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

WHITESTONE CONSTRUCTION CORP.

and **Case No. 02-CA-087444**

ANTHONY CHARLES, An Individual

Lara Haddad and Nancy Lipin, Esqs., for the Acting General Counsel.
Michael R. Fleishman, Esq. (Goetz Fitzpatrick LLP),
New York, NY, for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge and a first amended charge filed by Anthony Charles, An Individual (Charles), on August 16 and November 29, 2012, respectively, a complaint was issued against Whitestone Construction Corp. (Respondent or Employer) on November 29, 2012.

The complaint alleges, essentially, that the Respondent unlawfully discharged Charles, a shop steward for the Carpenters Union, because he complained to the Respondent that employees represented by the Laborers' Union were being assigned work within the jurisdiction of the Carpenters Union.

The Respondent's answer denied the material allegations of the complaint and asserted the affirmative defense that the arbitrator's decision requires deferral of this proceeding. A hearing was held before me on February 4, 5, and 7, 2013, in New York, NY. Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the Acting General Counsel[1] and the Respondent, I make the following:[2]

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a corporation located at 50-52 49th Street, Woodside, New York, has been engaged in the operation of a commercial construction business. During the past 12 months it purchased and received at its Woodside facility, goods valued in excess of $50,000 directly from points located outside New York State. The Respondent admits and I find that it is

[1] Hereafter, the Acting General Counsel shall be referred to as the General Counsel.

[2] Following the close of the hearing, the General Counsel moved to correct the transcript to substitute a complete copy of G.C. Exhibit 3. However, a complete copy of G.C. 3, which consists of three pages, had already been included in the G.C. Exhibit file at the hearing. Accordingly, the motion is denied.

an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Respondent denied knowledge or information concerning the statutory labor organization status of the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union). The Board has found that the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find. *America Piles, Inc.*, 333 NLRB 1118, 1122 (2001); *Millwright & Machinery Erectors, Local 740 (Tallman Constructors),* 238 NLRB 159,163 (1978).

II. The Facts

A. Background

The Respondent performs work at construction projects, many of which are at school buildings. The project involved here was the installation of a roof and windows at Public School 286 in Brooklyn, NY. This project employed various trades including carpenters and laborers. All the employees working in those trades were members of their respective unions, and a working union steward was required to be at the job site for each of the trades. The carpenters' shop steward was the Charging Party, Anthony Charles.

Whitestone's hierarchy includes president Steven Grizic, project manager Mike Kotowski, field superintendent Grzegorz (Gregg) Polinski, general foreman Jozef Nowak, and carpenter working foreman Miroslaw Maziag.

Kotowski, the project manager, has overall responsibility for the proper completion of the project. He schedules the work, ensures that the work is done well, and deals with any issues that arise. Kotowski is at the job site about once per week.

Field superintendent Polinski has an office in a trailer at the jobsite. He is present at the site each day and oversees the actual work and monitors its progress. To do this he "walks the job" every 45 minutes, checking the quality of the work performed, and making sure that the work is done well. Charles denied that Polinski "walked the job," testifying that Polinski remained in the trailer and he did not see him in the area where construction was taking place. Polinski schedules the work in advance and works to address any issues that may arise, and when needed, reports those issues to Kotowski. Polinski is the "eyes and ears" of the Respondent. The foremen report to him and he reports to Kotowski.

General foreman Nowak is consulted as to the number of employees needed to complete the project. He is responsible to ensure that an adequate number of tradespeople are hired or requested of the unions involved to complete the job. He visits the job site about once per week.

Miroslaw Maziag, a member of the Union, was the working foreman for the carpenters. He is at the jobsite every day. The complaint alleges that he is a statutory supervisor, and the General Counsel alleges that he discharged Charles. The Respondent denies that he is a supervisor. His supervisory status will be discussed below.

