

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

B.U.H. CONSTRUCTION a/k/a  
B.U.H. ENTERPRISES, INC.,

and

Case No. 01-CA-103438

NEW ENGLAND REGIONAL COUNCIL  
OF CARPENTERS

*Thomas E. Quigley, Esq.*, of Hartford, CT,  
for the General Counsel.

**DECISION**

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried on November 14, 2013<sup>1</sup> in Hartford, Connecticut pursuant to a complaint and notice of hearing issued by the Regional Director for Region 1 of the National Labor Relations Board (NLRB or Board) on June 12 (GC Exh. 1).<sup>2</sup> The complaint, based upon charges filed by the New England Regional Council of Carpenters (the Charging Party or Union), alleges that B.U.H. Construction a/k/a B.U.H. Enterprises, Inc., (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) when Respondent 1) threatened to reduce the wages of its employees because the employees had engaged in concerted discussions regarding their wages; 2) threatened to discharge its employees because they engaged in protected concerted activities; and 3) discharged employees Robert Osborne (Osborne) and Brian Grenier (Grenier) because they engaged in protected concerted activities (GC Exh. 1(e)).

The Respondent filed a timely answer to the complaint denying the material allegations in the complaint and asserting the affirmative defense that employees Osborne and Grenier voluntarily resigned when they refused to work for the wages offered by the Respondent (GC Exh. 1(g)). Prior to the date of the hearing, the legal representative for the Respondent withdrew as counsel (GC Exh. 18). On the day of the hearing, Robert Handlow, who was and is the owner of the Respondent, failed to appear. The counsel for the General Counsel and I attempted to contact Handlow at his office and personal cell phone numbers prior to the hearing date but we received no response. I delay the start of the hearing for approximately 1 hour, but neither Handlow nor any persons from the Respondent appeared at the designated hearing site. The hearing then commenced with the Respondent presenting no witnesses or evidence to support its answer to the complaint (Tr. 5, 6).

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<sup>1</sup> All dates are in 2013 unless otherwise indicated.

<sup>2</sup> Testimony is noted as "Tr." (Transcript). The exhibits for the General Counsel are identified as "GC Exh." The closing brief for the General Counsel is identified as "GC Br."

After the close of the hearing, the counsel for the General Counsel timely filed his brief, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses<sup>3</sup>, I make the following

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## Findings of Fact

### I. Jurisdiction and Labor Organization Status

At all material times, the Respondent B.U.H. Construction a/k/a B.U.H. Enterprises, Inc., has been a contractor in the construction industry with an office and place of business in McKees Rock, Pennsylvania and doing business in Brooklyn, Connecticut. During a representative 1-year period, Respondent performed services valued in excess of \$50,000 directly from enterprises outside the State of Pennsylvania. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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At all material times, the Union is a labor organization within the meaning of Section 2(5) of the Act.

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### II. The Alleged Unfair Labor Practices

#### 1. The Hiring Process

Robert Handlow (Handlow) is the owner of Respondent B.U.H. Construction a/k/a B.U.H. Enterprises, Inc, with its main business office located in Pennsylvania. In early March, the Respondent was contracted to perform construction services in Brooklyn, Connecticut. Eugene Arsenault (Arsenault), who is a carpenter and lives near the construction site, was informed by his son on March 8 that the Respondent was looking to hire workers. Arsenault then contacted Osborne, another carpenter, who was also interested in obtaining work. Both individuals went to the Brooklyn jobsite on March 8 to inquire about work and were told by the superintendent of the general contractor that Respondent was looking to hire carpenters (Tr. 122-124).

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Osborne confirmed that Arsenault contacted him on March 8 and that they went to the Brooklyn jobsite looking for work. Osborne testified that they spoke to an individual by the name of Mike Kowalczyk who is believed to work for the superintendent of the general contractor on the jobsite.<sup>4</sup> According to Osborne, Kowalczyk told them that the Respondent was looking to hire 5 to 10 carpenters. Kowalczyk asked for their phone numbers and promised to inform the Respondent that they were interested in work (Tr. 18-21).

