

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 17

JEFF MACTAGGART MASONRY, LLC	)	
d/b/a JM2	)	
	)	Cases 14-CA-138748
and	)	14-CA-143817
	)	18-CA-135993
INTERNATIONAL UNION OF	)	
BRICKLAYERS AND ALLIED	)	
CRAFTWORKERS LOCAL 15 MO-KS-NE	)	REPLY BRIEF OF JEFF MACTAGGART
	)	MASONRY, LLC
and	)	
	)	
INTERNATIONAL UNION BRICKLAYERS	)	
AND ALLIED CRAFTWORKERS LOCAL 3	)	
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**TABLE OF CONTENTS**

I.	Ernest Adame, Francis Jacobberger and Jared Skaff Were Not Genuinely Interested in Establishing an Employment Relationship With JM2.....	1
II.	JM2 Did Not Discharge or Refuse to Hire Marvin Monge Because He Engaged in Concerted Activities.....	5
III.	The Activities of the Union Abuse the Board’s Processes and Therefore Are Not Protected Activity.....	8
	Conclusion.....	10

Respondent, Jeff MacTaggart Masonry, LLC (“JM2”), submits the following Reply Brief in the captioned case.

**I. Ernest Adame, Francis Jacobberger and Jared Skaff Were Not Genuinely Interested in Establishing an Employment Relationship With JM2.**

The Administrative Law Judge (“ALJ”) found in error that Ernest Adame, Francis Jacobberger, and Jared Skaff genuinely were seeking to establish an employment relationship with JM2. ALJD at 10, lines 9-10. The ALJ acknowledged that he was not sure what the General Counsel needed to do to meet the requisite burden of proof. ALJD at 10, line 1. He then postulated a minimalist standard requiring only that (1) the applicant must apply for work; (2) the applicant must prove he or she is qualified for the work; and (3) the applicant testifies at trial that he or she would have worked for the employer had a job been offered. ALJD at 10, lines 1-5. The ALJ’s standard results in an effectively conclusive presumption that any individual who applies for a job is entitled to protection as an employee under Section 2(3) of the Act, for in reality, no union salt, especially after trial preparation by the General Counsel, will testify they would not accept a job from the target employer. The standard implemented by the ALJ does not meet the more demanding standard established by the Board in *Toering Electric*, 351 NLRB 225 (2007), and therefore was in error.

In *Toering Electric*, the Board explained that the employment relationship protected by the Act is an economic relationship in which the employee is dependent on the employer “for their livelihood or for the improvement of their economic standards.” *Toering Electric*, 351 NLRB at 229 (quoting *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999)). It is the unequal bargaining power resulting from the employee’s economic dependence on the employer that the Act seeks to balance by protecting the “employees’ rights to organize and

bargain in order to restore bargaining power and thereby to prevent the disruption of commerce caused by labor disputes.” *Toering Electric*, 351 NLRB at 228. When individuals apply for jobs for purposes other than to improve their economic status, they do not have the economic dependency on the employer that is required of employees by Section 2(3) of the Act, and the Act’s protections for balancing the bargaining power between the employer and employees do not extend to the individuals. *Toering Electric*, 351 NLRB at 229. Thus, to be genuinely interested in establishing an employment relationship so as to be protected by the Act, the applicant must have an economic dependency, actual or anticipated, on the employer. *Id.* Adame, Jacobberger and Skaff were not economically dependent on JM2, and therefore none of these applicants were genuinely interested in establishing an economic relationship with JM2.

**a. Ernest Adame Was Not Genuinely Interested in Establishing an Employment Relationship With JM2**

At the time Adame applied at JM2, he lived with his family in California. Tr. 358-359. He was employed full time as a Regional Representative by the International Union of Bricklayers and Allied Craftworkers (the “Union”) and was paid a salary of \$135,000. Tr. 347. His job responsibilities with the Union included assisting with receiverships and training new union officers. Tr. 329. In his Union job he received Union paid health insurance and was a participant in a defined benefit pension plan. Tr. 348. When he applied at JM2, he did not know the pay and benefits offered by JM2 and had no wage requirement. Tr. 340. He had last used his tools in the field in 2011. Tr. 339. The only evidence offered by the General Counsel that Adame was genuinely interested in working as a bricklayer at JM2 was Adame’s conclusory statement given in response to a leading question that if JM2 offered him a job as bricklayer, he would take it. Tr. 340. It is well-established Board precedent that conclusory statements