B. Charles's Complaint Regarding the Laborers and his Discharge

Charles has been a carpenter for thirty years, and has worked on 17 jobs where part of the work included the installation of windows, and five jobs where window installation was his sole work. He was the Union's shop steward, having been referred by the Union to the PS 286

job at issue here. Charles worked for the Employer one year before this job, at a public school in the Bronx where his job involved the installation of windows. Maziag was his foreman on that job also. Charles testified that his work on both jobs was similar, but the Respondent's witnesses disagreed.

The Respondent has been an employer member of the Association of Wall-Ceiling & Carpentry Industries of New York. The Association and the Union have maintained in effect and enforced a collective bargaining agreement covering the employees of the Respondent. Those contracts provide that "the handling of packing, distributing, and hoisting of materials to be installed and/or erected by employees covered by the agreement shall be done by apprentices." Union Business Agent Mangito (Manny) Fowlkes, testified that "apprentices" refers to carpenters, members of the Union.

Charles reported to the jobsite on Saturday, March 10, 2012. He noticed that members of the Laborers Union were carrying windows and window materials to the classrooms from the ground floor. Charles knew that such work was within the jurisdiction of the Carpenters Union but made no complaint that day. No work took place on Sunday, March 11.

Work resumed on Monday, March 12. Charles again saw members of the Laborers Union doing Carpenters work, but apparently did not mention this to anyone in authority.

Charles stated that the following, day, March 13, he began his shift at 4:00 p.m., and at about 4:30 p.m. he again saw laborers moving the window materials. He phoned Fowlkes and made a complaint. Fowlkes advised him to speak to the superintendent or the foreman.

Charles immediately spoke to foreman Maziac, telling him that the work being done by laborers was carpenters' work, and if he needed more carpenters, he (Charles) could obtain them. According to Charles, Maziac replied that this job was "priced competitively," unlike the job in the Bronx. Maziag added, "don't break my balls and I won't break yours." Charles answered that he did not mean to "break [your] balls, but I was doing my job as a shop steward and [if] I didn't say something I wouldn't be doing my job." Kotowski testified that laborers are paid about $15 less per hour than carpenters.

Charles testified that about 30 to 45 minutes later, Maziag was on the ground floor pulling up a window with a pulley and rope. The window became snagged in the scaffolding at the height of the second floor. Part of the window dropped to the ground, narrowly missing Maziag. At that time, Charles was on the scaffold at the third floor level waiting for the window to reach his floor. Maziag was "very upset."

Charles testified that about 15 minutes after that incident, Maziag shouted at him from the street level to the third floor scaffolding where he worked - "you fucked with the wrong guy." Maziag then came to the area where Charles and his partner Lanty Malloy were working and told them to stop what they were doing and to begin installing windows, adding "if you don't get these three windows installed tonight you're out of here." Charles replied that he would do the best he could but he needed certain "relevant" tools that they had not been given. Maziag told him to borrow the tools from other carpenters working on that floor.

Charles stated that he and Malloy finished installing the three windows but the trim and moulding around the perimeter of the windows was not done. He conceded that windows are considered incomplete if that additional work was not done. Charles testified that at about 12:15 a.m., at the end of his shift, Maziag told him and Malloy "you never got them finished." Charles replied that they did the best they could. Maziag answered "okay, you never got them finished

so you're out of here. You and your partner are terminated. You're out of here. The two of you … are out of here and I don't care who you know. You're not to come back." Charles responded that Union regulations prohibited a production quota that a certain number of windows be installed.

Maziag then criticized Malloy for miscutting the trim. Malloy testified that when Maziag saw that he had cut the trim too short he told Malloy "that's it. You messed up. I'm going to have to order a new shell for this window. I had enough. You're fired. Pack up your tools and go." Malloy stated that Charles was not present during this exchange. Malloy further stated that when he was preparing to leave, Charles asked him what happened. Malloy told him that he was fired because he miscut some material. Charles and Maziag then spoke alone. When they returned to his area, Malloy heard Maziag tell Charles "that's it. You're fired as well. You're out of here." Malloy estimated that he and Charles left the jobsite at about 12:15 a.m.

