondent had an opportunity to bring in extra, nonbadged, workers to catch up on the project. Sharp advised Sloan of Respondent's plan to bring in 15 extra workers over the weekend, and asked Sloan if he would be willing to work overtime on Saturday as part of the catch-up effort.[5] (Tr. 25–26, 189, 255–257.) Sloan declined, but indicated that he might be willing to change his mind if Respondent gave him a raise. (Tr. 190.)

Sloan was unhappy about all of these developments at Ferguson Middle. Sloan believed that having workers onsite who could not speak English posed a safety risk, since they might have trouble conveying or hearing warnings about hazards on the job. In addition, Sloan did not think it was fair that some employees (such as himself) had to maintain a clean lifestyle that would enable them to meet the Ferguson Middle badge requirements (i.e., a lifestyle that would enable them to pass a drug test and criminal background check), while other employees were allowed to work on the site without meeting the badge requirements. (Tr. 22–24, 112; see also Tr. 215–216, 234 (indicating that the Union shared Sloan's concerns).)

To address his concerns, Sloan telephoned former employee B.K. to see if B.K. could help Sloan obtain assistance from the Union about the developments at Ferguson Middle. (Tr. 25–27, 116; see also Tr. 99, 233 (explaining that the Union represents both members and nonmembers on certain workplace issues).) B.K. conveyed Sloan's concerns to Union President Poteet, who in turn left a voice message for Danis' Ferguson Middle School site manager to call him about some suspicious activity that might be occurring at the worksite on Saturday. (Tr. 214–215.)

Sloan also attempted to contact a Danis representative at the worksite. When Sloan was not able to locate anyone affiliated with Danis to speak to, he left the following unsigned note on the windshield of a car parked at the Danis trailer on the worksite:

> 15 illegal's will be Insulating Sat. 7/28/12, No background check's, No Drug test, No work permit's. Let U and school board know.

(Tr. 27–31; GC Exh. 2, p. 8.)[6]

At the end of the workday, Sharp again asked Sloan if he would be willing to work overtime on Saturday. Sloan replied that he might come to work if someone from Respondent called him to tell him he received a raise. No such raise was offered, and thus Sloan did not

---

[5] Sloan testified that Sharp told him about the 15 additional Saturday workers when he and Sharp spoke in the morning on July 27. (Tr. 25–26.) I have credited Sharp's and Cross's testimony that the plan for additional workers did not develop until the afternoon. (Tr. 189, 255–256.) This conflict in testimony is not material to my analysis.

[6] Sloan explained that he used the term "illegals" to describe workers who he believed were not lawfully on the worksite because they lacked proper badges, but he also acknowledged that he would also consider a worker who lacked proper immigration documentation to be "illegal." (Tr. 110–111.)

work on Saturday. (Tr. 108, 128; see also Tr. 189–190 (noting that the overtime that Respondent offered to Sloan was voluntary).)

4. July 28 – Respondent learns about Sloan's note to Danis

On July 28, Cross arrived at Ferguson Middle to supervise the Saturday work. When Cross arrived, a Danis manager gave Cross a copy of Sloan's note, and asked Cross if he knew anything about it. Cross reviewed the note and promised to take care of it, but later decided not to take action about the note until after he discussed the matter with Bottermuller on Monday. (Tr. 258–259.)

5. July 30 – Respondent sends Sloan for a drug test

Upon returning to work on Monday, July 30, Sloan asked Sharp if anything unusual happened at the Ferguson Middle worksite over the weekend. When Sharp responded that work went on as scheduled, Sloan decided to call B.K. to confirm that B.K. contacted the Union. B.K. confirmed that he had done so, but suggested that Sloan call Poteet directly. (Tr. 32–33, 121–122; see also Tr. 217 (Poteet noted that as of July 30, he had not heard back from Danis' site manager).)

Meanwhile, Bottermuller met with Cross and Haager to discuss the note that Sloan left for Danis. After reviewing samples of Sloan's handwriting that were available in Respondent's files and concluding that Sloan indeed wrote the note, Respondent decided this was "the kind of thing we don't need in the company." (Tr. 260–261.) Accordingly, Respondent decided to send Sloan and Sharp for a drug test, and to that end sent Cross to Ferguson Middle to escort Sloan and Sharp for a "random" drug test that day.[7] (Tr. 34, 262, 294–295.)

