K-Air Corporation *and* Sheet Metal Workers Local # 67, a/w Sheet Metal Workers International Association. Case 16–CA–091326

January 16, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On May 30, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed cross-exceptions, argument in support, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions except as set forth below, and to adopt his recommended Order as modified and set forth in full below.[2]

We briefly address four aspects of the judge's decision. (1) We affirm his finding that the Respondent, through its owner and president, Kyle Villarreal, unlawfully interrogated employees John Vega and Justin Reeder. (2) We reverse his finding that the Respondent did not unlawfully threaten employees who were union members. (3) We affirm his finding that the Respondent unlawfully discharged Vega for his former union membership. (4) We defer to compliance the issues of whether Vega is disqualified from reinstatement due to an alleged prior conviction and related misrepresentation on his employment application,[3] and whether backpay for Vega is tolled as of the date the Respondent completed the project on which Vega was hired.

1. The judge found that, in separate conversations on September 24, 2012,[4] President Villarreal unlawfully interrogated employees Vega and Reeder about their union affiliations. We agree that those interrogations were unlawful for the following reasons:[5] Villarreal was the Respondent's owner; he initiated both conversations; his direct and repeated inquiries as to whether Vega and Reeder were union members clearly connoted disapproval and hostility;[6] neither employee was known to be a past or present union member; and both employees minimized their union connections in response.

2. We disagree, however, with the judge's finding that the Respondent did not unlawfully threaten employees. In making that finding, the judge overlooked President Villarreal's statement to employee Reeder that he, Villarreal, "had no interest in having" or "did not want" union members as employees.[7] We find that Villarreal's statement would reasonably convey to Reeder that Villarreal did not intend to knowingly employ union members and thus was unlawful.[8]

3. The judge found that the Respondent unlawfully discharged employee Vega. For the reasons that follow, we agree.

Villarreal interviewed and hired Vega on Friday, September 21, to start work the following day in the construction of a LA Fitness facility in San Antonio, Texas. Vega was a former member of the Charging Party, Sheet

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[3] Accordingly, we will omit from the Order the usual 14-day deadline for an offer of reinstatement to be made. See *Galicks, Inc.,* 354 NLRB 295, 300 (2009), incorporated by reference in 355 NLRB 366 (2010).

[4] All dates are in 2012.

[5] See generally *Rossmore House,* 269 NLRB 1176, 1178 fn. 20 (1984) (identifying variety of factors the Board considers in examining alleged unlawful interrogations), affd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985).

[6] Villarreal also asked Reeder whether Vega and two other employees were union members, stating that he "had no interest in having" or "did not want" union members on the job. Below, we find that this statement was an unlawful threat, which further supports finding Villarreal's questioning of Reeder coercive. See, e.g., *Demco New York Corp*., 337 NLRB 850, 851 (2002). In any event, Villarreal appeared to be seeking information upon which to take action against individual employees, which supports a finding of coercion regardless whether the statement was unlawful. *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964).

[7] In dismissing the threat allegation, the judge considered a different conversation, in which Villarreal told Vega, "I don't want that to happen here," referring to an unfair labor practice charge that Reeder had filed against a previous employer. The General Counsel did not except to the judge's finding that this comment was "more a reference to unfair labor practice charges, rather than Union membership, and does not violate the Act." That finding consequently is not before us.

[8] See *Skill Staff of Colorado*, 331 NLRB 815, 821 (2000) (employer statement, overheard by an employee, that employer could not have and did not want union employees on the job was unlawfully coercive). Although not necessary to our finding, we reiterate that Villarreal made that statement contemporaneously with his unlawful interrogation of Reeder, adding to its coerciveness even as the threat reinforced the coerciveness of the questioning.

Metal Workers Local 67, but he did not inform Villarreal of this fact.

On the afternoon of Tuesday, September 25, Foreman Roger Trinidad assigned Vega to refasten a "unistrut" (strut) that was holding an elevated plenum in place but had been installed incorrectly by another employee. Finding that the strut would require welding to fasten it properly, Vega began to do what he could to fix the strut in place temporarily until a welder could work on it. At 3:30 p.m., the regular quitting time, Trinidad told Vega to stop work. Vega replied that he had not finished working on the strut, but Trinidad told him "[t]he day's over, there's no overtime."

Shortly after leaving work, Vega received a call from Villarreal asking if he had installed the strut in question.[9] Vega said he had not, and offered to show Villarreal a video he had made on his cell phone showing how the strut looked when he started to work on it. The judge implicitly credited Vega's testimony that he explained to Villarreal that he had done as much as he could to repair the strut in the time allotted.[10] Villarreal then told Vega he did not have the money to pay him for additional work. Vega said he needed the job and could wait 2 or 3 weeks to get paid, but Villarreal refused to keep him on.