Charles stated that he told certain fellow carpenters on the job that he had been fired, and then collected his tools and left with Malloy. On their way out of the building, he told Maziag that the carpenters on the job were excellent but that he should not demand a production quota. Charles asked about his paycheck and Maziag said that it would be mailed to him.

Charles submitted the Steward's Weekly Payroll Report when he left work on March 14 at about 12:30 a.m. It lists the names of the carpenters working at the jobsite and the hours they worked. Charles signed it, he claimed that Maziag signed it, and then brought it to the job trailer where Polinski also signed it. [3]

Charles stated that he did not report to work the following day because he believed that he had been fired and was told not to return to the job. Charles notified Union representative Fowkles that he was fired, and Fowkles told him that the Employer had not followed the proper procedure in terminating a shop steward.

C. The Internal Union Grievance

Charles, as a Union member, brought an internal union grievance against Maziag, a fellow Union member, on March 28. He listed the violations relevant here, as "enforcing production quotas or lay off; dismissing shop steward without proper procedure."

The matter was heard by a panel consisting of officials of the Union. As stated by Chairman Walter Mack, Charles was "seeking an apology and an acknowledgement that Mr. Maziag's general obligation to you as a fellow member was not observed when [Charles was] laid off." The matter was resolved by Maziag acknowledging and apologizing "for his actions toward shop steward Charles," and the apology was accepted by Charles.

D. The Union's Grievance and the Arbitration

On March 19, Union agent Fowlkes filed a grievance which stated that "Whitestone Construction laid off the shop steward and they did not call the Union" in violation of Article 5, Section 3 of the Project Labor Agreement (PLA) which states:

> Layoff of Steward: Contractors agree to notify the appropriate

[3] The signature, which Charles claimed to be that of Maziag, was established to be that of Polinski.

> Union 24 hours prior to the layoff of a Steward, except in cases of discipline or discharge for just cause….In any case in which a Steward is discharged or disciplined for just cause, the Local Union involved shall be notified immediately by the Contractor.

Arbitrator Richard Adelman stated the issue, as agreed by the parties, as "whether the Employer violated the PLA by laying off Charles." The arbitrator heard the evidence and issued his award on August 1, 2012. He credited the Employer's position that Charles was not discharged, but rather, when Maziag told him that he was unable to perform window installation work, he walked off the job and did not return to work the following day. The Union's position was that after Charles complained that laborers were performing carpenters work, Maziag discharged him.

The arbitrator found that Charles did not tell the Union that he had been discharged, and the Union did not grieve his discharge. The arbitrator concluded that the Employer did not violate the contract by not giving advance notice of Charles's discharge or layoff because he had not been discharged or laid off.

Analysis and Discussion

The Respondent urges that the alleged unfair labor practice be deferred to the decision of the arbitrator. The General Counsel argues that deferral is inappropriate.

The Board has consistently held that:

> While a deferral defense and the merits may be addressed in the same hearing and the same decision, "[w]hether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered." *Sheet Metal Workers Intl. Assn Local 18 (Everbrite)*, 359 NLRB No. 121, slip op. at 2 (2013) citing *L.E. Myers Co.,* 270 NLRB 1010, 1010 fn. 2 (1984).

Accordingly, the question of deferral shall be discussed first.

