

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

EURO BUILDERS, LTD

and

INTERNATIONAL UNION OF
BRICKLAYERS & ALLIED CRAFTWORKERS,
OHIO-KENTUCKY ADMINISTRATIVE
DISTRICT COUNCIL, LOCAL 22 OHIO

09-CA-106788
09-CA-106805
09-CA-106887
09-CA-107530

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for the General Counsel.

Randy G. Martinuzzi, Esq.
for the Respondent.

Ryan K. Hymore, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This consolidated case was tried in Cincinnati, Ohio, on May 5-7, 2014. On December 9, 2013, an order consolidating cases, consolidated complaint and notice of hearing issued against Euro Builders, LTD (the Respondent), based on charges filed by the International Union of Bricklayers & Allied Craftworkers, Ohio-Kentucky Administrative District Council, Local 22 Ohio (the Union).¹ On February 5, 2014, the General Counsel issued an amendment to the consolidated complaint.

¹ The charge in Case 9-CA-106788 was filed on June 7, 2013. The charge in Case 9-CA-106805 was filed on June 7, 2013. The charge in Case 9-CA-106887 was filed on June 7, 2013. The charge in Case 9-CA-107530 was filed on June 18, 2013.

The consolidated complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by, on or about May 8, 2013,² refusing to hire or consider for hire Roger Trotter and George Gaston because of their union and concerted activities; on or about May 31 or June 3, 2013, laying off its “Ohio crew;”³ and since on or about June 10, 2013, refusing to recall employees Rob E. Miller and Michael L. Dawson because of their union and concerted activities. The consolidated complaint also alleges that Respondent, by its owner, John Griffiths, violated Section 8(a)(1) of the Act by: on or about May 8, 2013, interrogating employees about their union activities, and informing employees that it was not hiring employees because of their union activities and membership; about the week of May 27, 2013, informing an employee that it would not hire employees because of their union activities and support; on or about June 4, 2013, informing an employee during a telephone conversation that employees were laid off because of the employees’ union activities and membership; on or about June 5, 2013, implying to an employee that employees would not be recalled to work because of their union activities and membership, implying to an employee that it knew which employees supported the union, informing an employee that it would not have employees on the job because of their union activities and membership, and informing an employee that it was not recalling employees because of their union activities and membership.

In addition, the amendment to the consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by its foreman, Daniel Nieman, an alleged supervisor and agent of the Respondent, coercively informing an employee that the union and its supporters were to blame for the June 2013 layoff.

The Respondent filed an answer and an amended answer⁴ in which it denied these allegations, and denied that Nieman was a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13) of the Act.

² All dates are in 2013 unless otherwise indicated.

³ Consolidated complaint paragraph 7(a) alleges that the “Ohio Crew” consists of: Arlie R. Jolly, Curtis L. Dunston, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers; Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty, Kevin McCleskey, Michael Dunston, Michael L. Dawson, Rob E. Miller, Ronald H. McCleskey, and Segundo Pinguill. While the Respondent initially denied that these individuals were laid off on June 3, 2013, it subsequently amended its answer at the hearing to admit that it laid off those individuals on May 31 and/or June 3, 2013.

⁴ On June 11, 2014 the General Counsel filed a motion to reopen the record to amend the exhibits to include Respondent’s answer and amended answer, which were inadvertently omitted at the hearing. This motion was unopposed. Pursuant to Section 102.35 of the Rules and Regulations of the National Labor Relations Board, the administrative law judge has the authority to dispose of procedural requests, motions or similar matters, such as ordering the reopening of hearings. Due to the inadvertent omission of Respondent’s answers, I find good cause exists to grant the General Counsel’s motion. I have therefore reopened the record for the limited purpose of receiving Respondent’s answer and amended answer into evidence as GC Exhibits 1(x) and 1(y), respectively.

On the entire record,⁵ including my observation of the demeanor of the witnesses,⁶ and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

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I. JURISDICTION

The Respondent, with an office and place of business in Livonia, Michigan, has been engaged in the operation of masonry contractor work in the construction industry performing commercial construction at various locations, including a jobsite in Englewood, Ohio. In conducting its operations, the Respondent annually performed services valued in excess of \$50,000 in states other than the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.⁷

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As mentioned above, the Respondent has denied that its foreman, Daniel Nieman, is a supervisor and agent within the meaning of Section 2(11) and 2(13) of the Act, respectively.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

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The Respondent is a masonry contractor headquartered in Livonia, Michigan, and owned and operated by John Griffiths. In April 2013, it commenced operations on the construction of the Northmont Early Learning Center in Englewood, Ohio (the Englewood project) for Harp Contractors, Inc., the general contractor on the project. The Respondent's masonry work ended on or about January 4, 2014. Griffiths employed permanent employees in Livonia, Michigan, and he brought five of those employees (three bricklayers and two masons) to work on the Englewood project, which is located in the Dayton, Ohio area. Harp requested that the Respondent perform the masonry work when the contractor originally hired refused to perform the work. Griffith testified that the Englewood masonry project was a 1.7 million dollar job, and the project was larger than his company typically handled. He also testified that when he started the job in April 2013, the masonry project was 3–4 weeks behind schedule. The record reveals that the Respondent planned to hire local masons and laborers to supplement its Michigan employees.

⁵ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; “Jt. Exh.” for Joint Exhibit; “GC Br.” for the General Counsel’s Brief; and “Resp. Br.” for Respondent’s brief.

⁶ In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole.

⁷ While Respondent initially denied in its answer that the Union was a labor organization within the meaning of Section 2(5) of the Act, it subsequently amended its answer at the hearing to admit this allegation. In addition, at the hearing the Respondent admitted service of the charges in these cases as set forth in paragraph 1 of the consolidated complaint.

B. The Respondent's Alleged Discriminatory Refusal to Hire or Consider for Hire Roger Trotter and George Gaston in Violation of Section 8(a)(3) and (1) of the Act, and the Alleged Related Independent Violations of Section 8(a)(1) of the Act

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1. The facts

It is undisputed that Respondent sought and hired local bricklayers/masons during the course of the Englewood project. Shawn Herzog, the Union's business agent, testified that when he heard about the nonunion company's project in the Spring of 2013, he had many members who were out of work. He visited the worksite on or about April 2, and spoke to Griffiths about supplying bricklayers for the project. Griffiths informed Herzog that he needed 10-12 local bricklayers for the job. When Herzog told Griffiths he could provide him bricklayers and he gave Griffiths his business card, Griffiths looked at the card and replied, "Not Union."

Roger Trotter and George Gaston were two experienced union bricklayers/masons who were not working in the spring of 2013. Both sought and received permission from the Union to work the nonunion Englewood job. It is undisputed that Trotter and Gaston visited the jobsite together on May 6 or 7, and spoke with Foreman Daniel Nieman, who informed them that the Respondent was going to hire bricklayers and that they should return when the owner was there because he did not have the authority to hire.⁸ Trotter testified that they were not wearing union insignias on their apparel when they made their initial visit to the jobsite.

Trotter and Gaston returned to the jobsite on May 8 and met with Griffiths to apply for work. Gaston testified that he was wearing a hardhat and tee-shirt with a union insignia on them. Gaston and Trotter conveyed their extensive bricklaying experience to Griffiths. According to Gaston, Griffiths said there would be a background check and drug screening, and Gaston assured him those would not be a problem. Griffiths told them to follow him to fill out applications, and they walked to Griffiths' vehicle where Griffiths retrieved what appeared to be employment applications.⁹ Gaston testified that as Griffiths began handing them the applications, he appeared to notice the union insignias Gaston was wearing and asked, "Are you a union mason?" Gaston said "yes," and Trotter responded that he was also a union mason, and that he would like to organize Griffiths' company.¹⁰ According to Gaston, Griffiths stated that he was not hiring union masons. Griffiths went on to state that he had trouble up in Toledo with the union and he was not going to have such trouble at the Englewood site. Gaston testified that Griffiths then put the applications back into his vehicle and he and Trotter left the jobsite.

Trotter, who has worked in the masonry industry since 1979 and has been a union member for 29 years, presented evidence consistent with that of Gaston. Trotter testified that he was wearing a ball cap with the union insignia on it, and Gaston was wearing a hardhat with a union sticker on it. Trotter also testified that when Griffiths started giving them the applications for hire, he appeared to notice the union insignias and asked them if they were union bricklayers. They both replied that they were union bricklayers, and he said "I'd like to get on out here and

⁸ Daniel Nieman did not testify in this proceeding.

⁹ Gaston testified that he believed the documents were applications and that the documents contained W-2 tax information.

¹⁰ Tr. 132-133.

organize this company.”¹¹ Trotter testified that Griffiths replied “that shit’s not happening here.” Trotter testified that Griffiths then stated, “They tried that up in Toledo,” and “I’m not hiring union bricklayers.” Trotter and Gaston left the jobsite and were never hired by the Respondent.

5 Both Trotter and Gaston testified that they had their tools with them and that they were ready, willing, and able to commence working immediately for the Respondent if they would have been hired. In addition, the undisputed record shows that Respondent hired bricklayers after Trotter and Gaston attempted to apply for work.¹²

10 With regard to Trotter’s and Gaston’s assertions, Griffiths offered a general denial, testifying that he never told anyone they would not be hired if they were union,¹³ and simply answered “no” to his counsel’s question as to whether he recalled what Trotter and Gaston described at the trial.¹⁴ Notwithstanding that denial, Griffiths did present his version of that encounter with Trotter and Gaston when he testified that “two guys” came to the jobsite and asked if he was hiring.¹⁵ Griffiths responded “not at the moment, but fill this form in.” According to Griffiths, they asked “are you union or what?” Griffiths testified that he said “No. I’m open shop. I got no problem.” According to Griffiths, one of the individuals “just went back and forth” and “just wouldn’t shut up,” and said “I’m going to unionize you.” Griffiths testified that he told them “I’ve been through it before in Toledo, and it didn’t avail.” He testified that he also told them “so, I mean, good luck” and “[i]f you want to work, you can work.”

2. The credibility determinations

25 Since Griffiths’ version of the event differs from that presented by Trotter and Gaston, as the finder of fact, I must determine the credibility of these witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations.

30 *Double D Construction/ Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)(citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party’s failure to call a witness who may be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord:

¹¹ Tr. 301.