Vega returned to the jobsite the next day, Wednesday, to pick up his tools, and there met a former coworker who told Vega that Villarreal had hired him and another worker that day. When Trinidad arrived for work that day, he asked Villarreal where Vega was. Villarreal said he could not afford to pay Vega and told Trinidad, "You want to get paid, right? Well I have to have enough money to pay all of you."

As stated, we agree with the judge's finding that the Respondent unlawfully discharged Vega because of his former union membership. There is no question that Vega previously had engaged in union activity and that the Respondent, in part through its unlawful interrogations, became aware of that activity. The record establishes the Respondent's animus toward union activity generally and Vega's former union affiliation specifically. Animus is shown by Villarreal's unlawful interrogations, his threat to Reeder that he "had no interest in having" or "did not want" union members on the job, his failure to ask Trinidad whether Vega had installed the strut,[11] and the timing of Vega's discharge 1 day after Villarreal learned of his former union affiliation.[12] Moreover, in discrediting Villarreal's shifting rationales for firing Vega—initially, that he could not afford to retain Vega (even as he hired two new employees the day after Vega's discharge), and later that Vega was incompetent—the judge found in effect that both rationales were pretextual, further supporting an inference, which we draw, that the real reason for Vega's discharge was his union affiliation.[13] In sum, the General Counsel has met his initial burden, under *Wright Line,*[14] to establish that animus against Vega's former union affiliation was a motivating factor in his discharge. Because the Respondent's defenses were pretextual, there is no need to further assess them under *Wright Line's* second step, which is applicable in mixed-motive cases.[15] We therefore adopt the judge's conclusion that Vega's discharge violated Section 8(a)(3) and (1) of the Act.

4. The Respondent contends for the first time in its exceptions that Vega should not be reinstated on the ground that he falsely stated on his job application that he had no criminal convictions. The Respondent alleges that, after the hearing in this case concluded, it discovered that Vega was on parole from a 10-year sentence for a serious felony conviction. It cites both Vega's misrepresentation and the conviction itself as independent bases for not reinstating him. The Respondent also contends that Vega's backpay period should extend no later than December 12, when the project on which he was employed ended, on the ground that the Respondent had no equivalent employment for him after that date. Because the record before us is inadequate to determine the merits of the Respondent's assertions, we leave them for resolution in the compliance proceeding.[16]

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[9] Villarreal never asked Trinidad who had improperly installed the strut.

[10] In addition to crediting Vega, the judge found Villarreal "clearly the least credible of the witnesses at the hearing."

[11] E.g., *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 984 (2007) (suspicious failure to investigate employee's purported misconduct supported an inference that discharge was unlawfully motivated), enf. denied on other grounds sub nom. *S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009).

[12] E.g., *L. B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006), enfd. 232 Fed. Appx. 270 (4th Cir. 2007).

[13] See *Control Building Services*, 337 NLRB 844, 845 (2002) (emphasizing that evidence of pretext may be significant evidence of anti-union animus).

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[15] See *United Rentals*, 350 NLRB 951, 952 (2007); *Golden State Foods*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Member Miscimarra does not agree that it is unnecessary to reach the second stage of *Wright Line* (which in mixed-motive cases requires the employer to establish that the employer would have taken the same action even in the absence of unlawful motivation), but he concludes that the record fails to support a finding that the employer has satisfied this burden in the instant case.

[16] With respect to prior misconduct, see *Ads Electric Co.,* 339 NLRB 1020 fn. 3 (2003); *Berkshire Farm Center*, 333 NLRB 367 (2001); *Arrow Flint Electric*, 321 NLRB 1208, 1210 (1996).

ORDER

The National Labor Relations Board orders that the Respondent, K-Air Corporation, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their and other employees' membership in Sheet Metal Workers Local #67, a/w Sheet Metal Workers International Association (the Union) or any other labor organization.

(b) Threatening not to hire or employ individuals who are members of the Union or any other labor organization.

(c) Discharging or otherwise discriminating against its employees because of their affiliation with or activities on behalf of the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining or coercing its 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) Offer John Vega full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Vega 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 judge's decision.

(c) File a report with the Social Security Administration allocating Vega's backpay to the appropriate calendar quarters, and compensate Vega for any adverse income tax consequences of receiving his backpay in one lump sum.

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

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

(f) Within 14 days after service by the Region, post at its facility in San Antonio, Texas copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 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 September 24, 2012.