Sharp and Sloan rode to the drug testing facility in the same car, while Cross followed in his own vehicle. During the ride, Sloan stated "this is bullshit," and went on to say that if Respondent "wanted to play these games and not give him a raise, then he was going to call the Union and the school board."[8] (Tr. 35, 178, 184–185, 262–263.) Sloan completed the drug test, and tested negative for drugs. (Tr. 294–295.) Later in the afternoon, Sharp told Cross about the remarks that Sloan made during the drive to the drug testing site. (Tr. 185–186.)

[7] This decision to "try and catch Sloan working dirty" arose from an incident in 2010, when Sloan walked off of one of Respondent's jobsites because he did not feel well and refused to take a drug test that was required for him to work at the site. (Tr. 102–104, 262.)

[8] I do not credit the portions of the record where Sharp stated that Sloan only threatened to call Danis and the school board (and not the Union). Sharp equivocated about the precise nature of what Sloan said, varying from asserting that he did not recall exactly what Sharp said, to asserting in a written statement that he prepared for Respondent that Sloan only said he would contact Danis and the school board. (Tr. 179–180, 182–183; GC Exh. 2, p. 7.) I have held Respondent to Sharp's admission in one of his affidavits that Sloan did say he would contact the Union (see Tr. 184), and I note that my finding is fully consistent with the evidence in the record that shows Sloan had already reached out to the Union when he spoke to Sharp on July 30.

6. Early morning July 31 – the Union acts in response to Sloan's concerns about workers at Ferguson Middle

On July 31, Sloan returned to the Ferguson Middle School worksite and resumed working. Sloan observed that some of the same workers who lacked badges were also at the worksite,[9] and thus decided to contact Poteet for assistance. (Tr. 35–37; see also Tr. 37, 144–145 (Sharp told Sloan that the nonbadged workers were working on the second floor ventilator units).) After exchanging telephone and text messages, Sloan and Poteet spoke by telephone, and Sloan explained that two individuals were working at the school (on the second floor) and were wearing badges that did not belong to them. Poteet advised Sloan that he (Poteet) was tied up in a training seminar, but nonetheless promised to make some telephone calls to see what he could do to respond to Sloan's concerns. (Tr. 39–40, 125, 217–218.)

First, Poteet called Charles Morton, the executive director of the Dayton Building Trades Council (an association of 14 building trades unions, including Ohio Insulators Local #50). (Tr. 199, 218–219.) Poteet advised Morton that there was a problem with undocumented workers at Ferguson Middle School, and asked Morton to check on the situation since Poteet was out of town. Morton agreed to do so. (Tr. 200–201.) Subsequently, Morton sent the following e-mail to Brad Wolgast, the principal of Ferguson Middle:

> For your information – I have been informed that under the guidance of Danis Co., that Ohio Insulation is using undocumented workers on Saturdays and may have two workers today on the job site using other workers ID passes, and have not undergone background checks or other requirements for this job site. I would ask that you [] please look into this, before we possibly go to the news media.

(GC Exh. 4(a); see also Tr. 202.) Second, Poteet spoke with Union Organizer Scott Emrich, who advised Poteet that he (Emrich) would visit the Ferguson Middle School project to determine what was happening.[10] (Tr. 219, 233.)

Upon receiving Morton's e-mail, Wolgast forwarded it to the school district superintendent, the school district's buildings and grounds supervisor, and three Danis officials to see if one of the group could check out the issues that Morton raised in his e-mail. Wolgast then went to the Ferguson Middle construction site, located Danis' site manager K.M., and alerted him to the issue of whether undocumented workers were on the jobsite. K.M. promised to take care of the issue, and Wolgast returned to his office.[11] (Tr. 161–162, 166–167; GC Exh. 4(c).)

---

[9] Cross admitted that Respondent tried to push its luck and have nonbadged workers remain on the Ferguson Middle project beyond the Saturday that Danis authorized. As a result, some of the nonbadged workers who came to the site on July 28 were still on the job on July 31. (Tr. 264–265, 282.)