¹² The record shows that after Gaston and Trotter attempted to apply for work, the Respondent hired: Gary Rodgers, Michael Dawson, Arlie Jolly, Kenton Beaty, Curtis Dunston, Michael Dunston, Walter Hann, and Clinton Green. See Jt. Exh. 1. In addition, Shawn Herzog credibly testified that Dawson and Curtis Dunston were both hired after Trotter and Gaston tried to apply for work. (Tr. 493–494).

¹³ Tr. 692.

¹⁴ Tr. 660.

¹⁵ Tr. 649–651.

General Fabrications Corp., 328 NLRB 1114 fn. 1 (1999), *enfd.* 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007).

5 My overall observation during the trial was that the General Counsel's witnesses were largely credible in their testimony and demeanor, and that they testified in a convincing and straight forward manner indicative of truthfulness. On the other hand, Griffiths, Respondent's lone witness in this case, testified in a less convincing manner, and was frequently inconsistent, evasive, and less than forthright. For example, at one point Griffiths testified that he was at the jobsite "every day," so he personally knew when the employees started and finished their work.¹⁶ 10 However, he also testified that at the time of the Englewood project, he was working on another job in Michigan,¹⁷ and he was only on the Englewood project 1 to 2 times per week.¹⁸ Griffiths' inconsistent testimony can also be found in the fact that he denied that he asked applicants if they were union members,¹⁹ and at the same time he claimed that he asked applicants whether or not they were union because he was concerned that the union employees might be penalized by the 15 Union if they were working a nonunion job.²⁰ Griffiths' testimony was also implausible and unbelievable at times. For example, Griffiths testified that Nieman was not authorized to assign employees to work on the hydro scaffolding if they were not "certified," but that testimony is inconsistent with the credible and uncontradicted testimony of several witnesses who testified that they were not certified and they were assigned to work on the hydro scaffolding prior to and 20 after the layoff. Griffiths also insisted that he was concerned with his workers' safety, but he also admitted that he put those workers back up on the scaffolding after the OSHA inspector deemed the scaffolding unsafe and declared it should not be used.²¹ Thus, while much of the evidence in this case was uncontradicted, on those occasions where Griffiths' testimony conflicted with that of the General Counsel's witnesses, I credit the General Counsel's witnesses 25 and their versions of the events that unfolded in this case over that of Griffiths.

Specifically, with regard to the witness testimony pertaining to the refusal to hire allegation, I note that Gaston and Trotter appeared sincere and honest in their demeanor. They provided clear, detailed and mutually corroborative testimony with regard to their attempt to find 30 employment with the Respondent, and the response they received from Griffiths. I also note that Trotter and Gaston recalled Griffiths' representation that he experienced problems with a union in Toledo, which adds to the likelihood that the conversation happened as Trotter and Gaston described. Griffiths, on the other hand, presented unbelievable, implausible and inconsistent testimony when he asserted on one hand that he failed to recall what Trotter and Gaston 35 described at the trial,²² and on the other hand, he relayed the encounter with the "two guys" which were clearly Trotter and Gaston. Thus, I specifically credit Trotter's and Gaston's version of the conversation that occurred when they attempted to apply for work with the Respondent.

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¹⁶ Tr. 91.

¹⁷ Tr. 96.

¹⁸ Tr. 683.

¹⁹ Tr. 733.

²⁰ Tr. 697.

²¹ Tr. 678.

²² Tr. 660.

3. The contentions of the Parties

The General Counsel alleges that the Respondent's refusal to hire or consider for hire both Trotter and Gaston because they identified themselves as union bricklayers was discriminatory and a violation of Section 8(a)(3) and (1) of the Act. The Respondent asserts that it did not violate the Act because neither Trotter nor Gaston had any interest in working for the Respondent, and it did not discriminate against them because it hired other workers who were union employees, such as Ted Cobb.²³

4. Analysis

It is a long established principle that it is unlawful to refuse to hire an individual because of their union affiliation. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941); *Willmar Electric Service*, 303 NLRB 245 (1991). Applicants for employment are considered to be employees as defined in Section 2(3) of the Act, and thus enjoy the statutory protection against antiunion animus as provided in Section 7 of the Act. However, the Board has held in *Toering Electric Co.*, 351 NLRB 225 (2007), that an applicant for employment must also be genuinely interested in seeking to establish an employment relationship with the employer in order to qualify as a Section 2(3) employee, and thus be protected against hiring discrimination based on union affiliation or activity. In simple terms, the Board explained “one cannot be denied what one does not genuinely seek.” *Id.* at 228. The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer. *Id.*

With respect to establishing a refusal-to-hire violation, the Board has set out an analytical framework for determining whether an employer violates the Act by failing or refusing to hire or by failing or refusing to consider hiring a job applicant because of his or her union activities or affiliation. *Allstate Power VAC, Inc.*, 354 NLRB 980, 981–982 (2009); *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir. 2002). To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), establish the following: (1) the respondent employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicant. Specifically, there must be a showing that the employer maintained animus against such union membership or sympathy, and the employer refused to hire the applicant because of such animus. *Kenmore Electric Co.*, 355 NLRB 1024, 1028 (2010). Once the General Counsel meets this initial burden, the burden shifts to the respondent to show that it would not have hired the applicant even in the absence of his or her union activity or affiliation. *Allstate Power*, *supra* at 2; *FES*, *supra* at 12.

Contrary to the Respondent's assertion, I find that Trotter and Gaston possessed a genuine interest in seeking to establish an employment relationship with the Respondent. The

²³ Resp. Br. at page 4.

credible and uncontradicted evidence shows that they were both out of work at the time they attempted to apply for work, they received the Union's permission to work the nonunion job, they had their tools with them at the time they attempted to apply, and they both credibly testified that they were ready, willing and able to work for the Respondent. The General Counsel has carried its burden of showing that their interest in working for the Respondent was genuine, and thus, they qualify as Section 2(3) employees who are entitled to protection against hiring discrimination based on union affiliation or activity.

Applying the Board's refusal-to-hire standards to this case, the undisputed evidence shows that with regard to the first factor, the Respondent had concrete plans to hire, and in fact, had hired bricklayers and masons for the project when Trotter and Gaston applied. The Respondent's admission that on or about May 8, 2013, "[it] was hiring, or had concrete plans to hire" employees, is consistent with the evidence that Respondent was hiring employees for a job that was larger than its Michigan employees could handle.²⁴ With regard to the second factor, the record shows that Trotter and Gaston had experience and training that was relevant to the requirements of the positions for hire, as Gaston had been a mason for 24 years and Trotter had been a bricklayer and member of the Union for 29 years, and their qualifications and experience were communicated to Griffiths and Nieman. Finally, with regard to the third factor, the credible evidence clearly establishes that antiunion animus contributed to the decision not to hire these applicants. In fact, the evidence establishes that antiunion animus was the only reason the Respondent decided not to hire them, as Griffiths specifically informed both Trotter and Gaston that he was "not hiring union bricklayers."²⁵ The fact that these employees were not hired because of antiunion animus is further evinced by, and consistent with, Herzog's uncontradicted testimony that Griffiths informed him that the Respondent was not hiring union bricklayers.²⁶ Furthermore, in considering the compelling evidence of Respondent's unlawful layoff, failure to recall two union employees, and coercive and threatening statements (as found below), I find that the evidence overwhelmingly shows that Respondent maintained animus against union membership, and it refused to hire Trotter and Gaston because of such animus. *Kenmore Electric Co.*, supra at slip op. at 5.

As mentioned above, once the General Counsel meets this initial burden, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *Allstate Power*, supra at 2; *FES*, supra at 12. In this case, the Respondent failed to offer any credible evidence to satisfy such a burden. In addition, I find no merit to Respondent's assertion in its brief that its failure to hire Trotter and Gaston was not discriminatory because it hired other union bricklayers. It is important to note that the Respondent failed to offer any credible evidence showing that it was aware the other employees hired were union members. To the contrary, the credible evidence shows that those union members did not disclose their union affiliation to the Respondent, as Cobb credibly testified that he never wore any clothing containing a union insignia on the jobsite,²⁷ Dawson credibly testified

²⁴ See consolidated complaint paragraph 6(a) and Respondent's answer admitting that allegation. See also Tr. 638-640.

²⁵ Tr. 301-302.

²⁶ Tr. 474.

²⁷ Tr. 555.

that he never told the Respondent he was a union member,²⁸ and Miller credibly testified that he did not indicate that he was a union member on the Respondent's contact sheet when he was hired.²⁹

5 On the basis of the above, I find that the Respondent violated Section 8(a)(3) and (1) of
the Act by failing to hire Trotter and Gaston.³⁰

10 5. The alleged unlawful interrogation and coercive statement by Griffiths in violation of
Section 8(a)(1) of the Act.

15 The General Counsel alleges that the Respondent, by Griffiths asking Trotter and Gaston
if they were union bricklayers, unlawfully interrogated those employees with regard to their
union affiliation or sympathies in violation of the Act.³¹ The Respondent argues the fact that
Griffiths saw the union insignia, and asked if Trotter and Gaston were union, "was not
discriminatory, [as] it was consistent with giving notice that he is Open-Shop."

20 I find that the Respondent's assertion is misplaced and without merit. First, the
Respondent is mistaken with regard to the nature of the allegation. The General Counsel does
not allege, as Respondent contends, that the statement was discriminatory (and therefore a
violation of Section 8(a)(3) of the Act); rather, the allegation is that the questioning was coercive
in violation of Section 8(a)(1) of the Act. An employer violates Section 8(a)(1) by statements
that are coercive and which have a reasonable tendency to interfere with employees' rights under

²⁸ Tr. 597.

²⁹ Tr. 176.

³⁰ I note that the consolidated complaint alleges the Respondent refused to hire or "consider for hire" Trotter and Gaston. The Board's framework for analysis of alleged discriminatory refusal-to-consider violations also appropriately allocates the *Wright Line* burdens, but requires two factors rather than the three factors for refusal-to-hire violations. In such refusal-to-consider cases, the General Counsel bears the burden of showing: (1) that the respondent excluded applicants from the hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. *Allstate Power*, supra at 3; *FES*, supra at 15. If the General Counsel establishes this, the burden shifts to the respondent "to show that it would not have considered the applicants even in the absence of their union activity or affiliation." Id.