I. Deferral to the Arbitration Award

In *Aramark Services*, 344 NLRB 549, 550-551 (2005), the Board reiterated its policy concerning deferral to arbitration awards:

> Labor policy 'strongly favors the voluntary resolution of disputes.' The Board will defer to an arbitrator's decision where the proceedings 'appear to have been fair and regular,' the parties have agreed to be bound by the result of the arbitration, the decision is not 'clearly repugnant' to the Act, and the arbitrator has considered the unfair labor practice issue. *Bell-Atlantic-Pennsylvanian*, 339 NLRB 1084, 1085 (2003); *Spielberg Mfg. Corp.,* 112 NLRB 1080 (1955); *Olin Corp*., 268 NLRB 573 (1984). A 'heavy burden' is on the party opposing deferral to show that an arbitration decision does not merit deferral by the Board under these standards. *Olin*, above, at 573-574.

> In deciding a question of deferral, the Board will presume that the arbitrator 'adequately considered the unfair labor practice issue' if the contractual issue was 'factually parallel' and the arbitrator was 'presented generally' with the facts relevant to the former. *Olin,* at 574. The Board will not find an arbitrator's award 'clearly repugnant' unless it is shown to be 'palpably wrong,' i.e., not susceptible to an interpretation consistent with the Act. An arbitrator need not decide a case the way the Board would have decided it, nor reach a decision 'totally consistent with Board precedent' in order to satisfy the Board's requirements for deferral. *Bell-Atlantic*, above, at 1085. In practical terms, where an arbitrator is presented with the substance of the same evidence that would have been presented to a judge in a Board proceeding, the Board will defer to the arbitrator's findings unless they are not susceptible to an interpretation consistent with the Act.

A. Were the proceedings fair and regular and did all parties agree to be bound

The *Spielberg* standards require that the proceedings be "fair and regular." Deferral is denied where minimum due-process has not been accorded to the grievant, where, for example, evidence was deliberately withheld from the arbitrator. *Precision Fittings,* 141 NLRB 1034 (1963), where the grievant was given insufficient time to prepare, or there was hostility between the union which purported to represent the grievant and the grievant himself. *Warehouse Employees Local 20408 (Dubovsky & Sons)*, 296 NLRB 396 (1989).

The General Counsel asserts that the arbitration hearing was not fair and regular because Maziag did not attend, and Charles was not given an opportunity to cross examine the Employer's witnesses. First, the fact that Maziag was not present at the arbitration could not harm Charles because Maziag could not refute Charles's testimony concerning their conversations. That the arbitrator chose to credit hearsay testimony concerning what Maziag allegedly told Kotowski and Polinski has no bearing on whether Maziag should have attended the hearing.

In addition, neither Union agent Fowkles nor Charles apparently asked for an opportunity to cross examine the witnesses who testified for the Employer. Apparently, the arbitrator asked all the questions and no one objected to that procedure. The facts here are different than those in *Versi Craft Corp*., 227 NLRB 877 (1977), where the grievant was advised not to attend the arbitration hearing, and in not deferring to the award, the Board found that due process was not accorded because he was not given an opportunity to cross examine the witnesses against him.

I accordingly find that the General Counsel has not proven that the arbitration proceeding was not fair and regular. Further, it appears that all parties agreed to be bound by the arbitrator's decision.

B. Did the arbitrator consider the unfair labor practice issue

As set forth above, the arbitrator's award is deferrable if he "considered the unfair labor practice issue." Under *Olin*, an arbitrator "has adequately considered the unfair labor practice issue if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice…. *Olin* does not require the arbitrator to make a specific finding that the issues are parallel." *Martin Red-Mix,* 274 NLRB 559, 559 (1985).

Here, as in *Martin Redi-Mix,* I find that the factual questions before the arbitrator "were coextensive with those that would be considered by the Board in a decision on the statutory issues." Here, as In *Martin Redi-Mix*, the questions are identical:

> What prompted [the employee's] departure from the jobsite on the day in question; what occurred during the conversation between [the employee] and his supervisor shortly before his departure from work that day; whether [the employee's] departure from work that day constituted a voluntary quit on his part; whether [the employee] was discharged and for what reasons. 274 NLRB at 559-560.