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Arsenault testified that they did not discuss wages with the Kowalczyk on March 8. Arsenault did discuss his wages with Osborne. Arsenault told Osborne that he was not willing to take less than \$25 an hour if Osborne plans to discuss wages with the Respondent (Tr. 123, 124). Osborne testified that wages were not discussed with Kowalczyk, but corroborated that he discussed wages with Arsenault and that they were going to ask for \$25 an hour if they were offered work (Tr. 20, 21).

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<sup>3</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

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<sup>4</sup> It is not clear from the testimony of Osborne and Arsenault as to whether Kowalczyk was actually the superintendent or an employee who assisted the superintendent.

Osborne testified that he received a call from Handlow over the weekend on Sunday. According to Osborne, Handlow was looking to hire 5 to 10 workers and asked Osborne how much he and Arsenault wanted in wages. Osborne replied they were looking for \$25 an hour. Osborne and Handlow negotiated back and forth for a dollar amount between \$17 and \$25. Osborne finally asked for \$20 an hour. Osborne said that Handlow agreed to hire him for \$20 an hour, saying "All right, Okay, I'll hire you in at \$20." Osborne denied that the \$20 was conditioned on a trial basis or on his work performance. Osborne recalled Handlow telling him that "...we'll try you out for a little while and if you're worth more I'll pay you more" (Tr. 20-24). Handlow informed Osborne to begin work on the Monday, March 11. Osborne told Handlow that he could not answer for Arsenault as to what he might be willing to accept in wages and suggested that Handlow call Arsenault (Tr. 23).

Osborne said that his phone conversation lasted for approximately 30 minutes. Knowing that Handlow would call Arsenault after ending the conversation, Osborne waited another 30 minutes before he called Arsenault. According to Osborne, Arsenault said he was adamant with \$25 an hour and was surprised that Osborne accepted \$20. Nevertheless, Arsenault said that since he was going to carpool with Osborne and would save on the gas money, he decided that the wage offer of \$20 an hour would be acceptable to him (Tr. 24, 25).

Arsenault testified that Osborne called him before he received a call from Handlow so he already knew how much Handlow was willing to pay Osborne. Arsenault received a call from Handlow and they discussed Arsenault's work experience before Handlow asked Arsenault about wages. Arsenault told Handlow that his base pay was \$25 an hour. The two individuals negotiated back and forth between \$15 and \$19 an hour. Finally, Arsenault said he would not take anything less than \$20. Handlow agreed to that amount and asked Arsenault to start work on Monday, March 11. Arsenault then called Osborne and told him that he accepted the \$20 an hour offer and confirmed they were to start work on Monday (Tr. 124-126).

Arsenault and Osborne carpooled to work on Monday morning, but no one from the Respondent was available to assign them work. Arsenault called Handlow, who informed them that he was running late and instructed them come in on the following day, March 12. Arsenault and Osborne returned on Tuesday and again, no one was available to assign them for work. Arsenault again called Handlow, who told them to come in on Wednesday when someone would definitely be there. When they arrived at the jobsite on Wednesday, March 13, the Respondent's work crew was again not present. Another worker and colleague, Brian Grenier (Grenier), who was also hired by Handlow, arrived on Wednesday morning and also had no work to perform. Osborne called Handlow and was told that he would be there later in the day. Osborne and Arsenault decided to leave, but Grenier stayed behind at the jobsite. Later that morning, Grenier called Osborne and Arsenault and told them to return because they needed to fill out some paperwork to begin work on Thursday (Tr. 26-28; 124-127).

Grenier testified that he has been a carpenter for over 35 years and was out of work at the time he was hired in mid-March. He said that Osborne called him and asked if he wanted to work at the Brooklyn site for \$20 an hour. Grenier agreed. Grenier went to work on Wednesday, March 13. When he arrived in the morning, no one from the Respondent was present but he observed Osborne and Arsenault at the jobsite. All three then went to the superintendent's trailer to inquire and spoke to Kowalczyk. Grenier confirmed the testimony of Osborne and Arsenault that Kowalczyk said no one from the Respondent was available and were told to complete some paperwork. According to Grenier, he informed Kowalczyk that he was here with Osborne and Arsenault to work as carpenters. Grenier then contacted Handlow by telephone and left a phone message that all three were at the Brooklyn worksite and ready to