I find that Griffiths considered Trotter and Gaston for hire, but refused to hire them upon noticing the union insignias on their apparel, and upon receiving confirmation of their union membership and desire to organize the Respondent. Thus, I find the appropriate analysis for this unfair labor practice allegation is under the refusal-to-hire framework articulated by the Board. Notwithstanding that determination, assuming arguendo that Respondent's actions toward Trotter and Gaston could be characterized more appropriately as a refusal-to-consider for hire, I find the evidence still supports a violation of the Act under the refusal-to-consider factors. Griffiths excluded Trotter and Gaston from the hiring process by changing his mind and pulling back the applications he was going to hand to them, thereby excluding them from the hiring process. In addition, as mentioned above, antiunion animus not only contributed to, but was the sole reason for Respondent's decision not to consider those applicants for employment. Finally, Respondent failed to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

³¹ See consolidated complaint paragraph 5(a)(i).

the Act. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006); *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002); *Lin Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999).

5 With issues of interrogation, the Board determines “whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Scheid Electric*, 355 NLRB 160 (2010); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enf. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors the Board considers in such an analysis are the identity of the questioner, the place and method of the
10 interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Scheid Electric*, supra at slip op.1; *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009).

15 Applying these factors, I find it inconceivable that the questioning of the employees could be more coercive. The questioning came from the Respondent’s highest official--its owner, it took place during the process of considering the applicants for employment, and the nature of the information sought concerned whether they were union members. While the employees had various union insignias on their clothing, they had not disclosed the fact that they were union members as reflected by Griffiths’ inquiry as to whether they were union bricklayers.
20 I find that questioning these applicants for hire about their union affiliation and membership was clearly coercive in nature and reasonably tended to coerce them, and thus interfered with their rights under Section 7 to engage in union activities and support.

25 Second, Respondent’s assertion that Griffiths’ questioning was lawful because his intent was to simply give notice that the Respondent was an “open shop,” is also without merit. The Board has held that interrogating employees with regard to their union preferences in the context of job application interviews is inherently coercive and unlawful. *Electro-Tec, Inc.*, 310 NLRB 131 (1993); *Thriftway Supermarkets*, 276 NLRB 1450, 1459–1460 (1985). It is also well established that an employer violates the Act by questioning job applicants about their
30 willingness to work for a nonunion shop. *Standard Sheet Metal, Inc.*, 326 NLRB 411 (1998). The Board has also held that the intent or motive of the respondent is not relevant with regard to 8(a)(1) violations of the Act. *Exterior Systems*, supra at 679; *Scripps Memorial Hospital Encinitas*, supra; *GM Electrics*, 323 NLRB 125, 127 (1997); see also *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987). Thus, the motive or intent behind Griffiths’ questioning has no
35 relevancy in an 8(a)(1) context. Accordingly, I find that Griffiths’ questioning of Trotter and Gaston as to whether they were union bricklayers constituted unlawful interrogation of their union sympathies or affiliations in violation of Section 8(a)(1) of the Act.

40 The General Counsel also alleges that Griffiths’ statement to Trotter and Gaston that he was not going to hire union bricklayers violated the Act.³² The Respondent contends that Griffiths’ “banter” after they both replied they were union bricklayers, which included his statement to them that he was “not hiring union bricklayers,” was “protected speech under 8(c) of the Act and the First Amendment of the U.S. Constitution, and therefore it is not admissible to show any violation of the Act.”³³

³² See consolidated complaint paragraph 5(a)(ii).

³³ Resp. Br. at p. 14.

The First Amendment of the Constitution of the United States of America provides that “Congress shall make no law ...abridging the freedom of speech....” In relation to the freedom of speech principle, Section 8(c) of the Act provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

An employer’s right to free speech is not absolute; it must be balanced against the employees’ right to engage in union activities or refrain from such activities, free of coercion, restraint and interference.

Informing the union applicants that Respondent was not hiring union bricklayers is an expression that clearly contains a threat of reprisal, and it is therefore not entitled to the protection of Section 8(c) of the Act. In fact, it is well established that employers violate Section 8(a)(1) of the Act by making statements to employees that job applicants will not be hired because of their union membership or affiliation. *Exterior Systems, Inc.*, supra at 679; *Lin Rogers Electrical Contractors*, supra at 1167. The Board has held that such statements are coercive and have a reasonable tendency to interfere with employees’ rights under the Act. *Id.* Accordingly, I find that Griffiths’ statement to Trotter and Gaston that he was not hiring union bricklayers was coercive and violated Section 8(a)(1) of the Act.

C. The Respondent’s Alleged Unlawful Layoff of its Ohio Crew and Discriminatory Refusal to Recall Employees Rob Miller and Michael Dawson, in Violation of Section 8(a)(3) and (1) of the Act, and the Alleged Related Independent Violations of Section 8(a)(1) of the Act

1. The Respondent hires the Ohio crew in April and May 2013

As mentioned above, the Englewood project was much larger than the Respondent’s usual jobs. As a result, it commenced hiring local bricklayers/masons and laborers on April 22, 2013 to supplement his Michigan employees, and it hired more local masons and laborers in May 2013, which comprised its “Ohio crew.”³⁴

2. Employees Rob Miller and Michael Dawson complain to Respondent about safety issues and they communicate those issues to the Union

Rob Miller and Michael Dawson were union bricklayers who were hired by the Respondent. They did not reveal their union affiliation when they filled out contact forms for Griffiths by leaving blank the specific entries for “union,” and the local union’s name, address

³⁴ Jt. Exh. 1.

and telephone number.³⁵ They also testified that they did not wear union insignias on their clothes when they applied to work with the Respondent.

5 The masonry work on the project required the use of scaffolding, both traditional tubular scaffolding and hydro or hydro electric scaffolding, which operated on hydraulic cylinders. The record reveals that Griffiths and Nieman assigned masons and labors to work on both types of scaffolding on the project. Both Miller and Dawson testified that they had concerns about the safety of the scaffolding. Miller relayed his concerns to the Respondent that the tubular scaffolding did not have the required base plates, toe boards, scaffold pins or safety rails. He
10 complained to Nieman several times in May, and in particular, one time on the morning of May 30, when he specifically told Nieman that he was concerned about the safety issues. Nieman informed Miller that the Respondent was “working on it,” and that the missing safety equipment should be on the jobsite the next day.³⁶ Miller reported those safety concerns to Union Business Agent Herzog, and he took pictures of the unsafe conditions on his cell phone and texted them to
15 Herzog.

During this same time period, Dawson also expressed his concerns about the safety of the scaffolding to Nieman and Scott Opie, the assistant foreman, including complaints that the hydro scaffolding lacked “x braces.” In response, Nieman told Dawson that Opie “knew what he was
20 doing” and to do as Opie directed. In late May, Dawson became so concerned after the safety complaints were not addressed, he collected his tools and walked off the job. Before driving off the site, while Dawson waited in his truck, Griffiths and Nieman approached him and asked why he was leaving. Dawson informed them of the safety concerns and Griffiths and Nieman apologized, told him they would fix the problems, and told him to go back to work, which he did.
25 That day, Dawson also conveyed his concerns about the safety of the scaffolding to Harp’s superintendent, and he reported the safety concerns regarding the scaffolding to Herzog and the Union.

30 3. Griffiths’ alleged pre-layoff violations of Section 8(a)(1) of the Act when he tells Mike Dawson he knows he is a union member and informs Dawson that the Respondent is not going to be union

Dawson testified that during his last week of work (the last week in May), he was
35 working laying brick with Griffiths on his left and Miller on his right. Griffiths told Dawson that he noticed the Local 22 sticker on the back of his hat, and he asked, “are you fucking union?”³⁷ Griffiths then said “I’ve had so much trouble out of these union guys,” and “they’re not getting my job and I’m not going union.”³⁸ Dawson testified that he responded that he was “not there politically,” and just wanted to feed his family. Miller corroborated Dawson’s testimony,
40 testifying that he heard Griffiths yell at Mike Dawson, “I know you’re a fucking union bricklayer,” and Griffiths walked away saying something he could not hear, and gesturing

³⁵ Jt. Exh. 2.

³⁶ Tr. 182; 193–194.

³⁷ Tr. 585.

³⁸ Tr. 585.

towards the back of Dawson's hard hat, which had a Local 22 sticker on it.³⁹ Griffiths never offered testimony to dispute these allegations.

I find the evidence concerning this event shows that Griffiths, upon noticing the union sticker on Dawson's hardhat, realized he was a union mason and after asking him if he was "fucking union," he coercively told him that he knew he was a "fucking union bricklayer," that he had trouble out of the union guys, and that he was not "going union." Such statements had a reasonable tendency to coerce Dawson, and it conveyed that Respondent would not hire employees because of their union activities and membership, in violation of Section 8(a)(1) of the Act.⁴⁰

4. The Union informs the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) of the safety concerns on the Englewood project and OSHA investigates on May 30 and 31 and finds Respondent committed OSHA violations.

On May 30 Herzog contacted OSHA about what he believed were serious safety concerns on the jobsite. On that same day, OSHA Compliance Officer John Crane visited the jobsite and found numerous violations pertaining to the tubular scaffolding. Crane told Griffiths and Nieman they had to correct problems such as missing base plates, which they indicated they would correct. Crane testified that after the inspection, he was contacted by an employee who stated that the employees were back on the scaffolding that OSHA found to be unsafe. Crane returned to the site on May 31 and found that the employees were working on the unsafe scaffolding. Crane testified that he asked Griffiths why employees were assigned to work on the scaffolding, and Griffiths told him that the employees were finishing a small portion of the work and that he "had not expected to see [Crane] back for a couple of weeks."

The record reveals that the safety complaints Crane received, and the infractions that OSHA subsequently found, concerned the traditional tubular scaffolding that Respondent was utilizing at the jobsite. Crane testified that the scaffolding was missing supporting base plates, and "toe boards" were not in place to protect employees below the scaffolding from falling tools or materials. Crane informed Nieman that the base plates were needed to provide support for the traditional scaffolding, and that in order for the employees to work safely, base plates should be installed. Nieman responded that the Respondent would take care of it, and that the base plates were on site or were about to be delivered to the site. Crane testified that when he informed Griffiths of the same information, Griffiths stated that the base plates were in his possession (he said he had them in his vehicle) and they were going to put those on the scaffolding.