[10] Poteet actually left a message for Emrich earlier in the morning to notify him that something was going on at the Ferguson Middle School project, and to see if Emrich could look into the matter since Poteet would be occupied with training. (Tr. 230–231, 233.)

[11] Later in the morning, Morton sent Wolgast a second e-mail advising him that he should "check for Juan and Hugo – working on the second floor on the ceiling units" to find the workers who did not belong at Ferguson Middle. (Tr. 167, 203; GC Exh. 4(a).) Wolgast passed this information along to Danis' site manager K.M., who advised Wolgast that the nonbadged workers had already left the worksite. (Tr. 167–

At approximately 10:30 am, Respondent received a telephone call from Apex Mechanical that any nonbadged workers needed to be off of the Ferguson Middle worksite because someone notified the school board that Respondent had "illegals" working at the school, and Danis was going to be checking badges. Cross accordingly called Sharp to tell him that everyone at Ferguson Middle who did not have a badge would be leaving (specifically, to be reassigned to another job). (Tr. 264–265, 277, 281–282, 324; GC Exh. 2, p. 3.)

In the same timeframe, Emrich arrived at Ferguson Middle and went to the worksite to find out how many insulators were working there. Emrich did not see many people working, but before leaving the site he did speak briefly with I.C. (Dan Cross' son) and provide I.C. with his business card and some union literature.[12] (Tr. 235, 238; GC Exh. 3(a)–(b).) I.C. texted Cross to let him know that he (I.C.) had been contacted by a union representative, and Cross subsequently let Bottermuller know about the union representative's visit. (Tr. 266–267, 278, 303–304.)

Sloan watched the results of these communications unfold at the worksite. Sloan observed a Danis representative run on to the worksite and tell workers that Danis was going to be checking ID badges. Minutes later, Sharp approached Sloan and told him that the crew was down to a handful of people because "everybody else got sent to another job." And, on his way to lunch, Sloan saw Respondent's nonbadged workers jump into their vehicles and take off from the parking lot. (Tr. 41–42, 46, 127, 132–134.)

7. Respondent terminates Sloan

In light of the morning's events, Bottermuller and Cross spoke and decided that Sloan had stirred up enough trouble and should be terminated for writing the note to Danis and causing problems at the worksite. Bottermuller therefore sent Cross and Haager to Ferguson Middle to terminate Sloan.[13] (Tr. 266, 302–303.)

Upon arriving at Ferguson Middle, Cross and Haager first went to the Danis trailer, where they spoke to Danis' site manager K.M. about the Union's visit to the worksite. (Tr. 278–279; GC Exh. 2, p. 4.) Next, Cross and Haager located Sloan, who was finishing his lunch break in the school parking lot with Sharp and another one of Respondent's employees. Sloan, who was carrying a tape recorder in his pocket, then recorded the following exchange:

168, 172; GC Exh. 4(b).)

[12] Emrich also stopped by Danis' trailer at Ferguson Middle, where he asked a Danis representative a few questions about the nature of the construction project, and left one of his business cards. (Tr. 238–240.)

[13] I do not credit Bottermuller's testimony that he asked Cross and Haager to investigate whether Sloan wrote the note to Danis before deciding to terminate Sloan. (Tr. 397–298, 312.) To the contrary, the evidentiary record shows that Respondent determined that Sloan wrote the note on July 30, and had already concluded that Sloan should be terminated when Bottermuller dispatched Cross and Haager to Ferguson Middle on July 31. (See Findings of Fact (FOF), Sections B(5), supra, and B(7), infra.)

Cross: Did they, ah, who was out here from the Union?

Sloan: I didn't see anybody.

Cross: Well, they were out here.

. . .

Cross: They gave [I.C.] a pamphlet. They're e-mailing the school district and everything else.

. . .

Sloan: I was right in the door there and I didn't see anybody.

. . .

Cross: Well, they're out here cause, Chuck, what's his last name? Martel?

Sloan: Morton.

Cross: Morton.

Sloan: He was the uh, he's no longer there is he?

Cross: I don't know, he's the one that's e-mailing the school board.

Sloan: I thought Poteet took his spot?

. . .