work for the agreed upon wages of \$20 an hour. Grenier said he never heard back from Handlow. Grenier said that Osborne and Aresenault then proceeded to leave the worksite. Since Grenier arrived separately, he stayed behind waiting for his ride when an employee for the general contractor asked Greiner to call Osborne and Aresenault and have them return to  
 5 complete their paperwork (Tr. 78-83). Aresenault testified that they returned after receiving the call from Grenier and completed their paperwork. All three were instructed to return to the jobsite on Thursday morning, March 14 (Tr. 29, 83, 127).

## 2. *Employees' Dispute Over Their Wages*

10 Osborne, Aresenault and Grenier carpooled on Thursday, March 14 and arrived at the Respondent's jobsite around 6:30 a.m. All three witnesses testified that the Respondent's work crew was running late and did not arrive until around 9 a.m. They testified that approximately five workers arrived and they were introduced to the crew foreman, Doug Flick<sup>5</sup> (Flick) and the  
 15 main foreman, Bill Schweitzer (Schweitzer). Osborne and Grenier testified that Handlow was not present (Tr. 29, 30; 34-36; 127, 128).

20 The three employees were instructed to unload a flatbed truck full with materials and tools. Once accomplished, they were instructed to perform carpentry work. Osborne testified that work on the building was just beginning and that Flick told him that the work was scheduled through September (Tr. 32). Grenier testified that they began work on assembling trusses<sup>6</sup>  
 25 when he noticed that they were being joined with an insufficient number of fasteners which would cause the trusses to loosen when shaken. He repined that they had to disassemble the trusses and start over again. According to Grenier, he also began to notice other hazardous working conditions which precipitated him to call his union representative, Robert Corriveau (Corriveau), who he had met earlier due to his union affiliation (Tr. 85-87). Osborne testified that he also knew Corriveau from a previous jobsite (Tr. 73).

30 Grenier testified that he and Osborne met Corriveau around 6:00 a.m. on March 20 at a fast food restaurant to sign their union cards (Tr. 88). Osborne testified that he, Aresenault and Grenier would meet with Corriveau at least three times a week during the weeks of March 18 and 25, usually in the morning before the start of work and at the same location (Tr. 34, 35)

35 Osborne testified that while working on March 21, he was approached by Schweitzer who told Osborne that the Respondent could not afford to pay him \$20 an hour, as promised. When Osborne asked why, Schweitzer reportedly said "I can't pay you \$3 more than I pay my head carpenter." When Osborne insisted they had agreed to \$20, Schweitzer replied "I want to pay you a certain amount and I want you to tell these guys what they're getting," referring to  
 40 Grenier and Aresenault (Tr. 35, 36). According to Osborne, Schweitzer wanted to pay him \$16 an hour and \$15 to the other two individuals. Schweitzer said that the non-Connecticut workers were mad that Osborne, Grenier and Aresenault were getting \$20. Schweitzer asked Osborne to inform Grenier and Aresenault about the decrease in their wage rate, but Osborne said for him to tell the others. However, Osborne did in fact relate this conversation to Grenier (Tr. 37, 38).

45 Grenier testified that Osborne approached him and said that the Respondent did not want to pay them the \$20 an hour and only want to give him \$15. Grenier replied that Osborne

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50 <sup>5</sup> The parties stipulated that Douglas Flick (Flick) was a supervisor at the time within the meaning of Section 2(13) of the Act (GC Exh. 18(a)).

<sup>6</sup> A truss is a structure comprising one or more triangular units constructed with beams that are connected at the joints.

must be joking so he decided to talk to Flick. Grenier testified that he, Osborne and Arsenault were informed by Flick that Handlow could not afford to pay \$20 and complained that other guys on the work crew were not making as much money and were upset. Grenier believed that the other workers must have heard how much they were making from Flick or another supervisor.  
 5 According to Grenier, Flick also upset because he was only making \$17 an hour (Tr. 88-92).