(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.

Dated, Washington, D.C. January 16, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

[17] 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."

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 coercively question you about your membership, or about other employees' membership, in Sheet Metal Workers Local # 67, a/w Sheet Metal Workers International Association (the Union), or any other union.

WE WILL NOT threaten not to hire or employ you for being a member or supporter of the Union or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting or being a member of the Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL offer John Vega full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make John Vega whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

K-AIR CORP.

Roberto Perez, Esq. and *Jonathon Elifson, Esq.,* for the General Counsel.

Melissa Fletcher, Esq. (Goode, Casseb, Jones, Riklin, Choate & Watson), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in San Antonio, Texas, on April 8, 2013. The amended complaint herein, which issued on March 26, 2013, and was based upon a charge and an amended charge that were filed on October 15, 2012,[1] and December 6 by Sheet Metal Workers Local # 67, affiliated with Sheet Metal Workers International Association, herein called the Union, alleges that on about September 24, K-Air Corporation, herein called the Respondent, by Kyle Villarreal, its president, interrogated employees about their union activities and coerced and threatened them with unspecified reprisals because of their union activities, and on about September 25 discharged John Vega because of his Union and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act. In addition to denying the substantive allegations of the complaint, Respondent defends that Vega was an independent contractor and not an employee within the meaning of the Act.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

This hearing involves the discharge of Vega after 3 days of employment with the Respondent. Vega is a journeyman sheet metal worker who has been a member of the Union since 1996. However, between January 2011 to November he was not a member in good standing because he moved from San Antonio, where the Union is located, to Houston, where he was under the jurisdiction of a different local union, until returning to San Antonio. Prior to working for the Respondent, he was employed by Swisher, another HVAC employer for about three days, performing sheet metal work. Justin Reeder, a friend, who was working for the Respondent, told Vega about the job, and said that he should call Villarreal and he gave him his telephone number. Vega called the number and when Villarreal didn't answer, he left a message with his name, telephone number, and work experience, saying that he knew Reeder and was looking for work and that he was told that the Respondent had a job at a LA Fitness location. Villarreal returned his call about 15 minutes later and Vega told him of his work experience and that he had just finished working at another LA Fitness job, and Villarreal agreed to interview him. They met at a small mall located at a nearby gas station and Villarreal told him that his company was growing from residential to light commercial work and that he was looking for people to staff his jobs and to work as foremen. Vega told him of his experience and Villarreal said that he would hire him to start at $17 an hour. Vega said that he was earning $18 at the other LA Fitness job and Villarreal said that he would see how he worked out for a couple of weeks and that they would talk about it again at that time. Villarreal asked if he could start the next day, Saturday, September 22, and Vega said that he could, and he told Vega to report for work at 7 a. m. Villarreal testified that at the conclusion of the interview, he did not tell Vega what time he had to be at the LA Fitness jobsite (the jobsite), the following day. Rather he told him that the other employees normally arrived at 6:30 or 7 a. m.

A. Garcia and Villarreal

Gilbert Garcia, an organizer for the Union, testified that on August 16 he went to the jobsite, as he does for all jobsites that

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2012.

he is aware of, in order to obtain work for union members. He met with the project superintendent for the general contractor and asked who was performing the HVAC work at the site, and he was told that it was the Respondent. Garcia asked if the boss was on site and he was told that he wasn't, and he left his business card with the project superintendent, who said that he would give the card to the owner of the HVA company, and Garcia left the jobsite. About 2 days later Villarreal called Garcia's telephone number and left a voice mail, asking what, if anything, Garcia wanted. Garcia was out of town at the time, and called him back when he returned 2 weeks later. Garcia identified himself and asked Villarreal if he needed any manpower for the job and he answered that he didn't have time at that moment to speak. Garcia asked if they could meet, and Villarreal said that he was going out of town. Garcia asked if they could meet when he returned, and Villarreal said that he was going to be gone for a while. Garcia asked him to call him when he returned, but Villarreal never returned the call. On the following day, Garcia went to the jobsite ". . . to see if I could get a hold of him before he left for out of town," but one of the employees said that he had just left.

Villarreal testified that the project superintendent gave him Garcia's card, which identified him as being employed by the Union, and he called Garcia and left a voicemail for him: "I called to hire a couple of the Union members, workers in sheet metal . . . I wanted to work with them. I wanted to hire them. I wanted to bid things with them. Unfortunate that it worked out this way, but I have a very pro union [sic]." When Garcia called him back, he no longer needed any additional employees, and since then he has not called the Union because he has lost jobs and didn't have any commercial work.