OSHA determined from its inspections on May 30 and 31, that Respondent committed three violations of its statute. The first, Citation 1, Item 1, categorized as a "serious" violation with a proposed penalty of \$4,200, concerned the tubular scaffolding and its lack of a structured decking at the "T" junction.⁴¹ The second, Citation 1, Item 2, a "serious" violation with a

³⁹ Tr. 208-210.

⁴⁰ See consolidated complaint paragraph 5(b).

⁴¹ The OSHA "Citation and Notification of Penalty" found that Respondent violated: "29 CFR 1926.451(b)(6): On scaffolds where scaffold planks are abutted to create a long platform, each abutted

proposed penalty of \$4,200, concerned the tubular scaffolding and the lack of toe boards, screens or guardrail systems to protect the employees from falling objects.⁴² And the third, Citation 3, Item 1, a “willful” violation with a proposed penalty of \$27,500, concerned the tubular scaffolding and the fact that base plates were not installed on 13 sections of the scaffolding that were in use.⁴³

OSHA did not find that Respondent committed safety violations pertaining to its construction and/or use of the hydro scaffolding, nor were there any indications of problems or violations regarding the employees’ certification or training on the hydro scaffolding. Crane testified that he did not have any conversations with Griffiths or Nieman about training or certification on the hydro scaffolding. In fact, Crane testified that no certification was necessary to work on hydro scaffolding, for either bricklayers or laborers.⁴⁴ He testified that the only training would consist of recognition of hazards and correct use. Crane testified that the only question he had regarding the hydro scaffolding was about its basic setup, design and use, and he asked Respondent for the owner’s manual so he could review it.⁴⁵ Crane testified that he talked to the Harp representative about training for Respondent’s employees, and Harp produced an “Injury and Illness Prevention Plan, Employee Orientation Acknowledgement,” which was a check list for various safety procedures and subjects reviewed and discussed with the employees at their safety training.⁴⁶ Finally, Crane testified that he was satisfied the employees received training, and met the necessary standards to work on the hydro scaffolding.⁴⁷

5. The Respondent lays off the Ohio crew on May 31 and/or June 3, 2013

The Respondent admits laying off its entire Ohio crew of masons and laborers on May 31 and/or June 3, consisting of: Arlie R. Jolly, Curtis L. Dunston, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers; Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty,

end shall rest on a separate support surface. This provision does not preclude the use of common support members, such as “T” sections, to support abutting planks, or hook on platforms designed to rest on common supports.” GC Exh. 5.

⁴² The “Citation and Notification of Penalty” found that Respondent violated: “29 CFR 1926.451(h)(1): In addition to wearing hardhats each employee on a scaffold shall be provided with additional protection from falling hand tools, debris, and other small objects through the installation of toe boards, screens, or guardrail systems, or through the erection of debris nets, catch platforms, or canopy structures that contain or deflect the falling objects. When the falling objects are too large, heavy or massive to be contained or deflected by any of the above listed measures, the employer shall place such potential falling objects away from the edge of the surface from which they could fall and shall secure those materials as necessary to prevent their falling.” GC Exh. 5.

⁴³ The “Citation and Notification of Penalty” found that Respondent violated: “29 CFR 1926.451(c)(2): Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.” GC Exh. 5.

⁴⁴ Tr. 413–417.

⁴⁵ Tr. 403.

⁴⁶ Tr. 418–419; GC Exh. 17(a).

⁴⁷ Tr. 419.

Kevin McCleskey, Michael Dunston, Michael L. Dawson, Rob E. Miller, Ronald H. McCleskey, and Segundo Pinguill.⁴⁸

5 According to Griffiths, the only reason he laid off the Ohio crew was because those employees did not have “certification” to work on the hydro scaffolding. That reason was conveyed to the employees, as Dawson testified that when Griffiths laid off the entire Ohio crew, he stated that he could not have anyone working who was not certified on the hydro scaffolding.⁴⁹ However, when Dawson told Griffiths that he used to be a laborer and had training or certification for working on hydro scaffolding, Griffiths did not respond to that statement, and he only said he would call them back and let them know about the work in a couple of weeks.

15 The record reveals that when the Ohio crew was laid off, Griffiths told several employees besides Michael Dawson that he would call them when it was time for them to come back to work. Arlie Jolly testified that when Griffiths told him he would be off for 2 weeks, he said that he would give him a call to return to work. In addition, Joseph Penny testified that Griffiths told employees to go home early on the day they were laid off, and he said he would call them when it was time to come back to work. Gary Rodgers testified that Griffiths told him he had some problems with OSHA and until he sorted things out, he would have to lay some of the guys off. Griffiths also told Rodgers that he would call him to come back to work, and that he eventually did call him to tell him to return to work.

25 6. The Respondent’s alleged post-layoff coercive statements to employees in violation of Section 8(a)(1) of the Act.

30 Curtis Dunston, a bricklayer with 20 years experience in the industry and a nonunion employee at the time of the Englewood project, was one of the Ohio crew employees laid off by the Respondent. The General Counsel has alleged that immediately after the layoff, Griffiths made several coercive statements to Dunston during a telephone conversation on or about June 4, and in a conversation at the jobsite on or about the following day.

35 As mentioned above, in determining whether an employer’s statements to employees constitute unlawful threats in violation of Section 8(a)(1) of the Act, the Board has held that such violations occur if the statements reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Exterior Systems*, supra at 679; *Scripps Memorial Hospital Encinatas*, supra; *GM Electric*s, supra. The Board does not consider whether the statement succeeds in discouraging union or protected activity under the Act, nor is the intent or motive of the respondent relevant. *Id.*

40 a. The allegation that on or about June 4, 2013, during a telephone conversation, Griffiths told Curtis Dunston that employees were laid off by Respondent because of their union activities and membership, in violation of Section 8(a)(1) of the Act.

⁴⁸ The parties stipulated with regard to the payroll records (Jt. Exh. 1) that some of the employees jobs are incorrectly listed, and specifically that Francisco Coronel, Curtis Dunson, and Mike Dunson are masons, while Kevin McCleskey is a laborer. (Tr. 32).

⁴⁹ Tr. 589.

5 Curtis Dunston testified that when he went to pick up his paycheck after OSHA was at the jobsite, Griffiths told him OSHA was there and Respondent did not have the required toe boards or safety equipment for the scaffolding. Dunston was not told by Griffiths that he was laid off, only that he should not come to work on Monday, but to come in on Wednesday. After hearing that some employees were still working on the jobsite, and concerned about his job, Dunston called Griffiths on Tuesday to find out whether he still had a job. During that conversation, Griffiths told him he had to let all the Ohio guys go because none of them were qualified to work on the hydro scaffolding, and Dunston responded that he never heard of that requirement. Dunston testified that Griffiths informed him that some of the union employees called OSHA on him because OSHA never comes to a site “back-to-back,” and that he had OSHA and union problems. According to Dunston, after he told Griffiths that he had nothing to do with those issues, Griffiths said he “had to let everybody go because he didn’t know which one of the union guys was calling the [union] hall [and] OSHA on him,” and that he had to “sort [that] stuff out.”⁵⁰

20 Curtis Dunston’s testimony was never refuted by Griffiths who testified twice in this proceeding. Griffiths, as owner of the Respondent, was its highest ranking official, and his statement had the tendency to coerce and restrain the employees in the exercise of their rights to support and assist the Union and engage in protected activities. I find that by Griffiths’ statements, he coercively informed Dunston that the employees were laid off because of their union activities and membership, in violation of Section 8(a)(1) of the Act.⁵¹ See *Mastercraft Casket, Co.*, 289 NLRB 1414 (1988) (the Board held that an employer’s statements blaming a layoff on the union’s knowledge of the employer’s favoritism toward his family is inherently threatening). See also, *Aero Metal Forms*, 310 NLRB 397, 400 (1993).

30 b. The allegations that on or about June 5, 2013, at the jobsite, Griffiths: (i) implied that employees were not being recalled because of their union activities; (ii) implied that Respondent knew which employees supported the union; (iii) told an employee that Respondent would not have employees on the job because of their activities; and (iv) told an employee Respondent was not recalling employees because of their union activities, in violation of Section 8(a)(1) of the Act.

35 Dunston also testified that he had a conversation with Griffiths later that week because Griffiths owed him money and was bringing him a pay check. When Dunston met Griffiths at the jobsite parking lot to pick up his check, Griffiths told him “you guys called the Hall on me,” and “you guys called OSHA on me.”⁵² When Dunston told him he had nothing to do with it, Griffiths said, “Rob, that son of a bitch, was taking pictures up here.” Griffiths described Rob as the guy with the brown hat, and the record shows that Rob Miller wore a brown hard hat at work.⁵³

⁵⁰ Tr. 340–341.

⁵¹ See consolidated complaint paragraph 5(c).

⁵² Tr. 342–343.

⁵³ Tr. 344–346; 382.

I find that by Griffiths' statement, he coercively conveyed to Dunston that he knew employees were reporting his safety infractions to the Union and OSHA, and in particular, that Miller was one of those employees supporting the union and engaging in such protected activities. His statement created the impression that those protected activities were under surveillance. The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether the employee would reasonably assume from the statement in question that his union and protected activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *United Charter Service*, 306 NLRB 150, 151 (1992). Employees are not required to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance, and the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employees' activities by unlawful means. *Id.* I have no doubt that Dunston would reasonably assume from Griffiths' statement that his union and protected activities, and the activities of other employees, had been placed under surveillance. Accordingly, I find that Griffiths' statement unlawfully implied that Respondent knew which employees supported the Union, and thereby created the impression that the employees' union and protected activities were under surveillance in violation of Section 8(a)(1) of the Act.⁵⁴ *Tres Estrellas de Oro*, supra at 51; *United Charter Service*, supra; *Waterbed World*, 286 NLRB 425, 426 (1987).