During the carpool trip home after work on Thursday, Osborne, Grenier and Arsenault discussed the day's event and to get to the bottom about their wages. Osborne optimistically believed that nothing was official about his wage rate until he receives his first check. Grenier  
 10 said that "we should find out" as to what was happening (Tr. 42, 43, 92, 93). Arsenault testified that he agreed to contact Handlow on Saturday, March 23 because he thought Handlow was supposed to get back to Osborne on Thursday about their wages and did not (Tr. 128, 129). The record reflects that all three individuals worked on Friday, March 22.

### 15 *3. Arsenault's Wage Dispute*

As agreed, Arsenault contacted Handlow on Saturday. This time, Arsenault was able to reach Handlow. Arsenault told Handlow that he overheard a conversation between Osborne and Flick that Handlow could not pay them \$20. Arsenault asked Handlow "what was going  
 20 on?" Handlow replied that Schweitzer should have spoken to him already and since Arsenault went to work on Friday, Handlow assumed that everything was straightened out with Arsenault willing to take less money. Arsenault replied that Schweitzer never spoke to him. Handlow then said that he pays his top foreman \$17 an hour and "...that one of you guys..." (referring to Arsenault, Osborne or Grenier) improperly informed the work crew that they were receiving \$20.  
 25 Arsenault denied that he had told anyone about his salary because that would "cause problems." Arsenault told Handlow that he was adamant about the \$20 an hour. According to Arsenault, Handlow replied that he would speak to his secretary to "...see how to handle this". Handlow also said he would speak to Schweitzer and see what they can do for him. Handlow told Arsenault that he does not mind paying a few dollars more and that he will let Arsenault  
 30 know by Sunday. Arsenault said that Handlow never contacted him on Sunday (Tr.129-132).

Arsenault testified that he spoke to Osborne on Sunday night and said that Handlow was supposed to call him, but did not. Arsenault said to Osborne that he was not going to work on Monday before first speaking to Handlow. Arsenault did not work on Monday because he was  
 35 still waiting for Handlow's call. Arsenault decided to contact Handlow on Monday afternoon, March 25. According to Arsenault, Handlow was yelling over the telephone and said he never told Arsenault that he would receive \$20 an hour. Handlow also said that his secretary told him that Arsenault had quit. Arsenault denied that he had spoken to his secretary and denied he had quit (Tr. 132-134).

Osborne confirmed that Arsenault called him on Sunday evening to say that he (Arsenault) would not be going to work on Monday. When Osborne asked why, Arsenault informed him that he was fired for asking about his pay. Osborne said he then received a call  
 45 from Flick. According to Osborne, Flick said that he believed Arsenault was fired and asked if he was coming to work on Monday. Osborne replied that he and Grenier would be at work on Monday (Tr. 44, 45).

Arsenault subsequently filed a claim for unpaid wages with the assistance of Corriveau (GC Exh. 13). Eventually, Arsenault received 2 separate paychecks for his work at \$20 an hour.  
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His pay period reflects work performed from March 8 to March 21 in one check.<sup>7</sup> His second check was for his work on March 22. Arsenault maintains that he was not paid for March 14 (Tr. 132-136; GC Exhs. 13-15). Arsenault subsequently filed an unemployment claim, which was upheld on appeal by the State of Connecticut Employment Security Appeals Division (Tr. 5 137; GC Exhs. 16, 17).

#### 4. April 2 Discharge of Osborne

Osborne and Grenier worked from Monday through Thursday. On Thursday morning, 10 March 28, they met with Corriveau to sign their union authorization cards and a statement of claim for wages against the Respondent that Corriveau had partially completed for them. Osborne said that the basis for their wage claims was that (1) they were not getting paid on a weekly basis; (2) the wage rate of \$16 was incorrect because they were to receive \$20 an hour; and (3) the number of hours worked was incorrect (GC Exhs 3, 4). Although Osborne signed 15 the wage claim for those three reasons on March 28, it was obvious that he did not know his actual calculated hours of work and wage rate since he had not received his first paycheck at this time. Osborne explained that on the following Monday, April 1, he received his paycheck in the mail and realized that his hours and wage rate were not accurate. He testified that he and Grenier met with Corriveau on the morning of Tuesday, April 2 to discuss his paycheck. 20 Osborne signed the wage claim that morning. During lunch, Osborne and Grenier again met with Corriveau. It was at that time that Osborne completed his wage claim with the additional information gleaned from his paycheck. Corriveau suggested that Osborne speak to the Respondent about straightening out his paycheck. Osborne replied that he was fearful of being terminated, but Corriveau assured Osborne that all he is asking is why he was not receiving the 25 \$20 an hour rate. Corriveau gave them a copy of their wage claim statements before they returned to work (Tr. 45-53; 56-58).