B. Vega's Employment with Respondent

Vega reported for work at 7 the next morning (September 22) wearing a hard hat and a safety vest, both of which had the name of a unionized HVAC company, Brandt Engineering, herein called Brandt, which is located in San Antonio and Dallas. He testified that he wore these items because he had been out of work for so long that he didn't have these items, so he borrowed them from his brother who works for Brandt and had an extra hard hat and vest. Villarreal testified that on Saturday, September 22, Vega was wearing a hard hat without an insignia. Vega met with Villarreal, who introduced him to the other employees and told them what work needed to be focused on, where they needed to be and what they needed to do. Vega was instructed to work in the pool area, where he spent most of the day working with the sheet metal vents and the aluminum duct work. Villarreal was away most of the day and Vega did not see him again until the end of the workday. At that time, he asked Vega if he knew anything about an altercation involving Reeder at Swisher that Reeder had filed a Board charge about. Vega told him that he didn't know anything about it as he had left Swisher's employ before it had occurred. Villarreal told Vega that, ". . . he didn't want that to happen to his company, whatever it was happening over there" and then asked Vega to fill out a time card, which he did, and returned it to Villarreal, who told him that he did a great job that day and told him to report for work Monday morning.

Villarreal testified that he arrived at the jobsite at about 11 that day and remained there for about an hour observing the work being performed at the site. As to what work Vega was supposed to perform that day, he testified: "He was supposed to know what he needs to do as an independent contractor. I told him that anything needs to get fixed and repaired, let me know and make advices [sic] and install duct work." He also went over the work prints with him and told him what needed to be done. He returned to the jobsite at about 3 p. m. and asked Vega if he was able to find any problems. At the end of that day, Vega and two other employees at the jobsite filled out an "Employee Timecard," actually, a piece of paper, stating that he arrived for work at 7 a.m. and left at 3:30 p. m. Villarreal testified that he believes that he told Vega to fill out the timesheet.

Vega next reported for work on Monday, September 24 at 7 a. m., again wearing a Brandt hat and vest. At 6:30 a. m. he received a call from Reeder saying that start time was 6:30 a. m.; Vega said that since start time on Saturday was 7 a. m., he thought that was the usual start time. Because he had the prints for the job, he said that he would be there shortly, as he lived around the corner from the jobsite. When he arrived, he apologized to Villarreal, who told him not to worry about it, but from then on, to be at work at 6:30 a. m. He testified that another mechanic employed by the Respondent, "Albert," said that he recognized him as a union member from another job, and Vega asked him not to say anything to Villarreal about it. Later, he saw Roger Trinidad, a union member who began working for the Respondent on September 20, and became the foreman a few days later, was also wearing a Brandt hard hat. At the end of the day, as he was preparing to leave, Villarreal stopped him and said that he noticed the Brandt name on his hard hat and asked if it was a union company. Vega said that it was, but that the hat belonged to his brother and since he had been out of work, he borrowed the hat from his brother. Villarreal then asked him if he was union and he said that he wasn't; he had been a union member, but he had been out of work and he was no longer in good standing. Villarreal asked him again if he was union, and he told him, again, that he was in the Union, but not in good standing, and that he was there just to make a living. Villarreal said that he would buy him a new hard hat,[2] Vega said that was fine, filled out the timesheet for the day, and left.

Villarreal was questioned by counsel for the General Counsel regarding a brief conversation that he had with some employees (including Vega) at the jobsite about unions. The questions were asked while Villarreal had his affidavit given to the Board in order to refresh his recollection. Counsel for the General Counsel began by asking if he overheard employees talking about the Union, at that time, pointing out the portion of the affidavit referred to; Villarreal initially answered: "No, I don't believe so." When asked if he overheard employees discussing the Union, he answered: "I don't recall if they did, but if they did . . . I believe I asked them a few questions." With some prompting he testified that he overheard Vega saying that he

[2] In an affidavit given to the Board, Villarreal stated that he ". . . was sort of ticked because I did not want to see another company's logo on my job."

was not in the Union and one of the other employees saying that union members make $35.90 an hour. Villarreal then asked, "Do union people make that much?" and, "Are you in the Union?" Vega then said, "You can't really talk about that" and Villarreal said that some jobs pay more than $35.90 an hour, and concluded the conversation by saying, "Why are we talking. Let's get back to work."