In addition, Griffiths said he could not afford to have union guys on the job because "they're too much trouble." When Dunston asked Griffiths what he meant by that statement, Griffiths said he had a job up north where "he had to pay into the hall of the union," and it cost him around \$20,000.⁵⁵ I find merit to the General Counsel's assertion that this statement was coercive and had a reasonable tendency to interfere with employees' rights under the Act, because it implied that employees were not being recalled by Respondent because of their union activities and membership. Therefore, I find that Griffiths' statement violated Section 8(a)(1) of the Act.⁵⁶

Later in that conversation, after Dunston assured Griffiths that he was not a union member, Griffiths eliminated all ambiguity by stating that he "didn't want any more union guys on the job."⁵⁷ I find that Griffiths, by this statement, coercively conveyed to Dunston that he would not have employees on the job because of their union activities and membership, and coercively threatened that Respondent was not recalling employees who engaged in union activities or who were union members, also in violation of Section 8(a)(1) of the Act.⁵⁸

⁵⁴ See consolidated complaint paragraph 5(d)(ii).

⁵⁵ Tr. 344-346.

⁵⁶ See consolidated complaint paragraph 5(d)(i).

⁵⁷ Tr. 345.

⁵⁸ See consolidated complaint paragraphs 5(d)(iii) and 5(d)(iv).

7. The Respondent recalls most of the Ohio crew employees in June 2013, but Rob Miller and Michael Dawson are not recalled from the layoff

Griffiths testified that employees from the Ohio crew began returning to work on or about June 17, 2013, and that he recalled employees who called him looking to come back to work.⁵⁹ The record establishes that most of the laid off employees (other than Miller and Dawson) were recalled to work. The Certified Payroll Reports (Jt. Exh.1) establish that the following employees were recalled and employed as of the following payroll week ending periods: Arlie Jolly (6/29/13), Curtis Dunson (6/22/13), Francisco Coronel (6/29/13), Gary Rodgers (6/22/13), Jose Diaz (6/22/13), Joseph Penny (6/29/13), Kenton Beaty (6/22/13), Kevin McCleskey (6/22/13), Michael Dunson (6/22/13), Ronald McCleskey (6/22/13), and Segundo Pinguill (6/22/13). These records, however, do not establish that Dustin Jackson or Joshua Johnston were recalled from layoff and employed by the Respondent from June 2013 to January 2014. The record does not contain evidence with regard to why these two employees were not recalled, or if they were offered reinstatement and declined.⁶⁰ With regard to the Ohio crew employees who were recalled, some of them left the job before the project was completed. For example, the record reveals: Jolly quit his employment with Respondent sometime in September 2013;⁶¹ Penny also left the Respondent around the time Jolly quit;⁶² and Rodgers left the Respondent's employment on November 13, 2013.⁶³

It is undisputed, however, that the Respondent did not recall Rob Miller or Michael Dawson from the layoff.

8. The contentions of the Parties

The General Counsel alleges that the Respondent's lay off of the Ohio crew and its failure to recall Rob Miller and Michael Dawson were discriminatorily motivated and violated Section 8(a)(3) and (1) of the Act. Specifically, the General Counsel asserts that the Respondent laid off the employees because it believed certain employees had sought out and secured the Union's assistance in addressing their safety concerns, and that certain employees were specifically responsible for OSHA's visit the jobsite on May 30 and 31.

The Respondent denies that its layoff was discriminatorily motivated, and instead asserts, as Griffiths testified, that the sole reason it laid off the Ohio crew of employees was because they were not "certified" to work on the hydro scaffolding. In addition, it asserts that it did not recall Miller or Dawson because those employees failed to call the Respondent to inquire about returning to work, as Griffiths allegedly directed the employees to do.

⁵⁹ Tr. 58-59.

⁶⁰ This is a matter I leave to a compliance proceeding.

⁶¹ Tr. 457-459.

⁶² Tr. 511-513.

⁶³ Tr. 523.

9. Analysis

a. *The Respondent's alleged unlawful lay off of the Ohio crew.*

5 In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the Act in
 “dual motive” cases, the Board applies an analysis under *Wright Line*, 251 NLRB 1083 (1980);
 enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this analysis the
 General Counsel must carry the initial burden of showing “that the protected conduct was a
 10 ‘motivating factor’ in the employer’s decision.” Id. at 1089. Once the General Counsel has
 satisfied this burden, the burden shifts to the respondent “to demonstrate that the same action
 would have taken place even in the absence of the protected conduct.” Id. The United States
 Supreme Court approved this allocation of burdens and adopted the Board’s *Wright Line* test in
NLRB v. Transportation Management Corp., 462 U.S. 393, 395, 403 fn. 7 (1983); see also
 15 *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267,
 278 (1994). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as
 follows. The General Counsel has the burden to persuade that antiunion sentiment was a
 substantial or motivating factor in the challenged respondent’s decision. The burden of
 persuasion then shifts to the respondent to prove its affirmative defense that it would have taken
 20 the same action even if the employee had not engaged in protected activity. See also *Webco*
Industries, 334 NLRB 608 fn. 3 (2001).

Applying that analysis here, I find that the General Counsel met its initial burden of
 establishing that the Respondent’s layoff of its Ohio crew was unlawfully motivated. In *W. R.*
Case & Sons Cutlery Co., 307 NLRB 1457, 1463 (1992), the Board held that “a prima facie case
 25 [of discriminatory motivation] is made out by proof of employee union activity, along with
 employer knowledge of, and employer animus toward, it.” Those elements are present here. The
 record shows that Respondent was well aware of the fact that some employees engaged in union
 and protected activity by reporting unsafe working conditions to the Union, and in turn to
 OSHA. Griffiths’ statements reveal that he knew union employees reported the safety issues to
 30 the Union and OSHA because he stated that OSHA never shows up at a jobsite “back-to-back.”
 The record is also rife with examples of the Respondent’s union animus, as reflected in Griffiths’
 and Nieman’s undisputed expressions of their animosity towards the Union. As discussed above,
 Griffiths commented to Herzog, Gaston and Trotter that he was not hiring union masons, and he
 told Dawson that the Respondent was not going to be union. In addition, Griffiths told Dunston
 35 that he could not afford union employees because they were “too much trouble” on a previous
 job, and he did not want any more union employees on the job.

As added evidence that the General Counsel has made a prima facie showing of
 discriminatory motivation, the record reveals that the timing of the layoff was suspect as the
 40 layoff occurred within a day or two after OSHA visited the jobsite, and without any advance
 notice. There is however, little doubt that the true motive behind Griffiths’ decision to lay off
 the Ohio crew was for discriminatory reasons, as is reflected in his direct and unmistakable
 statements to employees that the Ohio crew was laid off because he believed some of the union
 employees reported Respondent’s safety infractions to the Union and to OSHA, and he was
 45 trying to determine the identity of those employees. In this regard, Griffiths told Jolly that the
 layoff started with the Union and when the employees contacted OSHA. Griffiths also told
 Dunston that he had to let everyone go because he did not know which of the employees called

the Union and OSHA, and he had to “sort it all out.” In addition, as discussed in greater detail below, Nieman told Dunston that he could “thank those union assholes who got him laid off.” Thus, I find the record contains direct and convincing evidence that the Respondent knew or believed that its employees engaged in union and protected activities, that it harbored marked anti-union animus as evinced by the Respondent’s numerous coercive and threatening statements in violation of Section 8(a)(1) of the Act, and that the motivation for laying off the Ohio crew was based on the union and protected activities of some employees who reported safety infractions to the Union, and the Union reported them to OSHA.

The burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in union and protected concerted activity. As mentioned above, the Respondent asserts that the only reason it laid off the Ohio crew was because they were not “certified” to work on the hydro scaffolding. A close review of the record shows that for numerous reasons this asserted reason is not supported by the evidence.

First, there is a glaring flaw in the Respondent’s purported reasoning--the hydro scaffolding was never the subject of OSHA infractions or violations. The OSHA violations all pertained to the tubular scaffolding and its lack of base plates and other precautionary measures that would prevent employees from being hit by falling tools or debris. OSHA compliance officer Crane never found any infractions with regard to the hydro scaffolding’s construction, operation, nor with regard to any purported training or certification for working on that scaffolding. Thus, Respondent’s assertion that it had to lay off the Ohio crew because they were not certified to work on the hydro, when in fact the safety violations pertained to the tubular scaffolding, is nonsensical and illogical.

In its brief, the Respondent attempts to offer an explanation for its faulty reasoning, by asserting that “Mr. Dawson had complained about the incompetence in the erection and operation of the Hydro-Mobile, and with Mr. Crane having obtained the Owner’s Manual, everything had to be by the book, and Mr. Griffiths had the mandate and the obligation to confirm that anyone using the Hydro-Mobile, both laborers and bricklayers, have certification”⁶⁴ This explanation, however, is belied by the fact that Crane never found infractions with the hydro scaffolding, its construction, operation or the training/certification for working on it, and he only asked for the operator’s manual so that he could become familiar with its operation. Crane also testified that after reviewing the employee safety/training records, which he requested and received, he determined that the employees had adequate safety training to work on both the tubular and hydro scaffolding. In addition, it should be noted that Respondent’s assertion that “everything had to be by the book,” is a direct contradiction to Griffiths’ response to OSHA’s first visit, where Crane determined that the tubular scaffolding was unsafe and required that it be taken out of service until fixed. Instead of prohibiting the use of the scaffolds until they were repaired as directed by OSHA, Griffiths’ response was to direct the employees to resume working on that same faulty tubular scaffolding the very next day, in direct contradiction of OSHA’s instructions, which I find is hardly operating “by the book” as the Respondent asserts.

⁶⁴ Resp. Br. at p. 13.

Second, the evidence reveals that the Respondent did not have to lay off the employees because all the violations found by OSHA pertained to the traditional tubular scaffolding, and the record reveals those infractions could have been easily and quickly remedied by the Respondent. As mentioned above, the three violations found by OSHA concerned the tubular scaffolding and its lack of a structured decking at the “T” junction, the lack of toe boards, screens or guardrail systems to protect the employees from falling objects, and the fact that base plates were not installed on sections of tubular scaffolding that were in use. Crane credibly testified that based on his experience, it would have taken only hours to half a day to correct the safety problems outlined in the OSHA citations.⁶⁵ He also testified that a forklift was present at the jobsite which could have been used to securely place the base plates under the tubular scaffolding. On that subject, Miller testified that based on his many years of experience in the masonry field, it would have taken half a day to tear down the scaffolding and install the equipment that would remedy the safety infractions. He also testified that the safety equipment needed to fix the scaffolding would be easy to find because the scaffolding and businesses in the area had the equipment. In addition, Herzog testified that there were scaffold rentals near the jobsite in the Dayton, Ohio area, and that based on his experience in the masonry business, it would have taken no more than a few days to lease or rent scaffolding.