After lunch, Osborne and Grenier met with Schweitzer. Osborne testified he told 30 Schweitzer he had a wage claim against the Respondent for wages and for not being paid for hours worked. Osborne testified that he presented a copy of the statement for wage claim to Schweitzer. According to Osborne, Schweitzer replied "I don't know what a wage claim is" (Tr. 59). Osborne told Schweitzer that he has been trying to reach Handlow, but he would not return his calls. Schweitzer suggested Osborne used his cell phone to call Handlow because Handlow always return Schweitzer's calls, which Osborne agreed to do (Tr. 59, 60).

Osborne testified that Schweitzer dialed Handlow's phone number on his cell phone and handed the phone to Osborne. Osborne said that he and Grenier then walked outside to the back of the building for some privacy. Schweitzer was not privy to the phone call with Handlow. Osborne said that he put the cell phone on the speaker so that Grenier could hear the 40 conversation with Handlow. When the phone rang, Handlow picked up the phone, believing the call was from his foreman. Osborne identified himself and Handlow asked what he could do for him. Osborne began telling Handlow that we (meaning him and Grenier) had received their checks and they were short hours. Handlow interrupted Osborne and said "I know." Osborne continued and told Handlow they were supposed to get paid on a weekly basis and also at \$20 45 an hour (Tr. 60-63).

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<sup>7</sup> The record shows that the employees are paid on a weekly basis from Thursday to the following Wednesday. They should receive their checks on Fridays. Because the three workers (Arsenault, Osborne and Greiner) did not have direct deposit, their checks were mailed to them and received on the 50 following Monday. See, also testimony of Osborne (Tr. 46-51).

Osborne testified that Handlow got real angry when he mentioned the wage rate and that Handlow replied

5 Look I'll pay you your fucking \$20 an hour, but if I do you're fucking done right now.

Taken aback, Osborne asked why Handlow was getting so mad and screaming over the telephone when Osborne was just trying to resolve his wage dispute, but he was again interrupted by Handlow, who said

10 You guys get the fucking \$20 an hour and you're fucking done right now.

Osborne again asked why Handlow was screaming at them when he was merely trying to straighten out his wage rate. According to Osborne, Handlow concluded by saying

15 I'll tell you what, you guys aren't worth it. Get the fuck off my job (Tr. 63).

Handlow ended the call, but Osborne hoped that Handlow would calm down and call them back. When they waited awhile and he did not call back, Osborne gave the phone back to Schweitzer. When Schweitzer asked what happened, Osborne replied that Handlow had just fired them. Soon after, Osborne and Grenier collected their tools and left the jobsite (Tr. 63-66).

20 Osborne's first check received on April 1 was from March 8 to March 21 with 36.25 hours worked and he was paid \$16 (GC Exh. 3). Osborne testified that he eventually received a second check dated April 12, in which he was paid \$20 an hour. He was also paid for March 14 (which should have been in his first paycheck) (Tr. 68-71; GC Exh. 6).

#### 5. April 2 Discharge of Grenier

30 Grenier largely corroborated the statements of Osborne. He testified that he and Osborne met with Corriveau on March 28 and recalled signing a statement of claim for wages against the Respondent on that date. Similar to Osborne's situation, Greiner's wage claim initially was for not receiving his paycheck on a weekly basis (GC Exh. 8). When Grenier received his paycheck the following Monday, April 1, he realized that his paycheck was short on hours worked and his rate of pay was only \$14 (Tr. 104-107). Subsequently, Grenier and 35 Osborne met with Corriveau on Tuesday morning, April 2 to discuss their paychecks. Corriveau said that he would finish filling out the wage claim statements for them. When they met again during lunch, Corriveau gave each a copy of their statement of claim for wages (Tr. 94-103). Corriveau also encouraged Grenier to try and resolve this dispute with Schweitzer after lunch (Tr. 108).