unsupported by other evidence are insufficient to prove the proposition for which they are offered. *See Golub Corp.*, 338 NLRB 515, 516 (2002) (conclusory statement about traffic congestion insufficient to show business reason for barring solicitation because no supporting evidence). The evidence of record demonstrates that Adame was not applying for work to improve his economic standards or that he in any way was economically dependent on obtaining a job with JM2. As such, Adame he was not an “employee” under Section 2(3) of the Act and the protections of the Act do not extend to him. *See Toering Electric*, 351 NLRB at 229. For these reasons, the ALJ findings regarding Adame should be vacated.

**b. Francis Jacobberger Was Not Genuinely Interested in Establishing an Employment Relationship With JM2**

At the time Jacobberger applied at JM2, he resided with his wife and young children in Maryland. Tr. 267. He was employed full time in Washington, D.C. as an organizer by the Union and was paid a salary of between \$120,000 to \$150,000. Tr. 252; GC Ex. 7. He also received health insurance paid by the Union and was a participant in a defined benefit pension plan. Tr. 255. When he applied at JM2, he did not know and did not ask about the pay and benefits offered by JM2. He testified, “I was happy to work for anything.” Tr. 258-260. The only evidence offered by the General Counsel that Jacobberger was genuinely interested in working for JM2 was Jacobberger’s response to a leading question that he would have accepted a job at JM2 if one had been offered. The evidence demonstrates that Jacobberger had no economic dependency, actual or anticipated, on JM2. Jacobberger did not ask what JM2 provided for pay and benefits because his economic well-being was not dependent on JM2 – his full time Union job provided him with a substantial salary, Union paid health insurance, and a defined benefit pension plan. Because Jacobberger had no economic dependency on obtaining a

job with JM2, he was not an “employee” under Section 2(3) of the Act, and the protections of the Act do not extend to him. *See Toering Electric*, 351 NLRB at 229. For these reasons, the ALJ findings with respect to Jacobberger should be vacated.

**c. Jared Skaff Was Not Genuinely Interested in Establishing an Employment Relationship With JM2**

At the time Skaff applied at JM2, he was employed full time by the Union as a field representative earning in excess of \$52,000 per year, with Union paid health insurance and a defined benefit pension plan. Tr. 318-19; GC Ex. 19A. When he applied at JM2, Skaff did not know the pay and benefits offered to a bricklayer at JM2. Tr. 320. After completing the application form, Skaff never contacted JM2 about the status of his application. Skaff testified he had no wage requirements with respect to possible employment at JM2. Tr. 316. The only evidence that Skaff was genuinely interested in working for JM2 was Skaff’s conclusory statement that he could work as a bricklayer for JM2 and continue to perform his full time job as field representative during breaks and after work. Tr. 316.

The evidence demonstrates that Skaff had no economic dependency on obtaining work with JM2. He had a full time job with the Union, with Union paid health insurance and a defined benefit plan. He did not know what JM2 paid and had no pay requirement from JM2 because he already was economically supported by the Union. Because Skaff had no economic dependency on obtaining a job with JM2, he was not genuinely interested in establishing an employment relationship with JM2. *See Toering Electric*, 351 NLRB at 229. For these reasons, the ALJ findings with respect to Skaff should be vacated.

## **II. JM2 Did Not Discharge or Refuse to Hire Marvin Monge Because He Engaged in Concerted Activities.**

The ALJ concluded in error that JM2 violated 8(a)(3) of the Act by discharging Marvin Monge from the JM2 Nebraska operations on August 19, 2014 because of his support for the Union. ALJD at 7, lines 24-26. Assuming *arguendo* that the General Counsel proved that Monge's protected activity was a motivating factor in his discharge, the evidence nevertheless demonstrates that Monge's job with JM2 ended because Nebraska Area Supervisor Scott Fangman acted on his reasonable belief that he could not rely on Monge to predictably attend work. The evidence further demonstrates that Fangman would have taken this action even in the absence of any protected activity by Monge.