Third, the Respondent’s assertion that it had to lay off the employees because they were not certified to work on the hydro scaffolding is not supported by the record, which shows instead that there is no OSHA requirement that employees be certified to work on hydro scaffolding. In fact, Crane testified (as did many of the General Counsel’s witnesses who were experienced bricklayers) that there is no certification necessary to work on the hydro scaffolding. Rather, an employer only needs to orient employees on how to work safely and recognize hazards on the scaffolding, and that training can be accomplished in various ways, most notably by a person within the company. With regard to the training issue, Crane requested and was provided the general contractor’s training records (GC Exh. 17(a) and (b)), which convinced him that Respondent’s employees had sufficient training to work on all the scaffolding on that jobsite, both traditional and hydro.

Fourth, the record reveals that even though the Respondent owned its hydro scaffolding and was aware that it was going to use the scaffolding for the Englewood project when it hired its employees, it never inquired whether they had training or certification to work on the hydro scaffolding. Critically, despite the fact that Griffiths testified that his Michigan employees were certified (which he defined at trial as being trained by the manufacturer or supplier of the equipment), he failed to offer any explanation why he could not use his Michigan employees to operate the hydro scaffolding and therefore avoid laying off the employees.

Fifth, even assuming the record established that a “certification” was required to work on the hydro scaffolding, the evidence reveals that when Griffiths told the employees they were laid off because he could not have anyone working who was not certified on the hydro scaffolding, Dawson spoke up and told Griffiths that he used to be a laborer and he had training or certification for working on hydro scaffolding. However, rather than tell Dawson he could continue to work, Griffiths failed to respond to the statement, and he said he would call the employees back and let them know about the work in a couple of weeks. I find it implausible

⁶⁵ Tr. 420-421.

that if in fact the asserted reason for the layoff offered by Griffiths was true, he would not have an experienced mason, who met the alleged “certification” requirement, stay and work on that job which was already behind schedule. Griffiths’ failure to keep Dawson on the job with his alleged satisfactory certification only proves further that Griffiths fabricated the layoff and used it as an excuse to remove the union employees from his jobsite.

Sixth, and finally, the record does not support the Respondent’s assertion that its layoff was based on the Ohio crew not being certified to work on the hydro scaffolding, as it shows instead that some bricklayers or masons worked on the hydro without “certification” prior to and after the layoff. In that regard, Jolly testified that he worked on the hydro scaffolding before the layoff occurred.⁶⁶ In addition, Miller testified that before the layoff, he worked 6 or 7 times on the hydro scaffolding at the project, and he was never asked if he was certified or trained to work on that scaffolding. The record also shows that when some of the employees returned to work after the layoff, they worked on the hydro scaffolding without any “certification.” Curtis Dunston returned to work on June 17, and the Respondent had TNT (a supplier of construction equipment) conduct a training program regarding the hydro scaffolding about four weeks later on July 11. When Dunston returned to work, he and his brother worked that first day back on the hydro scaffolding finishing off a gym wall. He estimated that he worked 2-1/2 days on the hydro after returning from the layoff. Dunston also worked on the hydro scaffolding 1 day before the TNT training program, and no one from the Respondent ever told him that he needed to be certified to work on that scaffolding.

In regard to employees working on the hydro scaffolding without certification, the Respondent asserts, based on Griffiths’ testimony, that Nieman was not authorized to put employees on the hydro scaffolding to work before the layoff.⁶⁷ However, Griffiths was not a credible or believable witness, and Nieman never testified to corroborate Griffiths’ assertion. In addition, Griffiths’ unsupported statement that Nieman was not authorized to assign employees to the hydro scaffolding, does not constitute proof that employees did not work on that scaffolding. As the record reveals to the contrary, some of the General Counsel’s witnesses credibly testified that they had worked on the hydro scaffolding without certification both before and after the layoff.

The Respondent also argues that the layoff was lawful because in addition to laying off union employees, it also laid off nonunion employees. In its brief, it specifically asserts that “all uncertified employees” were laid off, including “union bricklayers, non-union bricklayers, as well as labors [sic].”⁶⁸ This argument, like the Respondent’s other arguments above, lacks merit. The Board has held that where the central aim of a layoff is to discourage union activity or to retaliate against employees because of the union activities of some, the layoff will be unlawful even though employees who were opposed to the union were laid off along with the others. *J.T. Slocomb Co.*, 314 NLRB 231, 241 (1994); see also *McGraw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1996). In addition, the Board in finding that a respondent’s layoff of employees violated Section 8(a)(3) and (1) of the Act, stated that “[t]he layoff itself, not the selection of employees, was unlawful.” *Pyro Mining Co.*, 230 NLRB 782 fn. 2 (1977).

⁶⁶ Tr. 461.

⁶⁷ Tr. 738.

⁶⁸ Resp. Br. pp. 13-14.

Based on this evidence, I find that Respondent failed to offer any credible nondiscriminatory reason for the layoff, and that the Respondent's asserted reason for the layoff was mere pretext for its unlawful discriminatory motivation. *Shattuck-Denn Mining Corp. V. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Therefore, Respondent has failed to carry its burden of showing that the layoff would have taken place even in the absence of the protected conduct. In making this finding, I note that the Board has found in similar situations that when a respondent's lay off was implemented for unlawful discriminatory reasons, it violates Section 8(a)(3) and (1) of the Act. *Ferragon Corporation*, 318 NLRB 359, 361-362 (1995); *West-Pac Electric, Inc.*, 321 NLRB 1322 (1996); *Pyro Mining Co.*, supra at 782 fn. 2. Accordingly, I find that Respondent's layoff of the Ohio crew on May 31 and/or June 3, 2013, violated Section 8(a)(3) and (1) of the Act.⁶⁹

b. The Respondent's alleged unlawful failure to recall Rob Miller and Michael Dawson from the layoff

It is undisputed that the Respondent did not recall Rob Miller and Michael Dawson after the lay off when many of the employees were returned to work. Under a *Wright Line* analysis, the General Counsel has carried its burden to persuade that antiunion sentiment and their protected concerted activities were a substantial or motivating factor in the decision not to recall Miller and Dawson. The evidence shows that Miller and Dawson were union members, that Griffiths was aware of their union affiliation and protected activities, and that Griffiths believed they engaged in the union and protected activity of registering complaints about the safety of the working conditions with the Union and OSHA. As mentioned above, Griffiths became aware of Dawson's union affiliation during Dawson's last week of work when he became openly hostile about the fact that Dawson was wearing a union sticker, asking him, "are you fucking union?" Griffiths also eventually concluded that Miller was a union member and the person responsible for supplying the Union and OSHA with photographic proof of the safety violations, as he testified that he believed Miller was a union member by the way he worked,⁷⁰ and he told Rodgers he did not know that Miller was a "big union guy."

As mentioned above, there is direct evidence that Respondent harbored animus toward the Union, which included Griffiths' statements that he was not hiring union masons and "not going union." Furthermore, there is evidence that Respondent's refusal to recall Miller and Dawson was motivated by its belief that they engaged in the union and protected concerted activity of reporting safety infractions to the Union and to OSHA, as reflected by Griffiths' coercive statements he made to Jolly that the layoff started with the Union and when the guys called OSHA; his statement to Dunston that he had to let everybody go because he didn't know which of the guys called the Union and OSHA; and (as discussed below) by Nieman's statement to Dunston that he could thank those "union assholes" who got him laid off. These facts reflect that the General Counsel has made a very strong prima facie showing that Respondent's failure to recall Miller and Dawson was for discriminatory reasons.

⁶⁹ See consolidated complaint paragraph 7.

⁷⁰ Tr. 658.

5 However, with regard to the General Counsel's prima facie case, the Respondent argues that "while Miller engaged in an activity through his Union to notify OSHA, his activity was not a concerted union activity."⁷¹ On this subject, the issue before me is whether Miller and Dawson engaged in union and/or protected concerted activities, and whether the Respondent's failure to recall them was motivated by one or both of those activities. While I have found that Miller and Dawson clearly engaged in union activity by reporting Respondent's unsafe working conditions to the Union, I also find that those same complaints, which were in turn reported by the Union to OSHA, also constituted engagement in protected concerted activities. The Board has held that employee complaints to federal and state agencies are protected by Section 7 of the Act. *Delta Health Center, Inc.*, 310 NLRB 26, 43 (1993) (employees' communications to a government agency (the Public Health Service) were protected); *Afro-Urban Transportation*, 220 NLRB 1371 (1975) (employee effort to seek the aid of governmental organizations and agencies in order to protect working conditions is protected activity provided it is undertaken without malice or bad faith). In this case, Miller and Dawson's activities were protected and they were exercised in what appeared to be a good faith attempt to ensure the workplace safety for themselves and their fellow co-workers on the jobsite. Furthermore, the record is void of any evidence that they engaged in those activities with malice.

20 With regard to the Respondent's assertion that the activity was not concerted, I note that in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*) and *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), the Board overruled the doctrine that individual complaints to a government agency are per se concerted.⁷² In those cases, the Board held that such activity is still protected, however, in order for a violation to be established, it must also be shown that the conduct was concerted.⁷³ I find that both Miller and Dawson, during the same time period, complained to the Respondent about unsafe working conditions on the jobsite, which obviously affected and were concerns for all the employees. Miller and Dawson simultaneously, but separately, reported those unsafe working conditions to the Union as a logical outgrowth of their group concerns, which the Board has found to be concerted. *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993) (concerted activity includes concerns that are a "logical outgrowth" of group concerns). Thus, I find that Miller's and Dawson's reporting of the unsafe working conditions to the Union constituted protected concerted activity, as well as union activity. Accordingly, I find no merit to the Respondent's assertion that the General Counsel failed to make a prima facie showing of unlawful motivation with regard to its failure to recall Miller and Dawson.

35 With the General Counsel having proved its prima facie case, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in union and protected concerted activity. The Respondent asserts that it did not recall Miller and Dawson to their jobs because they failed to call Griffith about returning to work. Griffiths testified that the employees who returned to work were those who called him requesting to return, and that the only employee he ever called to return to work was Ted Cobb, who had quit his job before the layoff.

⁷¹ Resp. Br. at p.12.