40 Consistent with Osborne's testimony, Grenier said that they met Schweitzer and informed them about "our paychecks." According to Grenier, Schweitzer told them that he knew that they might be short a day of pay. Grenier testified that Osborne then told Schweitzer that the wage rate was also wrong. Schweitzer allegedly told them that he was only one of three 45 workers making \$20 or more. Grenier recalled telling Schweitzer that they had filed wage claims against the Respondent and showed him a copy of his wage claim. Schweitzer allegedly responded that he "did not know what a wage claim is." Schweitzer told them to take it up with Handlow and Osborne was allowed to use Schweitzer's cell phone to make the call (Tr. 108-110, 112).

50 Grenier testified that he was present during the conversation on the phone between Osborne and Handlow. He recalled that Osborne informed Handlow that Grenier was in on the

conversation. Grenier said that Osborne began telling Handlow that their checks were wrong, and Handlow replied that he might have shorted them a day. At that point, Osborne told Handlow that their rate of pay was also wrong because he had agreed to \$20 and they only received \$15 (Osborne) and \$14 (Grenier). According to Grenier, Handlow said

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I'll give you your \$20 an hour but if I do, you're fucking done right now.

Grenier testified that Osborne said to Handlow, "Why are you yelling at me. I'm just trying to have a conversation with you." Grenier said he heard Handlow said to them

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Just get the fuck off my job right now (Tr. 110,111).

Grenier had taken notes of this and other events. His notes indicated that Handlow had fired them at 2 p.m. on April 2. (GC Exh. 19).

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Grenier's first paycheck reflected 32.25 hours of work at \$14 an hour (GC Exh. 7). Grenier testified that he eventually received his second paycheck that reflected a wage rate of \$20. He was paid for his work on March 14 at \$20 an hour. Grenier filed a claim for unemployment insurance and his appeal upheld by the State of Connecticut (Tr. 113, 114; GC Exh. 11, 12).

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### Discussion and Analysis

The counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) of the Act on March 23 when Handlow threatened to reduce the employees' wages and again on April 2 when Handlow threatened employees Osborne and Grenier with discharge for engaging in protected concerted activities. The counsel for the General Counsel further argues that the Respondent violated Section 8(a)(1) of the Act when it discharged Osborne and Grenier on April 2 because of their protected concerted activities.<sup>8</sup>

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The Respondent, in its answer to the complaint, argues that Osborne and Grenier were not discharged inasmuch as they voluntarily quit their employment when they refused to work for the wages offered by the Respondent. The Respondent also contends that it had not violated Section 8(a)(1) of the Act as it has not interfered with, restrained or coerced employees in the exercise of their rights in Section 7 of the Act.

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#### 1. The Threats

The counsel for the General Counsel asserts that various threats uttered by Handlow violated Section 8(a)(1) of the Act when Arsenault, Osborne and Greiner engaged in protected concerted activity when they complained to Handlow that they did not receive the wage rate as agreed upon and the unpaid hours that they had worked. Specifically, the counsel for the General Counsel alleges that (1) Handlow threatened Arsenault on March 23 after Arsenault inquired about his wage rate and told Handlow that he was adamant in accepting nothing less than \$20 an hour and when (2) Handlow threatened Osborne and Grenier with discharge for pursuing their agreed upon wage rate of \$20 an hour.

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<sup>8</sup> The Regional Director, by letter dated July 30, approved the union's withdrawal of the allegations regarding the discharge of Arsenault and the discharge of Osborne and Grenier to the "...extent a violation of Section 8(a)(3) is alleged" (GC Exh. 21 appended to the counsel for the General Counsel post-hearing brief).

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I agree with the counsel for the General Counsel. I find that Handlow threatened Arsenault, Osborne and Grenier when they complained to him after learning from Schweitzer that they would not be paid at the \$20 wage rate.