JM2 has a legitimate business interest in expecting its employees to come to work as scheduled. On August 8, 2014, when Monge requested time off, he told both his Foreman Ian Lindberg and Scott Fangman that he would be absent one week and was going camping with his kids. Tr. 128-29; 181. By certified letter to Fangman dated August 8, 2014, the same day Monge had spoken with Fangman and requested one week off from work to go camping with his kids, Monge wrote that he had told Lindberg that his mother was sick and that he was taking two weeks off to care for her in Washington, D.C. Tr. 130; GC Ex. 15.

Fangman was confused by Monge's letter which differed significantly from what Monge had orally stated to both Lindberg and Fangman. Tr. 131. Both Lindberg and Fangman testified without contradiction that Monge said nothing about visiting his sick mother or being absent for two weeks when he had orally requested time off. Tr. 128-129; 190. Based on Monge's conflicting statements and Fangman's experience in the construction industry, Fangman believed Monge found work elsewhere and had abandoned his job with JM2.

Fangman moved other employees to take Monge's place so the job could stay on schedule.

Tr. 131,158-60.

On August 19, 2014, Monge unexpectedly appeared at the job site about an hour after starting time. He had not telephoned Fangman prior to coming to work as he had promised in his August 8 letter, but simply showed up at the job site well after work had started for the day. August 19 was a Tuesday and was neither the day he originally told Lindberg and Fangman that he would return to work, nor the day he said he would return in his certified letter. Tr. 132; ALJD at 7, lines 8-15.

When Monge arrived at the job site, he spoke to Fangman and surreptitiously tape recorded the conversation. GC Ex. 30. As demonstrated by the tape recording, Fangman was surprised to see Monge and asked Monge why he had not called about returning to work as he had promised. Monge acknowledged that he should have called Fangman about coming back to work. Fangman said he was scrambling on each of his jobs and he did not have work planned for Monge. Monge then volunteered to call Fangman later in the day. Fangman said he would see if he could find some work for Monge. GC Ex. 30.

When Fangman later had time to review the work to be performed, the efficient staffing of the work, and Monge's unusual and inconsistent behavior relating to his time off, Fangman determined based on his experience in the construction business, that he could not rely on Monge to predictably attend work. When Monge called Fangman later on August 19, Fangman told Monge that he considered Monge's letter to be a resignation letter, that Fangman had moved on, and that he expected Monge to also move on. Monge asked whether "that was it with my employment" and Fangman responded "yes." Tr. 392. Fangman took this action because based on his experience in the construction business, when an employee takes time off

and then gives varying dates of return, the employee can no longer be counted on to reliably attend work. Tr. 159. To meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1<sup>st</sup> Cir. 1981), JM2 need not prove that Monge was unreliable. JM2 must show, however, that Fangman had a reasonable belief that Monge was unreliable and that Fangman acted on that belief when he discharged Monge. See *McKesson Drug Co.*, 337 NLRB 935, 936 n. 7 (2002). The testimony of both Fangman and Monge demonstrates Fangman's reasonable belief that he could not rely on Monge to predictably attend work and that this was the reason he discharged Monge. Fangman's decision was consistent with Fangman's prior experience which demonstrates that he would have taken the same action even in the absence of Monge's protected activity. See *FES*, 331 NLRB 9, 12 (2000).

Given the major inconsistencies between Monge's oral statements to Lindberg and Fangman and his certified letter regarding when and why he would be absent from work, plus his failure to actually visit his mother as he had stated in his letter, it was error for the ALJ to credit Monge's testimony regarding the timing and reasons for taking time off from work and its ramifications for his employment at JM2. It is particularly inappropriate for the ALJ to credit Monge's testimony given Monge's failure to produce any documents supporting his testimony and given the ALJ's severe restrictions on JM2's attempts to cross examine Monge to determine the truth on these issues. See Tr. 431-434. The ALJ then compounded his error by flatly stating (with no supporting analysis) that "anything Monge said pertaining to this case that was not true was also immaterial." ALJD at 8, n.8. Monge's untrue statements about why and how long he would be gone are the very reasons his employment with JM2 ended and are absolutely material to this case.