⁷² Overruling *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

⁷³ The Board subsequently affirmed that decision in *Myth, Inc., d/b/a Pikes Peak Pain Program*, 326 NLRB 136 (1998).

I do not credit Griffiths' assertion that he only called Cobb to return to work, as Griffiths was not a credible witness, and his assertion is inconsistent with what he told many of the employees when he laid them off. At the time of the layoff, Griffiths told Miller he would call the employees back to work in a week or two;⁷⁴ he specifically told Miller he would call him to be rehired;⁷⁵ he told Jolly that he would give him a call to return to work;⁷⁶ he told employee Joseph Penny that he would call the employees when it was time to come back to work;⁷⁷ and he told Rodgers that he would call him to come back to work.⁷⁸

Griffiths' assertion is also inconsistent with the testimony of several of the General Counsel's witnesses who credibly testified that Griffiths and Nieman called them to come back to work. For example, Griffiths called Jolly and told him he would put him back to work the following week; Griffiths instructed Jolly to bring Penny back to work;⁷⁹ and Nieman called Rodgers and asked him if he wanted to come back to work. Critically, in addition to this evidence and contrary to Respondent's assertion, Dawson credibly testified that he did contact the Respondent about returning to work after the layoff. In this regard, Dawson asked Griffiths shortly after the layoff when he was going to be hired back and Griffiths said it would be a couple of weeks. Dawson also left a message with Nieman inquiring if the Respondent was going to hire the employees back soon. Neither Griffiths nor Nieman responded to those inquiries.

Thus, the credible evidence belies Griffiths' assertion that Miller and Dawson were not recalled because they did not call him. Instead, the evidence reveals that Respondent's asserted reason for failing to recall the two very experienced masons at a time when there remained an abundance of masonry work to be completed on a job that was behind schedule,⁸⁰ constituted a pretext for its unlawful motivation and its desire to remove the union workers from its work force. The Respondent also failed to offer any credible evidence which showed a legitimate nondiscriminatory reason for the fact that it failed to recall Miller and Dawson.

Accordingly, I find that the Respondent's failure to recall Miller and Dawson from layoff was based on discriminatory and unlawful reasons, and it constituted a violation of Section 8(a)(3) and (1) of the Act.⁸¹

⁷⁴ Tr. 201.

⁷⁵ Tr. 250.

⁷⁶ Tr. 447-448.

⁷⁷ Tr. 511-512.

⁷⁸ Tr. 521.

⁷⁹ Tr. 449.

⁸⁰ The record also shows that at the time of the layoff, the job (which was behind schedule) was only about 25 percent finished and many of the witnesses testified that there was a significant amount of masonry work left to do. (Tr. 596). In June and July the Respondent also hired additional masons to work on the project, such as Quinton Greene, John Cooley and James Austin. (Tr. 705; Jt. Exh. 1). The Respondent's masonry work continued from June 2013 to January 4, 2014.

⁸¹ See consolidated complaint paragraph 7.

c. *The Respondent's alleged unlawful statement attributed to its foreman, Daniel Nieman, in violation of Section 8(a)(1) of the Act.*

1. The supervisory issue pertaining to Nieman

As mentioned above, the General Counsel alleges, and the Respondent denies, that Nieman is a supervisor and/or agent within the meaning of the Act.

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that the authority is exercised with "independent judgment" on behalf of management and not in a routine manner. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Clark Machine Corporation*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). It is also well established that the burden of proving supervisory status rests on the party asserting such status. *Kentucky River*, supra at 713; *Billows Electrical Supply of Northfield, Inc.*, 311 NLRB 878 (1993); *The Ohio Masonic Home, Inc.*, 295 NLRB 390 (1989); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *The Republican Company*, 361 NLRB No. 15, slip op. 5 (August 7, 2014). For the reasons set forth below, I find that the General Counsel has carried its burden of showing beyond a preponderance of the evidence that Nieman exercised independent judgment with regard to the supervisory indicia of assignment and direction of work.

In *Oakwood Healthcare, Inc.* 348 NLRB 686, 689 (2006) the Board noted that with regard to the meaning of the term "assign" in Section 2 (11) of the Act:

[W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing) appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g. restocking shelves) would generally qualify as "assign" within our construction.

The record in this case establishes that Nieman exercised independent judgment with regard to assigning work for the Respondent. Besides the uncontradicted testimony from the General Counsel's witnesses who stated that Nieman assigned them where to work, Griffiths specifically stated:

5 “[Nieman] would see what mason could be left on a little tight spot, what mason is good in larger areas, where...some masons are quicker than others, so you put him ...on a longer stretch of wall so he can get more material laid from him. And the guy who’s slower, maybe you put him in a little slow spot. I would leave that up to him, you know, because I’m not going to be there – I can’t be there 24/7, but I’d leave it to his best judgment.”⁸²

10 The fact that Griffiths left it to Nieman’s judgment as to where to assign masons based on their skill sets and abilities to perform certain jobs, and their abilities to perform work within a certain time frame, is indicative of the exercise of independent judgment in the assignment of work.

15 In *Croft Metals, Inc.* 348 NLRB 717, at 721 (2006) the Board summarized the definitions of “responsibly to direct” and “independent judgment” as set forth in its decision in *Oakwood Health Care*, supra, as follows:

20 The authority “responsibly to direct” is “not limited to department heads,” but instead arises “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible,’ . . . and carried out with independent judgment.” “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” “Thus, to establish

25 accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take the steps.” (Internal citations omitted).

30 “[T]o exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action, free of the control of others and from an opinion or valuation by discerning and comparing data.”

35 It is undisputed that Nieman ran the Respondent’s job as its foreman, directed the work, and was responsible for making sure the work was completed. He was responsible for the work of Respondent’s employees and he alone was accountable on those many occasions when Griffiths was not there. While Griffiths was on the jobsite 3–4 days a week before the layoff, and 1–2 days a week after the layoff, Nieman was the person who oversaw the Respondent’s

40 work.⁸³ Griffiths testified that Nieman, as the “lay out person,” was responsible for making sure

⁸² Tr. 101.

⁸³ Nieman never testified to offer any evidence to contradict the evidence offered by the General Counsel’s witnesses. In this regard, Miller testified that Griffiths was on the jobsite only a couple of times per week. Jolly testified that Nieman was in charge when Griffiths was not at the site, and that before the layoff Griffiths was on the jobsite 3–4 days a week, and after the layoff, he was there 1–2 days per week. Cobb also testified that Griffiths was on the job around 1–2 times per week. This evidence is

the job was done correctly and he was the person the general contractor's superintendent would communicate with regarding the Respondent's work on the job.⁸⁴ The record reveals that Nieman's actions in directing the work was free from the control of others, especially when Griffiths was not on the jobsite, as reflected by the General Counsel's witnesses who testified that Nieman directed what work to perform and where to perform it, without checking with anyone.⁸⁵

In applying the traditional criteria for the establishment of supervisory status to the facts of the instant case, I find that the record establishes that Nieman exercised independent judgment in the assignment and direction of the Respondent's employees' work, and therefore, the General Counsel has met its burden of proving that Nieman was a supervisor within the meaning of Section 2(11) of the Act.

2. The agent issue pertaining to Nieman

With regard to whether Nieman was an agent of the Respondent, Section 2(13) of the Act states:

In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board and the courts have long held that in determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008); *NLRB v. Longshoreman (ILWU) Local 10 (Pacific Maritime Association)*, 283 F.2d 558, 563 (9th Cir. 1960) enfd. as modified 123 NLRB 559 (1959). Under the common-law rules of agency, an agency relationship can be established by vesting an agent with actual or apparent authority. Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) Of Agency, Section 3.01* "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency, Section 2.03*.

The party asserting an individual acts as an agent must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). In addition, the Board has held that an employer may be responsible for an employee's

supported by Griffiths' admission that after June his attendance on the jobsite declined significantly to approximately 1-2 days per week, and some weeks he was not on the site at all.

⁸⁴ It is important to note that while the Respondent's bricklayers and laborers were hourly paid, Nieman was a salaried employee. While not an indicia of supervisory status, this evidence nevertheless suggests that Nieman held a status separate from the bricklayers and laborers. Nieman also did not perform masonry work on the job, but instead was responsible for directing the employees' work.

⁸⁵ Both Miller and Cobb testified that Nieman directed their work.

conduct if the employee is “held out as a conduit for transmitting information [from the employer] to the other employees.” *D & F Industries Inc.*, 339 NLRB 618, 619 (2003).

5 In the instant case, Nieman was assigned to operate the Respondent’s business for Griffiths and he was responsible for making sure the work was completed, especially on the many days when Griffiths was not at the job site. Griffiths admitted that Nieman was responsible for making sure the job was done correctly and he was the person the general contractor communicated with regarding the Respondent’s work. The record establishes that Griffiths vested Nieman with actual authority by expressing his assent that Nieman’s actions were on Griffiths’ and the Respondent’s behalf. The record also establishes that Nieman’s assignment as foreman vested him with apparent authority to act on the Respondent’s behalf because the general contractor believed Nieman had the authority, and treated him as if he had the authority, to act on Respondent’s behalf. In addition, the record reveals that Nieman was a person who was a conduit between Griffiths and the employees for the transmission of information. He was viewed by the employees as the person conveying Griffiths’ desires with regard to the work, and he acted as the person responsible for getting the Respondent’s work completed.

20 Based on the above, in addition to finding that Nieman was a supervisor, I also find that he was an agent of the Respondent within the meaning of Section 2(13) of the Act, and he bound the Respondent by his actions.

25 3. The allegation that on or about June 18, 2013, Respondent, by Nieman, told an employee that the union and its supporters were to blame for the June 2013 layoff, in violation of Section 8(a)(1) of the Act

30 Curtis Dunston was recalled to work from the layoff on or about June 17, 2013. He testified that during that first week he was back at work, he had a conversation with Nieman, in which he asked Nieman about the possibility of working overtime hours. In response to that question, Nieman told him, “No,” and that he “could thank them assholes from the union that got [him] laid off for them two weeks.”⁸⁶ Nieman never testified to deny the statement Dunston attributed to him, and Respondent failed to offer any other evidence to rebut Dunston’s credible assertion.