Thus, the contractual issue is factually parallel to the unfair labor practice issue: Why did Charles leave the job on March 13? The General Counsel argues that he was discharged after complaining that the laborers were doing carpenters' work. The Respondent asserts that after being told by Maziag that he was not performing properly, he quit.

Here, the arbitrator notes twice that he was presented with the statutory issue which is the subject of the complaint: that the Employer dismissed Charles as shop steward and ordered him off the job because he complained to the foreman that the Laborers Union was doing work that the Carpenters Union should be doing. In fact, Charles stated here that he testified at the arbitration hearing that his lay off "may have had something to do with the fact that I had stopped the contractor's laborers from doing the carpenters work."

Thus, the arbitrator was presented with essentially the same evidence necessary for the determination of the unfair labor practice complaint – that Charles complained to foreman Maziag that the laborers were doing carpenters' work and he was discharged because he made that complaint.

The arbitrator phrased the issue as agreed by the parties: "Did the Company violate the Project Labor Agreement by laying off Anthony Charles?" Thus, Charles's departure from the jobsite was placed at issue, and the arbitrator noted the arguments of the Union and Charles that his departure was caused by his complaint that members of the Laborers Union were doing Carpenters Union work. The inquiry is "whether the arbitrator was presented generally with the relevant facts necessary to consider the unfair labor practice." *Martin Redi-Mix*, above at 560. I find that he was.

I emphasize the fact that, as the party opposing deferral, the General Counsel bears a "heavy burden" of proving that the arbitrator did not consider the unfair labor practice.

I find that the arbitrator considered the unfair labor practice issue essentially because the contractual issue, why Charles left his employment, is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. I reach the same conclusion as the Board reached in *Martin Ready-Mix*, that the arbitrator's award is entitled to deferral.

C. Is the Award Clearly Repugnant to the Act

The General Counsel argues that arbitrator's award is clearly repugnant to the purposes of the Act because, at the arbitration, neither employee Malloy nor foreman Maziag testified, and no one directly contradicted Charles's testimony concerning his conversation with Maziag.

Further, the General Counsel argues that the arbitrator faulted the Union for not filing a grievance relating to Charles's discharge, thereby concluding that the Union did not believe that Charles had been fired. Further, the General Counsel argues that the arbitrator's decision rested solely on a narrow interpretation of the contract, and that the award is confusing and its reasoning is circular.

First, the Board will defer to an award which is "not a model of clarity." *Smurfit-Stone Container Corp.,* 344 NLRB 658, 660 (2005). Further, the Union could have called Malloy to testify but did not.

The arbitrator's findings and conclusions were essentially that Charles was told that his work performance was not good and that he left the job voluntarily although he was entitled to remain until a new shop steward replaced him. The arbitrator found that the Employer had no obligation to notify the Union that Charles was being laid off because he was not laid off or discharged – rather, he walked off the job. The arbitrator offered additional reasons for finding that Charles was not discharged – that Charles allegedly did not tell the Union that he was fired, and the Union did not file a grievance specifically alleging that his discharge violated any agreement with the Union. The Board may disagree with such findings, but that disagreement is insufficient to decline to defer to his award.

Based on the above, the General Counsel has not shown that the arbitration award is clearly repugnant to the Act. Simply because the Board may have decided the contractual issue differently than the arbitrator did is not a ground for finding the award clearly repugnant to the Act. "The Board's review under *Olin* does not contemplate that the Board will substitute its judgment for that of the arbitrator in resolving contractual issues. Rather, we will inquire only whether the arbitrator adequately considered the unfair labor practice issues…." *Martin Redi-Mix*, above at 560.

As set forth in *Olin*, the Board does not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, deferral is required. That means that "even if there is one interpretation that would be consistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act." Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act.