Reeder testified that on a Monday in September (which he mistakenly identified as September 22), while in the parking lot in front of the building, Villarreal again asked him about his unfair labor practice charge against Swisher and also asked him if he was a member of the Union and Reeder said that he wasn't a union member. Villarreal said that he had no interest in having union members on the job and Reeder said that he didn't know who were members of the Union as he had only recently moved to the area. Villarreal asked if Brandt is a union company, and Reeder answered that he believed that it was. Villarreal asked him if he had recommended union employees, and if Vega, George, and Albert were members of the Union. He answered that Vega had previously been in the Union, but his union was out of a different local and he didn't believe that he was an active member, and that he didn't know the other employees, Albert and George.

Sometime that day, Monday, Villarreal pointed out some work in the pool area, about 25 feet from where Vega was working, that had been performed improperly in that it had been assembled with galvanized steel rather than aluminum. Villarreal asked him who did the installation, and he said that he didn't know as it was installed before he started working in the area, but Vega agreed that it was installed improperly. Villarreal was asked by counsel for the General Counsel seven times wasn't it true that he knew that Vega did not do the improper installation, as stated in the affidavit that he gave to the Board, but he refused to admit it, answering that he wasn't there when the installation was performed (five times) and that counsel for the General Counsel should ask Trinidad who performed the installation. Villarreal testified that he asked Trinidad that day about the improper duct work, and that Trinidad, ". . . wasn't clear on it."

Vega reported for work on Tuesday September 25 at 6:30 a. m.again wearing his Brandt hard hat and vest. He testified that Trinidad, the foreman that day, told him to work in the pool area and replace a metal drive that was improperly installed on an aluminum duct. Later, Villarreal approached them yelling, "What is this shit? You are supposed to be looking out for K-Air. This isn't the kind of work we do." Vega told him that he didn't do the work involved and Villarreal told Trinidad that since he is the foreman, he is responsible for the work, and the next time it happened, he would be fired along with the employee who did the work. Vega then got on the lift to replace the metal drive with an aluminum drive, which took about 30 to 45 minutes. After completing that job, he worked with Trinidad for some time. Shortly before lunch, Trinidad walked away, and when he returned he asked Vega, "Did Kyle ask you if you are union?" Vega said that he did, and Trinidad said that he asked him as well, and Vega told Trinidad that he told Villarreal that although he was a member of the Union, he was not in good standing because he had moved. This conversation ended at lunch time, and Villarreal took the employees to lunch that day telling them that he was looking for a good crew of employees so that he could expand his business from residential to commercial. At about 1:45, Trinidad told him of a "unistrut" that was holding a plenium in the dressing room at the jobsite that had to be repaired. It was installed incorrectly, wasn't fastened to the building and there was a real danger of it falling and killing somebody, and Vega was told to fasten it and repair it. Because it had been improperly done, and he thought that Villarreal would want to see it, he recorded it on his cell phone. He had to locate baling wire to hold it temporarily until it could be permanently repaired and he worked on it until the end of the day when Trinidad told him to come down. Vega told him that he had not completed the job, and Trinidad told him that it didn't matter; Villarreal wanted him and was distributing the pay checks: "The day's over, there's no overtime." He went to the gangbox and Villarreal told him to complete an employment application, which he did, and to fill out a W-9 form. Vega told him that he didn't know what that was as he had never done one before, but Villarreal insisted so he completed that form as well. Villarreal asked if he could get him another hard hat, and Vega said that he didn't have a problem with that, he filled out his timesheet and left.

Reeder testified that he was working on the roof of the jobsite when he saw that the unistrut needed to be repaired, as quickly as possible, because of the danger that it entailed, and Vega was assigned to repair it, although he did not install it; it was installed before they got there. He also testified that Vega was discharged at about noon on Tuesday, September 25, while he was at a hospital with an employee who had been injured. Trinidad testified that when he arrived for work on Tuesday, September 25, Vega was not there, and he asked Villarreal where Vega was and he told him that he didn't have the money and couldn't afford to pay him and that he told Vega "to stay home." Trinidad asked why, and Villarreal said, "You want to get paid, right? Well I have to have enough money to pay all of you." Trinidad worked part of that day, September 25, but felt uncomfortable with the idea that there might not be enough money to pay him, so he told Villarreal that he was quitting with "no hard feelings" and Villarreal gave him the amount that was owed him. Trinidad also testified that Reeder, who was working on the roof of the jobsite on Monday, September 24, told him that the duct was not properly fastened, and at about 2 p. m. , Trinidad told Vega to fix the hangers on the duct because they were incapable of holding it, and Vega began to repair it. At 3:30 p. m.Trinidad told him to come down: "I told him, hey, there's no overtime on this job. Let it go, we'll get it tomorrow, because it was already repaired. . ." He felt that the job had been completed to his satisfaction, and that there was no longer any danger because of it. They all left for the day, and Villarreal never asked him about the strut.