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Under the Act, employees' concerted activities are protected by Section 7. The Act also protects concerted activities for mutual aid or protection regardless of whether a union is involved.<sup>9</sup> *Alton H. Piester*, 353 NLRB No. 369, 371 (2008). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984). The concerted activity also includes circumstances where "an individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887 (1986).

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I find that Osborne, Grenier and Arsenault engaged in concerted activities protected under the Act when they discussed their wages and hours worked with Handlow.<sup>10</sup>

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Here, Osborne, Grenier and Arsenault negotiated a wage rate with Handlow for \$20. Initially, they were unable to get Handlow to agree to \$24 an hour. Arsenault reluctantly agreed to the \$20 per hour after Osborne told him that he accepted \$20. Grenier also credibly testified that he told Handlow that he would accept \$20. However, on March 21, the general foreman, Schweitzer approached Osborne, Grenier and Arsenault and essentially told them that the Respondent could not pay them \$20 and wanted them to accept \$16 an hour. In the carpool ride home that same day, all three indicated that they would get to the bottom of the dispute over their wages and Arsenault agreed to call Handlow on Saturday, March 23. When Arsenault called, Handlow was upset and told Arsenault that his demand for \$20 per hour caused problem with the rest of his work crew. Arsenault denied talking about his wage rate with the non-Connecticut crew, but it was obvious that some crewmembers knew how much the three Connecticut employees were being paid.<sup>11</sup> Handlow believed that Arsenault was talking to his crew about his wage rate and his continued insistence of demanding \$20 was causing problems with his crew. Handlow was equally upset when the wage dispute with Arsenault was not straightened out. Handlow believed that because Arsenault went to work on Friday, March 22, that Arsenault had accepted the lower wage rate. Handlow was angry when Arsenault called on March 23 and informed him that nothing was resolved. By asking for his proper wages, Arsenault was threatened for engaging in protected activity.

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I now turn to the April 2 threat in the phone call between Osborne and Handlow with Grenier present during the call. Osborne and Grenier credibly testified that they called Handlow because the paychecks they received on April 1 did not have the correct wage rate of \$20. By

<sup>9</sup> The pertinent part of Section 7 provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection* (emphasis added)."

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<sup>10</sup> Discussions by employees with supervisors on disputed wages are protected concerted activities. See, *Delta Gas, Inc.*, 282 NLRB 1315, 1317 (1987) (The Board found protected concerted activity when employee made efforts to obtain overtime pay); *Phillips Petroleum*, 339 NLRB 916, (2003) (a single employee inquiring about a higher wage rate he believed applied to him had engaged in protected concerted activity).

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<sup>11</sup> The discussions between Osborne and Schweitzer and Grenier with Flick regarding the amount of their wage rate and hours worked occurred in an open area at the jobsite. I find that their dispute over their wage rate would have reasonably been overheard by other workers.

asking for their proper wages, Osborne and Grenier engaged in protected concerted activity. However, instead of discussing the matter, Handlow wanted nothing more to do with them and angrily told them that “Look I’ll pay you your fucking \$20 an hour, but if I do you’re fucking done right now.”

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I find all the threats advanced in the General Counsel’s brief are based upon credible evidence by the employee witnesses involved. All are unmistakable threats. Arsenault was threatened by Handlow to stop talking about his wage rate of \$20 to other crewmembers (whether true or not) and to stop insisting on getting paid \$20 because this was causing (Handlow) problems with the crew.<sup>12</sup> Handlow then threatened Osborne and Grenier with termination for continuing to demand their agreed-upon wage rate of \$20. These declarations by Handlow threaten adverse economic consequences if the three continued to insist on receiving \$20.

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Accordingly, I find that the Respondent threatened Arsenault, Osborne and Grenier in violation of Section 8(a)(1) of the Act when they concertedly inquired about the status of their wage rate on March 23 and April 2.