Sloan: Yeah, cause he's the Business Manager or whatever. Yeah Charles Morton.

Cross: It all started with whoever wrote the note, left it on the uh . . .

. . .

Cross: Yeah, somebody, ah somebody's gotta start shit, and ah, ruins you know, tryin' to get a job done, but somebody's happier stirrin' the pot so I can't even get the fuckin' job done. I'm not doin' anything wrong, just getting', finishin' work but, people get unhappy and its fuckin' easier to do that kinda shit than it is just to keep working. Thought we got rid of all of our problems . . . .

(GC Exh. 5(c), Track 2, 28:08–31:04 (unrelated background conversation by Haager omitted); see also Tr. 270; GC Exh. 2, p. 4.)[14]

[14] For reasons that are not clear to the ALJ, none of the parties asked Sloan, Cross or Sharp to go

When the lunch break ended a few minutes later, Cross and Haager asked Sloan to remain with them in the parking lot while the other employees returned to work. (Tr. 270–271.) Cross and Haager then terminated Sloan, as indicated in the following conversation that Sloan recorded:

Haager: We're gonna have to terminate you for insubordination and disruptive behavior.

Sloan: What disruptive behavior did I do?

Haager: Well, do you have that, do you have a copy of that note?

Cross: Don't have a copy of it. The note . . . .

Haager: They said there was a note that was left on somebody's windshield or on somebody's desk.

Cross: You know about it?

Sloan: Yep.

Cross: Bet you do.

Haager: And they said there was goin' to be fifteen illegals workin' and none of them had background checks and badges.

Sloan: Yep, that's what I heard. And that's illegal activity so therefore, but go ahead, finish your story.

Haager: And then today, they called and said that they were, they went to the school board and then the union guy showed up and it went to the school board that there was guys here that didn't have badges and ah, illegals workin', none of 'em had badges and all that bullshit, so, and then the note matched up to your handwriting, so which led to thinkin' that well, it was your handwriting.

---

through the recorded conversations line by line during the trial to identify the names of the people who spoke on the recording. Similarly, none of the parties tendered an annotated transcript of the recording that identified the speakers on the recording (something that a witness could have prepared before the trial after listening to the recording). There was, however, sufficient testimony about the recordings for me to identify the speakers that I have set forth in this decision. (See Tr. 61–65, 69–73, 75, 78–79, 82, 86, 91, 94–95, 272, 285–291 (identifying statements made by Cross, Haager, Sharp and Sloan).)

In that connection, I also note that during the trial, I admitted a transcript that a Board agent prepared of the conversations that Sloan recorded. (See GC Exh. 5(d) (a typewritten transcript of what the Board agent heard on the recording, with no speakers identified).) I admitted that transcript only as a listening aid, however, and thus to the extent that there are differences between the conversations that I have set forth here and the Board agent's transcript (or the transcript that the court reporter prepared at trial), my findings about the conversations control since they are based on my direct review of the recorded conversations. (See GC Exhs. 5(a)–(c).)

Sloan: All I did was, uh, tell on something that was illegal that was happening.

Cross: How was it illegal?

Sloan: Havin' illegals workin' on the job.

Cross: They're not illegal.

Sloan: Well, then why'd they all take off for?

Cross: They're not illegal . . . They're not badged . . . .

Sloan: One of 'em had, like uh, Hugo's badge or whatever on his hard hat, what's that all about?

Haager: Oh, that was Juan, that was Juan and Javier's.

Sloan: Well Juan and Javier's or whatever, so there's an old switch-a-roonie being played. . . . What do you mean well? I mean, that's illegal. This only happened because I was told I was getting a raise and everybody seems to be overlookin' me.

Cross: And well . . . that's not the way you handle yourself if you want a raise.

Sloan: Well that's, hindsight's twenty-twenty to say that now.

Cross: Well I would've said that then, I mean . . . you lookin' for a raise and you turn around and do something like that?

(GC Exh. 5(c), Track 2, 33:11–35:17; see also Tr. 270–271, 280; GC Exh. 2, pp. 4, 6.) Sloan subsequently left the worksite without incident. (GC Exh. 2, p. 4.)