Thus the Board's "mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award." *Smurfit-Stone Container Corp*., 344 NLRB 658, 658-660 (2005). The Board notes that the factual finding of the arbitrator "who heard the relevant testimony, including the testimony of the [Charging Party] is one to which we would defer." *Kvaerner Philadelphia Shipyard, Inc.,* 347 NLRB 390, 392 (2006). The arbitrator's award here is susceptible to an interpretation consistent with the Act since the Board may make a finding that an employee has quit his employment and has not been discharged. *Swardson Painting Co*., 340 NLRB 179,180 (2003). In addition, the Board may disagree with the arbitrator's ruling here that Charles was not discharged. However, the arbitrator reached a reasonable conclusion that Charles left the job after being criticized for his performance. That conclusion is not palpably wrong and is not clearly repugnant to the Act.

I accordingly find and conclude that the unfair labor practice issue shall be deferred to the arbitrator's award, and that the complaint is dismissed in its entirety.

II. Alternative Findings

If the Board does not agree with my conclusion that the unfair labor practice should be deferred to the arbitrator's award, I make the following findings and conclusions regarding the issues raised in the complaint.

A. The Supervisory Status of Maziag

As set forth above, the complaint alleges and the Respondent denies, that Maziag is a statutory supervisor. The General Counsel asserts, and the Respondent denies that Maziag discharged Charles.

Maziag gave limited testimony concerning his responsibilities and what he actually does on the job. He stated that he asked Charles to help him transport some windows. Maziag is the only carpenter foreman on the jobsite, and when he is not overseeing the carpenters' work, he does his own work.

Kotowski stated that Maziag did not have the authority to hire or fire any employees. Maziag, similarly, denied that he has that power. Kotowski testified that Maziag's responsibilities include driving the Respondent's truck which was filled with window materials. He drives the truck from Whitestone's headquarters to the job site, and reviews with Polinski the schedule which lists what windows had to be installed each day. Maziag was given the schedule by Polinski which had been prepared by Kotowski. According to Kotowski, Maziag "takes that schedule and in order for [Polinski] not to have direct contact with 50 employees at one point… each foreman says 'okay. You know, you pick up a window. You do this. You do that….' So he's got the schedule and he's trying to make sure that everything is being done as per the schedule."

Charles testified that Maziag assigned work to him and the other carpenters, corrected mistakes made, made sure that the quality of workmanship was at the level required, ensured that the carpenters had the tools needed to perform their duties and oversaw production. If a carpenter had a question about how to perform a task, Maziag would instruct him and actually show him how to complete the job. Charles also testified that he "answered to" Maziag, but conceded that, ordinarily, a foreman cannot fire a shop steward. After the jobs were completed, Maziag inspected the work to ensure that it was done properly. Charles stated that Maziag used his judgment in assigning work of installing subframes to those carpenters who he knew were proficient at such work.

Employee and Union member Lanty Malloy, who worked with Charles, testified that he saw Maziag telling employees what to do, for example, unload the truck and move the frames to different locations. He instructed Malloy to help those carpenters who were installing windows. I credit Malloy's admission that he miscut a piece of trim, and that Maziag inspected it and saw that it was cut too short.

I also find that Maziag assigned and reassigned the carpenters to work. Thus, as credibly testified by Charles and Malloy, Maziag assigned them to remove scaffolding so that windows could be inserted into their openings, and then reassigned them to install windows. He also imposed deadlines and quotas on them, and threatened that if they did not complete the work as ordered, they would be fired. Indeed, that is exactly what occurred. Later, when they had not finished the installation, Maziag told them to leave and not return, thereby discharging them. Both Charles and Malloy followed Maziag's order, left the jobsite, and did not return.

I do not credit the Respondent's witnesses' testimony that Maziag did not have the authority to discharge workers. The undenied, detailed, consistent, believable testimony of Charles and Malloy, set forth above, concerning their exchanges with Maziag, convince me that Maziag discharged them.