Villarreal testified that he did not speak to Vega before he left work on the afternoon of Tuesday, September 25, but he called him after seeing the struts that Vega had been working on prior to leaving for the day: "to me, that's not . . . good quality work, plus safety hazard, plus just horrible job that can be very dangerous to people." In the call, he asked Vega if he had worked on that job and he said that he had. Villarreal asked if

he finished repairing it, and he said no, and when Villarreal asked him, "Why is that?" Vega answered, "That's the best I can do." Villarreal testified that this response was very disappointing and he was hoping that Vega would offer a good excuse so that he would not have to let him go, but Vega was "nonchalant" about it and because Vega's work wasn't up to his standard, he told him that he doesn't have extra money to pay for mistakes and he again asked Vega to "give me a good reason," and again he said that's the best he could do, and he discharged him. On the following day, Frankie Sanchez, a helper, repaired this dangerous situation; he testified that it took Sanchez about an hour and a half to correct the problems.

Sanchez was employed by the Respondent for about 2 or 3 months beginning in about September. He was not at work on Vega's final day of employment for the Respondent, but on the following day Trinidad directed him to repair the strut that Vega had worked on that day; it took him about an hour to complete the repairs. George Subirias, who was employed by the Respondent for about 3 or 4 weeks beginning in about early September[3] testified that while employed there, he told Villarreal that the work that Vega and Reeder performed showed that they were not as experienced as they claimed to be. He observed the strut in question and testified that it was very precarious: "And I didn't see how anybody claiming to be a mechanic would do something like that. It was just an accident waiting to happen, in my opinion." On the morning after Vega's discharge, Trinidad asked Subirias to repair it, and while examining it, other employees told him that Vega had performed the work on the struts.

Vega testified that shortly after leaving work on September 25 he received a call from Villarreal asking if he had installed the unistrut involved herein and he said that he hadn't, but that he had a video of it that he could show him. He told him that although he didn't install it, he temporarily fixed it, although it needed to be welded. Villarreal told him that he didn't have money to pay him, and Vega told him that he needed the job and could wait 2 or 3 weeks to get paid, but Villarreal refused to relent. Vega returned to the jobsite the next day picked up his tools and while there he met a former coworker, George Duarte, who told him that Villarreal had hired him and another worker that day. On cross examination, Vega was asked by counsel for the Respondent whether he told Villarreal, "That's the best I can do" in his telephone conversation with him on the afternoon of September 25, and he answered: "Yes." On redirect, counsel for the General Counsel asked him what he meant by that statement, and he testified:

> To repair it, that was the best of my ability with the material that I had. That was the best that I can fix it to where it needed attention tomorrow. It needed to be welded. That's all I can do temporarily. That was the best I can do temporary, and I was wrapping it with baling wire to secure that stud from shifting . . . so it wouldn't fall until somebody can get in there with a welder and weld it.

In answer to a question from me, he testified that the statement that he made to Villarreal was: "That's the best I can do at the moment."

C. Independent Contractor Status

As stated above, in addition to defending that Vega was discharged because of poor work performance, Respondent defends that he was an independent contractor rather than an employee within the meaning of the Act. As he only worked for the Respondent for 3 days, there is a limited amount of evidence on this subject. Vega testified that when he was hired Villarreal told him that he would be earning $17 an hour and, when Vega told him that he was earning $18 an hour at his prior job, Villarreal said that after a couple of weeks employment he would see how his work was, and they would discuss a pay raise and possibly his becoming a foreman after that. There was no discussion of his being an independent contractor. He was told to be at the jobsite at 7 the next morning. He filled out an undated Employment Application and on September 22, he filled out an "Employee Timecard," actually a sheet of paper, along with two other employees, stating that he worked from 7 to 3:30, and he was paid in cash for that day. He also filled out a timecard for September 24 and 25, and was paid by check for these 2 days, and on September 25, he completed a W-9 form at Villarreal's request, although he did not know what it was and had never previously filled out such a form. He testified that Villarreal told him that it was for tax purposes for Villarreal. Vega does not operate his own business, or carry his own insurance, and Villarreal chose the order of the work that was to be performed, the hours worked and the time for lunch. Vega incurred no work expenses, and brought his own hand tools to the job, while the Respondent provided the power tools. Reeder also testified that he provided his own hand tools for the job, was directed by Villarreal as to what work, as well as the order of work, to perform, and what hours to work, and he could not employ a substitute for himself, and he did not incur any expenses on the job, other than the cost of fuel driving to work. On September 20, about a week after Reeder began his employ with the Respondent, he completed a W-9 form, and on October 5, he entered into an agreement with Villarreal, at Villarreal's request, for a different job, providing that he would be paid $60 per grill installed for 20 grills, for a total of $1200, with $840 of that to be kept by Reeder, and the remaining $360 to be paid to his helper on the job.