## 2. *The Discharge of Grenier and Osborne*

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In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced a causation test in all cases alleging violations of Section 8(a)(3) and (1) turning on employer motivation. The United States Supreme Court approved and adopted the Board’s *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows

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The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

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However, the *Wright Line* analysis is not appropriate where the Respondent’s motivation for taking the allegedly unlawful action is not in dispute. *Felix Industries, Inc.*, 331 NLRB 144 (2000); *Plaza Auto Center, Inc.*, 355 NLRB 493 fn 5 (2010). Here, it is undisputed that the Respondent discharged Osborne and Grenier during their telephone exchange with Handlow. The only issue is whether they had engaged in protected concerted activity during that exchange.

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Osborne and Grenier were discharged by Handlow when they insisted on the agreed-upon wage rate of \$20 during the April 2 telephone call. According to Osborne, Handlow was angry and yelling at them over the telephone. The record does not show that Osborne and Grenier had yelled back or cursed at Handlow over the telephone.<sup>13</sup> Osborne asked Handlow why he was getting mad and screaming at them when he was only trying to straighten out his

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<sup>12</sup> I find that it was reasonable to conclude that supervisors Flick and Schweitzer would also be upset since Flick only earned \$17 and Schweitzer was at \$20.

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<sup>13</sup> The Respondent does not allege, and I do not find, that the employees were discharged because they had engaged in opprobrious conduct costing them the Act’s protection. *Atlantic Steel Co.*, 245 NLRB 814 (1979).



to offer Osborne and Grenier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and to make Arsenault, Grenier and Osborne whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In accordance with the decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), my recommended order requires Respondent to compensate Arsenault, Grenier and Osborne for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for Osborne and Grenier.

My recommended order also requires the Respondent to expunge from its files any and all references to the unlawful discharge of the aforementioned employees and to notify them in writing that this has been done and that the unlawful discharge will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

### ORDER

The Respondent, B.U.H. Construction a/k/a B.U.H. Enterprises Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from talking about their wages, earnings and hours work at the jobsite.

(b) Threatening its employees with discharge for engaging in protected concerted activity.

(c) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(d) 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 Brian Grenier and Robert Osborne full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

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<sup>15</sup> 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.

(b) Make Brian Grenier and Robert Osborne whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, as set forth in the remedy section of this decision.

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(c) Compensate Brian Grenier and Robert Osborne for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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(d) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful discharge of Brian Grenier and Robert Osborne, and within 3 days thereafter notify them in writing that this has been done and that the discharge will not be used against them in any way.

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(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. Absent exceptions 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 due under the terms of this Order.

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(f) Within 14 days after service by the Region, post at its existing jobsites in Connecticut and Pennsylvania copies of the attached notice marked “Appendix.”<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, 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 jobsites 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 March 23, 2013.

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<sup>16</sup> If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

(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.

5 Dated, Washington, D.C. February 6, 2014

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Kenneth W. Chu  
Administrative Law Judge

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**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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection
- Choose not to engage in any of these protected activities

WE WILL NOT prohibit you from discussing about your wages, earnings, hours of work and other terms and conditions of employment on your own time and during work hours.

We WILL NOT threaten discipline to you for engaging in protected concerted activity.

WE WILL NOT discharge you or otherwise discriminate against you for engaging in protected concerted activity.

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

WE WILL offer full and immediate reinstatement to Robert Osborne and Brian Grenier to their former jobs or, if those jobs are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL make Brian Grenier and Robert Osborne whole for any loss of earnings and other benefits they suffered as a result of our discrimination against them, plus interest.

WE WILL compensate Brian Grenier and Robert Osborne for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for them.

WE WILL within 14 days from the date of the recommended Order, remove from our files any reference to the unlawful discharge on April 2, 2013 of Robert Osborne and Brian Grenie and expunge it from our records, and within 3 days thereafter, we will notify them in writing that we have done so and that the discharge will not be used against them in any way.

**B.U.H. Constructions a/k/a B.U.H. Enterprises, Inc.**

\_\_\_\_\_  
(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: [www.nlrb.gov](http://www.nlrb.gov).

10 Causeway Street, Federal Building  
6th Floor, Room 601  
Boston, Massachusetts, 02222-1072  
Hours: 8:30 a.m. to 5 p.m.  
617-565-6700

**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, 716-551-4946.