Further, Kotowski's letter dated April 24 entitled "allegations against Maziag" stated that Maziag warned Charles to be more careful and productive in performing his work. The letter further states that on March 12, Kotowski saw Charles standing idle at work. When asked why he was not working, Charles said that he did not have to follow Maziag's orders. Kotowski and Employer official Nowak "both instructed Mr. Charles to go back to work and complete the task he was assigned, if he did not do so, he was told [that the Respondent] would seek to have him removed." This is clear evidence that Maziag made assignments to Charles and that Charles was required to follow Maziag's orders or he would be terminated.

Apart from generally denying that he had the authority to discharge workers, Maziag's testimony did not contradict the essential, material parts of the testimony of Charles and Malloy. Thus, he did not deny any of the conversations that Charles and Malloy testified that they had with Maziag. Nor did he deny any of the statements attributed to him by those two men.

I accordingly find and conclude that Maziag is a statutory supervisor who discharged Charles.

B. The General Counsel's Prima Facie Case

Under *Wright Line,* 251 NLRB 1083 (1980), the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse employment action. The General Counsel satisfies this burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity. If the General Counsel meets his initial evidentiary burden, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, above, at 1089.

I credit Charles's testimony that when he complained to Maziag on March 13 that members of the Laborers Union were performing Carpenters Union work, Maziag told him that this job was priced "competitively" unlike a previous job in which they had worked together in the Bronx. This testimony is believable since it was conceded that laborers are paid about $15 per hour less than carpenters.

The contract between the Association and the Union provides that the work that the laborers were doing was carpenters work, and that Charles, in complaining about that to Maziag, was attempting to enforce the contract. Such an effort clearly constitutes protected, concerted activity. *White Electrical Construction Co*., 345 NLRB 1095, 1095 (2005). Thus, I find that Charles engaged in protected activities by complaining about laborers doing carpenters work.

Despite the Respondent's claims that it was not a current member of the Employer Association, a claim denied by the Union, it apparently recognized Charles's complaint as legitimate inasmuch as its officials testified that they immediately directed that laborers cease transporting or moving windows, and Kotowski spoke to Union agent Fowlkes and told him the problem had been corrected.

In addition, Polinski and Kotowski learned immediately that Charles made this complaint and Polinski testified that he spoke to Charles at the jobsite about this issue. This proves that Maziag and Respondent's officials Kotowski and Polinski were aware that Charles was engaging in protected, concerted activities by attempting to enforce the contract which required that employees represented by the Carpenters Union perform carpenters work.

After Charles complained to Maziag, Maziag became angry, warning Charles not to "break his balls." Shortly thereafter, Maziag further warned Charles that he "fucked with the wrong guy." These warnings were a clear prelude to what came next – Charles's discharge. These warnings to Charles, coming very shortly after Charles challenged the assignment of carpenters work to laborers, illustrated Maziag's anger and animus toward Charles. Maziag did not deny these conversations with Charles.

The evidence establishes that Charles was discharged and did not quit, as contended by the Respondent. "The fact of discharge does not depend on the use of formal words of firing. It is sufficient if the words or action of the employer would logically lead a prudent person to believe his [her] tenure has been terminated." *North American Dismantling Corp.,* 331 NLRB 1557, 1557 (2000).

Here, I credit the undenied, mutually corroborative, consistent and believable testimony of Charles and Malloy that Maziag first warned them that if they did not complete three window installations that night they would be "out of here," and then, when the work was not finished, ordered them to leave and not return. Such a direction to Charles was a clearly stated discharge from his employment. Charles credibly testified that he believed that he had been discharged and did not return to work thereafter. He immediately told Union agent Fowlkes that he had been fired.

In this regard, Kotowski testified that the carpenters were expected to install only one window per shift. This is evidence that Maziag was imposing an unreasonable burden on Charles and Malloy by directing that they install three windows between them. Later, when Charles and Malloy did not complete that assignment, they were told that they are "out of here" and should not return. Clearly, they were discharged. They testified that they did not return because they were told not to. Maziag did not deny those conversations with the two men.