Villarreal's testimony is not as clear because he did not answer questions directly, especially while being questioned by counsel for the General Counsel. He often answered questions that were not asked by providing answers that he considered favorable to his case, often by adding the words "independent contractor." For example, counsel for the General Counsel subpoenaed Respondent's records seeking all employees of the Respondent employed at the jobsite; Vega's name was not included. Counsel for the General Counsel asked:

> Q. So it was a mistake to leave him off the list? He was employed there. You don't dispute that, I presume. Is that correct?
>
> A. He was . . . worked for me for three days as independent contractor.

[3] He mistakenly testified that Vega was employed there when he began and was still there after he left the Respondent's employ.

Counsel for the General Counsel asked Villarreal if it were true that he employed both employees and independent contractors at the jobsite, and he testified: "I tell all my subcontractors and my employees that the first two weeks is a probation trial, and three month probation period for any kind of work they do." He also testified: "There's occasions that I hire employees as employees, and there's occasions that independent contractors, they're good at what they do, and I wish to hire them as W-2, and I do so. It just depends on what we agree on." When counsel for the General Counsel asked Villarreal to explain why he did not supply time sheets pursuant to the subpoena request, he testified: "I do have time sheets for employees, but I do not have necessary time sheet for the independent contracts, due to they have idea of amount of work they need to do, and I don't necessarily keep up with too much of independent contractors." He also testified that the IRS W-9 form is the form that he employs for independent contractor agreements. The subcontract for the jobsite was the largest job that he had performed, and it was the first time that he utilized independent contractors to perform work for his company.

Later, on redirect examination, counsel for the General Counsel asked him if it were true that W-2 employees sign confidentiality agreements and employment agreement while independent contractors do not, and Villarreal agreed with that statement, but when counsel for the General Counsel showed him subpoenaed documents for Christopher Morales, whom Villarreal had listed as an independent contractor, specifically a W-9 form and an Employment Agreement both dated September 24, it took six additional questions before he answered that question, and even then, he attempted to explain more than was asked of him. Subiarias, whom Respondent indicated was an independent contractor, testified that he filled out time sheets, but did not fill out a W-2, W-9, or an employment agreement with the Respondent; he gave Villarreal his driver's license and insurance.

III. ANALYSIS

Credibility obviously, plays an important part in this case. Counsel for the General Counsel alleges that Vega was discharged on September 25 because of his union membership, while counsel for the Respondent defends that he was discharged because of his poor work quality and his statement to Villarreal: "That's the best that I can do." In order of credibility, I found Villarreal to clearly be the least credible of the witnesses at the hearing. As recited above, it often required counsel for the General Counsel to repeat a question numerous times before he would answer a question directly, even while in possession of his affidavit which clearly set forth the answer. He would rarely admit to anything that he felt could harm his case without being forced to do so. While one can understand that events that occurred more than 6 months ago are, at times, difficult to remember, it appeared to me that his memory was selective and that he often feigned difficulty remembering only certain facts. On the other hand, I found Vega to be a credible witness, who appeared to be testifying to the facts as he best remembered them. For example, in answer to a question from counsel for the Respondent, he admitted that he told Villarreal, "That's the best that I can do" while later explaining what he meant in answer to a question from counsel for the General Counsel. Trinidad and Reeder also appeared to be credible witnesses although they had the date of Vega's discharge confused. Trinidad testified that Vega was discharged on Monday, September 24, because when he arrived for work on the following day, Villarreal told him that he had been discharged the prior day and Reeder testified that Vega was discharged at about noon on Tuesday, September 25, while he was away from the jobsite. Regardless of their confusion about the date of the discharge, I find that there were attempting to testify in an honest and truthful manner regardless of their confusion with dates. Sanchez and Subiarias also appeared to be credible and believable witnesses.

Counsel for the Respondent, in her answer, alleged that Vega was an independent contractor and not an employee within the meaning of the Act. A party asserting independent contractor status has the burden of proof of establishing that status so that the employee is excluded from the protection of Section 2(3) of the Act. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In determining independent contractor status under Section 2(3) of the Act, the Board applies the common law agency test and considers all the elements of the employee's relationship with his employer and no one factor is controlling. *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998). It is not necessary herein to examine these factors as the Respondent has presented no credible evidence that Vega was an independent contractor. Vega was told what hours and days to work, what work to perform, and was paid by the hour. Although he brought some of his own hand tools, the Respondent supplied the power tool and he filled out an Employment Application and time sheets for the 3 days that he was employed by the Respondent. The only evidence of independent contractor status was that on September 25, Vega was told to complete a W-9 form, even though he did not know what it was. I therefore find, with no difficulty, that Vega was an employee within the meaning of the Act while employed by the Respondent.