35 The General Counsel correctly alleges that Nieman’s statement violated the Act.⁸⁷ Nieman’s statement to Dunston that the union employees were to blame for the layoff had a reasonable tendency to restrain, coerce, or interfere with Dunston’s rights to engage in union activities under the Act. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act through Nieman’s statement.

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⁸⁶ Tr. 354–356.

⁸⁷ See consolidated complaint paragraph 5(e).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 5 2. The International Union of Bricklayers & Allied Craftworkers, Ohio-Kentucky Administrative District Council, Local 22 Ohio, is a labor organization within the meaning of Section 2(5) of the Act.
- 10 3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:
- (a) Unlawfully interrogating job applicants/employees about their union activities;
 - 15 (b) Threatening or coercively informing job applicants/employees that Respondent was not hiring employees because of their union activities and membership;
 - (c) Threatening or coercively informing employees that Respondent would not hire employees because of their union activities and membership;
 - 20 (d) Threatening or coercively informing employees that Respondent laid off employees because of their union activities and membership;
 - (e) Coercively implying to employees that Respondent was not recalling them from layoff because of their union activities and membership;
 - 25 (f) Coercively implying that Respondent knew which employees supported the union, thereby creating the impression that the employees' union and protected activities were under surveillance;
 - 30 (g) Threatening or coercively informing employees that Respondent would not have them on the job because of their union activities and membership;
 - (h) Threatening or coercively informing employees that Respondent was not recalling employees because of their union activities and membership;
 - 35 (i) Threatening or coercively informing employees that the layoff was caused by the Union and/or the employees support for the Union;
 - 40 (j) Refusing to hire and/or refusing to consider for hire applicants because they formed, joined or assisted the Union and/or engaged in protected activities;
 - (k) Laying off employees because they formed, joined or assisted the Union and/or engaged in protected concerted activities;
 - 45 (l) Refusing to recall employees from layoff because they formed, joined or assisted the Union and/or engaged in protected concerted activities;

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

- 5 (a) Refusing on or about May 8, 2013, to hire or consider for hire Roger Trotter and George Gaston because of their union membership and activities;
- 10 (b) Laying off its Ohio crew on or about May 31 and/or June 3, 2013, consisting of: Arlie R. Jolly, Curtis L. Dunston, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers; Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty, Kevin McCleskey, Michael Dunston, Michael L. Dawson, Rob E. Miller, Ronald H. McCleskey, and Segundo Pinguill, because of their union and/or protected concerted activities; and
- 15 (c) Failing to recall employees Rob Miller and Michael Dawson from layoff on or about June 10, 2013, in retaliation for their union and/or protected concerted activities;

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

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

30 The Respondent, having discriminatorily refused to hire or consider for hire Roger Trotter and George Gaston, must offer them the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges to which they would have been entitled had they not been discriminated against by the Respondent. The Respondent must also make them whole for any

35 loss of earnings and other benefits they may have suffered as a result of Respondent's discriminatory refusal to hire or consider them for employment. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

40 With regard to the Respondent's layoff of the "Ohio crew," the Respondent would normally be ordered to offer its Ohio crew, including Arlie R. Jolly, Curtis L. Dunson, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers, Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty, Kevin McCleskey, Michael Dunson, Michael L. Dawson, Rob E. Miller,

45 Ronald H. McCleskey, and Segundo Pinguill, immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed. However, as discussed above, the

evidence established that besides Rob Miller and Michael Dawson, who were not recalled from layoff for discriminatory and unlawful reasons, the Respondent recalled and employed for various time periods, all other Ohio crew employees, with the exception of Dustin Jackson and Joshua Johnston. Therefore, I order the Respondent to offer Jackson and Johnston immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed.⁸⁸ The Respondent is further ordered to make all the above named Ohio crew employees whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having specifically found that Respondent discriminatory failed to recall Rob Miller and Michael Dawson from layoff, the Respondent is ordered to recall and offer Rob Miller and Michael Dawson immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. As mentioned above, backpay shall be computed in accordance with *F.W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall file a report with the Social Security Administration allocating backpay, if any, to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences for additional Federal and State income taxes the discriminatees may owe, if any, as a consequence of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Tortillas Don Chavas*, 361 NLRB No. 10 (August 8, 2014).

The Respondent shall also be ordered to expunge from its files any references to the failure to hire or consider for hire Roger Trotter and George Gaston, the unlawful layoff of the Ohio crew employees, and the refusal to recall employees Rob Miller and Michael Dawson from layoff, and notify them in writing that this has been done and that evidence of the unlawful actions will not be used as a basis for future personnel action against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁸⁹

⁸⁸ The record does not establish why these two employees were not reinstated, or if they were offered reinstatement and declined it. I find these are factual questions, and as such, should best be resolved by a factual inquiry in a compliance proceeding. *Dean General Contractors*, 285 NLRB 573, 574 (1987)

⁸⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Euro Builders, LTD, Livonia, Michigan, its officers, agents, successors,
and assigns, shall

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1. Cease and desist from

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(a) Interrogating applicants for employment/employees about their union activities and support.

(b) Informing applicants for employment/employees that Respondent was not hiring them because of their union activities and membership.

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(c) Informing employees that Respondent would not hire employees because of their union activities and membership.

(d) Informing employees that Respondent laid off employees because of their union activities and membership.

20

(e) Implying to employees that Respondent was not recalling them because of their union activities and membership.

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(f) Implying to employees that Respondent knew which employees supported the union thereby creating the impression that the employees' union and protected concerted activities are under surveillance.

(g) Informing employees that Respondent would not have them on the job because of their union activities and membership.

30

(h) Informing employees that Respondent was not recalling them because of their union activities and membership.

(i) Informing employees that the layoff was caused by the Union or their support for the Union.

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(j) Failing to hire and/or refusing to consider for hire applicants because they formed, joined or assisted the union and engaged in protected activities.

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(k) Laying off employees because they formed, joined or assisted the Union and/or engaged in protected concerted activities.

(l) Refusing to recall employees because they formed, joined or assisted the Union and/or engaged in protected concerted activities.

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(m) 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.

5 (a) Within 14 days from the date of the Board's Order, offer George Gaston and Roger Trotter employment for the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges to which they would have been entitled had they not been discriminated against by the Respondent.

10 (b) Make George Gaston and Roger Trotter whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

15 (c) Within 14 days from the date of the Board's Order, offer Ohio crew employees Dustin Jackson, Joshua Johnston, Rob Miller and Michael Dawson full reinstatement to their former jobs, or if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed.

20 (d) Make its Ohio crew, including Arlie R. Jolly, Curtis L. Dunson, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers, Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty, Kevin McCleskey, Michael Dunson, Michael L. Dawson, Rob E. Miller, Ronald H. McCleskey, Segundo Pinguill, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

25 (e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

30 (f) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful refusals to hire and/or consider for hire George Gaston and Roger Trotter, the unlawful layoff of the "Ohio Crew," including Arlie R. Jolly, Curtis L. Dunson, Dustin M. Jackson, Francisco Coronel, Gary F. Rodgers, Jose Diaz, Joseph W. Penny, Joshua E. Johnston, Kenton J. Beaty, Kevin McCleskey, Michael Dunson, Michael L. Dawson, Rob E. Miller, Ronald H. McCleskey and Segundo Pinguill, and the unlawful failure and refusal to recall Rob E. Miller and Michael Dawson from layoff, and within 3 days thereafter, notify the employees in writing that this has been done and that the above-referenced actions will not be used against them in any way.

40 (g) 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
45 electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- 5 (h) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."⁹⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, 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 May 8, 2013.
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- (i) 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.
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- (j) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.
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Dated, Washington, D.C. October 24, 2014

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Thomas M. Randazzo
Administrative Law Judge

⁹⁰ 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."

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 a representative 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 ask job applicants/employees about their union membership or otherwise unlawfully interrogate them about their union activities and support.

WE WILL NOT inform job applicants/employees that we will not hire them because of their union activities and membership.

WE WILL NOT inform employees that we will not hire employees because of their union activities and membership.

WE WILL NOT inform employees that we laid off employees because of their union activities and membership.

WE WILL NOT imply to employees that we are not recalling them from layoff because of their union activities or membership.

WE WILL NOT imply to employees that we know who supported the Union and thereby create the impression that their union and protected activities are under surveillance.

WE WILL NOT inform employees that we will not have union supporters or members on our job.

WE WILL NOT inform employees that we are not recalling them from layoff because of their union activities and membership.

WE WILL NOT inform employees that the layoff was caused by the Union or their support for the Union.

WE WILL NOT refuse to hire or refuse to consider for hire applicants because they formed, joined or assisted the Union and engaged in protected activities.

WE WILL NOT lay off employees because they form, joined or assisted the Union and/or engaged in protected concerted activities.

WE WILL NOT refuse to recall employees from layoff because they formed, joined or assisted the Union and/or engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Roger Trotter and George Gaston the positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges they would have enjoyed had they not been discriminated against.

WE WILL make Roger Trotter and George Gaston whole for any loss of earnings and other benefits suffered as a result of our refusal to hire them or consider them for hire, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to our unlawful refusals to hire or consider for hire Roger Trotter and George Gaston, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire or consider them for hire will not be used against them in any way.

WE WILL within 14 days from the date of the Board's Order, offer "Ohio crew" employees Dustin M. Jackson, Joshua E. Johnston, Rob E. Miller, and Michael L. Dawson, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed.

WE WILL make the "Ohio crew," including the following named laid off employees, whole for any loss of earnings and any other benefits resulting from their layoff, less any net interim earnings, plus interest:

Arlie R. Jolly
Curtis L. Dunson
Dustin M. Jackson
Francisco Coronel
Gary F. Rodgers
Jose Diaz
Joseph W. Penny
Joshua E. Johnston
Kenton J. Beaty
Kevin McCleskey
Michael Dunson
Michael L. Dawson
Rob E. Miller
Ronald H. McCleskey

Segundo Pinguill

WE WILL make Rob E. Miller and Michael L. Dawson whole for any loss of earnings and any other benefits resulting from our failure to recall them from layoff, less any net interim earnings, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to our unlawful layoff of the above-mentioned Ohio crew employees, and to our failure to recall Rob E. Miller and Michael L. Dawson to work from the layoff, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that their layoff and failure to be recalled to work from the layoff, will not be used against them in any way.

EURO BUILDERS, LTD
(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.nlr.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-106788 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.