COMPLAINT ALLEGATIONS

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging Tony Sloan on or about July 31, 2012, because he assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in those activities. (GC Exh. 1(c), pars. 5–6.)

LEGAL STANDARDS

A. *Witness Credibility*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the

record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

B. *Section 8(a)(3) Violations*

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 14 (2012) (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Consolidated Bus Transit, Inc.*, 350 NLRB at 1066; *Pro-Spec Painting*, 339 NLRB at 949; *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal — an unlawful motive — at least where the surrounding facts tend to reinforce that inference.) (citation omitted). However, a respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 13.

The *Wright Line* standard does not apply where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a single motive case, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. Specifically, when an employee is disciplined or discharged for conduct

that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 13 (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

DISCUSSION AND ANALYSIS

A. *Credibility Findings*

My credibility findings are generally incorporated into the findings of fact that I set forth above. My observations, however, were that the Acting General Counsel's witnesses were poised, forthright and composed when they testified. In addition, much of their testimony was corroborated by e-mail communications and by Sloan's audio recordings of the events of July 31. By contrast, many of Respondent's witnesses (particularly Cross and Sharp) took great pains to assert that they were not aware that Sloan contacted the Union, only to have their testimony (and credibility) undermined by audio recordings and written statements that demonstrated they were well aware that Sloan contacted the Union about his concerns about Ferguson Middle.

B. *Did Respondent Violate the Act when it Terminated Sloan?*

The evidentiary record establishes, and I find, that Respondent terminated Sloan because of the note that he wrote to Danis, and because Sloan was behind the Union's e-mails to the school board to complain about Respondent using workers at Ferguson Middle who were not authorized to be there (because they were undocumented and/or lacked proper ID badges). Among other compelling evidence, the audio recording in the record includes statements by Cross that blame the Union for contacting the school board about Ferguson Middle, and assert that the Union's actions started after Sloan wrote his note to Danis.

With that foundation, this is a "single motive" case where the *Wright Line* framework does not apply. Respondent, however, does not make the customary argument (under *Atlantic Steel*) that Sloan's activities were so egregious that they lost the protection of the Act. Instead, Respondent asserts that: (1) Sloan's activities were not protected activities from the outset; and (2) Bottermuller was not aware of Sloan's union activities when he decided to terminate Sloan. As I explain below, each of those arguments fails.

First, I find that Sloan's activities indeed were protected under the Act. Section 7 of the Act guarantees employees "the right to self organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." *Praxair Distribution, Inc.*, 357 NLRB No. 91, slip op. at 11 (2011) (quoting Section 7 of the NLRA). Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. Id. Of particular relevance to this case, Section 7 affords workers the right to work through channels outside of the immediate employee-employer relationship to improve their working conditions, such as by communicating with their employer's customers, third parties, or

5 governmental agencies.[15] *Trinity Protection Services*, 357 NLRB No. 117, slip op. at 2 (2011) (citing *Eastex, Inc.*, 437 U.S. 556, 565 (1978)). Given those authorities and the facts of this case, Respondent misses the mark with its argument that Sloan did not engage in protected activities when he contacted Danis and the Union about nonbadged workers at Ferguson Middle. As Sloan explained, among other things he believed that it was unfair that some of Respondent's
10 employees had to pass a drug test and criminal background check before working at Ferguson Middle, while others were permitted to work at the site without meeting those requirements. Sloan's communications to Danis and the Union about Respondent's use of nonbadged workers clearly qualified as protected activity aimed at improving working conditions (specifically, stopping Respondent's selective compliance with badging requirements), and thus were
15 protected by Section 7 of the Act.[16]

Second, I find that Bottermuller was aware of Sloan's union and protected activities when he decided to terminate Sloan. Respondent argues that Bottermuller was in the dark about Sloan's union activities since the Union did not contact Respondent directly about its concerns
20 regarding Ferguson Middle. That argument is undermined to some extent by the fact that Cross told Bottermuller in the morning on July 31 that the Union had visited the Ferguson Middle worksite. Since Cross and Bottermuller were communicating about the Union's activities at Ferguson Middle, it stands to reason that Cross would have shared his suspicion that Sloan was not only responsible for writing the note to Danis, but also was responsible for contacting the
25 Union about nonbadged workers at Ferguson Middle. Moreover, even without that inference, Cross' knowledge that Sloan contacted the Union (as established by Sloan's audio recording and other evidence, see FOF Section B(7), supra) is imputed to Bottermuller and Respondent because Cross had direct input into the decision to terminate Sloan. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3 (2011) (explaining that "the Board's case law is clear that the anti-union
30 motivation of a supervisor will be imputed to the decision making official, where the supervisor has direct input into the decision").