It is initially alleged that Respondent, on about September 24, interrogated employees about their union membership, activities, and sympathies, and those of their fellow employees, and coerced and threatened them with unspecified reprisals because of their union affiliations. The credited testimony of Vega and Reeder establishes that on about September 24, Villarreal interrogated them as to whether they were union members and asked Reeder if Vega, George and Albert were union members. It requires no case citation to establish that such a question initiated by a boss to an employee, without any lawful justification, violates Section 8(a)(1) of the Act. On the other hand, I find that Villarreal's statements to Vega regarding Reeder's unfair labor practice charge against Swisher: "I don't want that to happen here," is more a reference to unfair labor practice charges, rather than union membership, and does not violate the Act. As there is no evidence to support the complaint allegation that the Respondent coerced and threatened employees with unspecified reprisals because of their union activities, I recommend that this allegation be dismissed.

The final allegation is that the Respondent discharged Vega on September 25 because of his Union and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act, and this

allegation is to be judged under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980). Under this test, the initial issue is whether counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to terminate Vega. If that has been established, the burden then shifts to the Respondent to establish that it would have terminated him even in the absence of his protected conduct. I find that counsel for the General Counsel has sustained his initial burden herein. Villarreal overheard Vega discussing union wages with other employees, he asked Vega if Brandt was a union company, and he asked him on a number of occasions whether he was a union member; Vega told him that he was, but was not a member in good standing. In addition, Villarreal told Reeder that he had no interest in having union members on the job and asked him if he had recommended union employees to his job; he obviously was referring to Vega, whom Reeder had initially told about the job. Finally, the credible evidence establishes that Vega did not install the unistrut in question, and had begun to repair it when the workday ended on September 25, when he was told by Trinidad to quit for the day. While blaming Vega for the situation, Villarreal never asked Trinidad about the strut even though he would have told him that Vega had been working to repair it when the workday ended.

I also find that the Respondent has not sustained its burden of establishing that Vega would have been terminated absent his protected conduct. I do not credit Villarreal's testimony that he was prounion, and wanted to hire union workers and work with the Union. The only evidence of that was that he called Garcia shortly after being given his card by the project superintendent at the jobsite. Although Garcia was remiss in not returning his call for about 2 weeks, Villarreal was clearly not being honest when he told Garcia that he couldn't meet with him because he was going out of town, and would be out of town for a while. At the time, he was the sole individual supervising the jobsite and the evidence establishes that he was at the jobsite on a daily basis. As there was no other credible testimony to establish that Vega would have been discharged absent his protected conduct, I find that the Respondent violated Section 8(a)(1)(3) of the Act by discharging him on September 25.

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 has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their Union membership and the union membership of fellow employees.

4. The Respondent violated Section 8(a)(1)(3) of the Act by discharging John Vega on September 25, 2012.

5. The Respondent did not violate the Act as further alleged in the amended complaint.

THE REMEDY

The Respondent having discriminatorily discharged Vega, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). I shall also order the Respondent to file a special report with the Social Security Administration allocating Vega's backpay to the appropriate calendar quarters and to compensate him for any adverse income tax consequences of receiving his backpay in one lump sum. Having found that the Respondent also engaged in unlawful interrogation, in violation of Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist therefrom, and to post the attached notice to this effect.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, K-Air Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their membership in, and those of their fellow employees, in Sheet Metal Workers Local #67, a/w Sheet Metal Workers International Association, the Union, or any other labor organization.

(b) Discharging or otherwise discriminating against its employees because of their activities on behalf of the Union, or any other labor organization.

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

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

(a) Offer John Vega full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him 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 this decision.

(b) File a special report with the Social Security Administration allocating Vega's backpay to the appropriate calendar quarters and compensate him for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Vega, and within 3 days thereafter notify him, 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

[4] 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.

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 facility in San Antonio, Texas copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. 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 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 September 24, 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. May 30, 2013

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 question you about your membership, as well as that of other employees, in Sheet Metal Workers Local # 67, a/w Sheet Metal Workers International Association (the Union), or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union, or any other union and WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL offer John Vega immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, together with interest.

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

K-AIR CORP.

[5] 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."