I accordingly find that Charles's protected activities were a motivating factor in his discharge.

C. The Respondent's Defenses

Polinski and Kotowski testified that they were informed that Charles had complained that laborers were doing carpenters work. They directed that laborers cease doing such work, and the situation was corrected. Accordingly, the Respondent argues that it possessed no animus toward Charles because he made the complaint. Indeed, it argues that Charles was not discharged because Maziag had no authority to fire employees, but rather, that Charles simply walked off the job and did not return the following day.

The Respondent alleges that Charles left the job after being told that his job performance was not up to par. There was testimony by Respondent's officials that Maziag reported that Charles damaged materials and that Maziag told him that his performance was not what was required. Maziag testified that Charles "did not know what he was doing." However, he could not recall that he told Charles that he was not doing a good job or that he cut any materials incorrectly.

I credit Charles's testimony that his work was not criticized, although conceding that on his last night of employment he was told that he did not install the three windows required. It is undisputed that Charles's partner, Malloy, cut materials improperly. In this regard, I credit Charles's testimony that he is experienced in the installation of windows, and had worked without incident on a prior job for the Respondent in which he installed windows, also at a public school. The Respondent argues that the types of windows on the two jobs differed greatly, but he worked at the previous job without complaint. Significantly, when he appeared at P.S. 246, the current job, there was no complaint from Respondent that he lacked knowledge concerning the installation of windows. Similarly, based on his credited testimony, the Respondent made no complaint about his work until he complained about the use of laborers to perform carpenters' work. I rely on Maziag's testimony that he could not remember telling Charles that he was not doing a good job. If he was as poor a worker as the Respondent asserts, his failing job performance would have been noticed and complained of during the three days of his employment, and not during his last night at work.

Polinski stated that Charles presented the steward's payroll report to him at about 11:30 p.m. or midnight on the evening of March 13. Polinski stated that Charles's shift that day was from 7:00 p.m. to 3:30 a.m., and he asked Charles why he was submitting the form so early. Charles replied that he did not think that he would be returning to work the following day. Polinski asked what happened and Charles did not reply. I credit Charles's denial that he left work early on March 13, and his further denial that he told Polinski in the trailer that he was leaving the job and would not be returning to work. Maziag, Charles and Malloy all testified that the shift began at 4:00 p.m. that day. It would therefore have ended at about midnight. Charles and Malloy so testified. If Charles presented the report at about midnight, as he testified, there would have been no need for Polinski to have asked him why he was submitting the form early.

The Respondent attempts to buttress its argument that Charles walked off the job on his own and did not return by asserting that it faxed a letter to the Union requesting a replacement steward for Charles when he did not return to work on March 14. However, the letter was faxed to the Union at 2:26 p.m. on March 14. It is critical to note that the fax was sent before Charles was expected to report to work on that day. There was some dispute as to whether Charles's shift began at 4:00 p.m. or at 7:00 p.m., but regardless, by sending the fax hours before Charles's shift was to begin, the Respondent clearly was aware that it had discharged him the night before and thus needed a replacement steward at the start of the shift. The fax stated that the shift began at 7:00 p.m. If Charles had simply left the job early, as Respondent contends, it could have expected him to return to work the following day at his regular shift time. By requesting a replacement steward hours before his shift was to begin, the Respondent acted with the knowledge that it had fired him the previous evening.

Based upon the above, I would find and conclude that the Respondent has not met its burden of proving that it would have discharged Charles even in the absence of his protected, concerted union activities. *Wright Line*, above.

Conclusions of Law

1. The Respondent, Whitestone Construction, is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in conduct violative of Section 8(a)(1) and (3) of the Act as alleged in the complaint.

4. The decision of arbitrator Richard Adelman dated August 1, 2012 is deferred to.

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

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 31, 2013

_____
Steven Davis
Administrative Law Judge

[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.