The ALJ also concluded in error that JM2 violated Section 8(a)(3) by failing to hire Monge on August 25, 2014 in Iowa. The facts demonstrate that Iowa Area Supervisor Isaac Otdoerfer did not hire Monge because Otdoerfer believed that Monge had been dishonest with both Otdoerfer and Fangman, Monge failed to provide necessary I-9 information, and Monge simply hung up on Otdoerfer during their last telephone conversation when Otdoerfer was asking about the I-9 information. Tr. 115, 119. The facts are undisputed that Monge failed to disclose to Otdoerfer that he had worked for JM2 in Nebraska even though the JM2 application form specifically requests that information from all applicants. GC Ex. 18. It also is undisputed that Monge failed to provide necessary I-9 information to Otdoerfer and hung up on Otdoerfer when Otdoerfer was requesting the information. Tr. 119. These undisputed facts are the reasons Otdoerfer did not hire Monge and demonstrate that Otdoerfer would not have hired Monge even in the absence of any union activities by him. *See FES*, 331 NLRB 9, 12 (2000). For these reasons, the ALJ decision that Monge was not hired, or was hired and discharged, in Iowa should be vacated.

**III. The Activities of the Union Abuse the Board's Processes and Therefore Are Not Protected Activity.**

As forewarned by the Board in *Toering Electric*, the Union's actions in this case abuse the Board's processes in an attempt to accomplish goals fundamentally inconsistent with the policies and the purposes of the Act. The Union and General Counsel claim that the Union's picketing of JM2 work sites throughout the summer of 2014 was not for recognitional purposes. GC Brief at 45. This claim is disproved by Jared Skaff's statement on his application that he would organize the JM2 workforce into the Union (GC Ex. 5); Ernest Adame's statement on his application that he would organize the JM2 workforce into the Union (GC Ex. 8); Francis

Jacobberger's statement on his application that he would organize JM2's workforce into the Union (GC Ex. 7); Jacobberger's recruitment of William Zabriskie to obtain employment with JM2 for the purpose of organizing the JM2 workforce into the Union (Tr. 231); and Jacobberger's open admission that his goal was to organize the JM2 workforce for the Union (Tr. 257). Despite this substantial evidence, the General Counsel continues to claim that the Union's picketing of JM2 was not for purposes of recognition, and thus not in violation of 8(b)(7)(C) of the Act.

If the General Counsel's argument is accepted and it is believed that the Union's actions in this case were not with the objective of organizing the workforce of JM2, then what was the Union's objective? As foreseen by the Board in *Toering Electric* and demonstrated by the substantial evidence of record, the Union's objective was to create a "basis for unfair labor practice charges and thereby to inflict substantial litigation costs" on JM2. *See Toering Electric*, 351 NLRB at 225. In fact, from August 2014 through January 2015, the Union filed at least seven unfair labor practice charges against JM2. Even with the active assistance of the Board's Regional Office to develop and prepare the evidence (Tr. 248), only three were finally consolidated in the captioned case. Despite the lack of merit in the charges, JM2 was required to search its records, produce hundreds of pages of documents, remove several of its employees from productive work to be interviewed by the Board, and pay legal fees to defend against the charges. As a result, the resources of the federal government were used "not to promote collective bargaining but to impose economic injury" on JM2. *See Toering Electric*, 351 NLRB at 230. Adame, Jacobberger and Skaff's applications at JM2, carefully orchestrated and surreptitiously videotaped, were not applications by three individuals genuinely interested in work as masons or laborers for JM2, but were the manipulative actions of highly paid Union

officials manufacturing evidence for unfair labor practice charges. Similarly, Monge's surreptitious tape recording of his conversation with Scott Fangman was coached by the Union with the hope that an unsuspecting Fangman might say something that could serve as evidence for an unfair labor practice charge. The General Counsel and the ALJ furthered the Union's efforts to inflict as much economic harm on JM2 as possible. "The Board does not serve its intended statutory role as neutral arbiter of disputes if it must litigate hiring discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise with a targeted employer." *Toering Electric*, 351 NLRB at 231. The Board should discourage the filing and prosecution of unfair labor practices for destructive purposes inconsistent with the purposes of the Act. For these reasons, the decision of the ALJ should be vacated.

### CONCLUSION

For the reasons set forth above, the ALJ decision and recommendations should be vacated, and the Complaints should be dismissed.

Respectfully submitted,



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I certify that a true copy of this document was served upon the individuals listed below via email at the email address shown below on July 1, 2015:

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