Since both of Respondent's defenses fail, and the evidentiary record establishes that Respondent terminated Sloan because of his protected activities, I find that Respondent violated
35 Section 8(a)(3) and (1) of the Act as alleged in paragraphs 5 and 6 of the complaint.[17]

---

[15] Employee rights in this context are not unlimited, but none of the limitations apply in this case. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990) (noting, for example, that employees may not make statements about employers that are maliciously untrue).

[16] I have considered Respondent's point that Sloan admittedly was motivated to complain about Respondent's use of nonbadged workers because he was unhappy that Respondent had not given him another raise. I am not persuaded by Respondent's argument that Sloan was merely acting in his own interest, because the record establishes that Sloan complained about working conditions that affected multiple employees who were eligible to work at Ferguson Middle and shared an interest in ensuring that all employees had to comply with the same badge requirements.

[17] As previously noted, since Respondent did not argue that Sloan's activity was rendered unprotected by misconduct, it is not necessary to analyze this case under *Atlantic Steel*. See *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at 3 fn. 12 (2012). However, I do note that Respondent would not prevail under such a theory in any event, since the worst that can be said about Sloan's protected activity was that it was somewhat confusing insofar as Sloan's use of the term "illegals" led some (including the Union) to believe that Respondent may have been using undocumented workers at Ferguson Middle, as opposed to nonbadged workers. However, since Sloan honestly believed that it

CONCLUSIONS OF LAW

1. By discharging Tony Sloan on or about July 31, 2012, because he engaged in union and protected concerted activities by contacting the Union and others about Respondent's use of nonbadged workers at Ferguson Middle, Respondent violated Section 8(a)(3) and (1) of the Act.

2. The unfair labor practices stated in conclusion of law 1 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent, having discriminatorily discharged employee Tony Sloan, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

Respondent, Ohio Insulation and Manufacturing Company, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

---

was illegal for Respondent to use nonbadged workers at the school worksite, and more generally since nothing about Sloan's conduct comes close to being so egregious as to lose the protection of the Act, Respondent cannot justify its decision to terminate Sloan under an *Atlantic Steel* theory. Cf. *Central Security Services*, 315 NLRB 239, 243 (1994) (explaining that while knowingly false statements are malicious and thus not protected, false statements standing alone (i.e., statements that are not knowingly false) are protected under the Act).

[18] 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.

(a) Discharging or otherwise discriminating against any employee for supporting the International Association of Heat and Frost Insulators and Allied Workers Local Union #50 or any other union.

(b) Discharging or otherwise discriminating against any employee for engaging in union or concerted activities protected by Section 7 of the Act.

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

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

(a) Within 14 days from the date of the Board's Order, offer Tony Sloan full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Tony Sloan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Tony Sloan, and within 3 days thereafter notify Tony Sloan in writing that this has been done and that the discharge will not be used against him in any way.

(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 backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Dayton, Ohio, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent

[19] 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."

shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2012.

(f) 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.

Dated, Washington, D.C. March 27, 2013

Geoffrey Carter
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 discharge or otherwise discriminate against any employee for supporting the International Association of Heat and Frost Insulators and Allied Workers Local Union #50 or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or concerted activities protected by Section 7 of the National Labor Relations Act (the Act).

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

WE WILL, within 14 days from the date of the Board's Order, offer Tony Sloan full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tony Sloan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tony Sloan, and within 3 days thereafter notify Tony Sloan in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Tony Sloan for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

OHIO INSULATION AND MANUFACTURING COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

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 union representation and it investigates and remedies unfair labor practices by employers and unions. 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: **Error! Hyperlink reference not valid.**

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

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, (513) 684-3750.