

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

SHAMBAUGH & SON, L.P.

and

Cases 25-CA-141001
25-CA-145447

INTERNATIONAL ASSOCIATION OF HEAT AND
FROST INSULATORS AND ALLIED WORKERS,
LOCAL #41

POST-HEARING BRIEF OF COUNSEL
FOR THE GENERAL COUNSEL

Respectfully submitted by:

/s/ Raifael Williams

Raifael Williams

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I. INTRODUCTION

Briefly stated, this case involves an unfair labor practice arising out of Shambaugh & Son, L.P.'s, hereinafter referred to as the Respondent, failure to consider for hire or hire Ryan Wieresma, a Business Manger and District Organizer for the International Association of Heat and Frost Insulators and Allied Workers, Local #41, hereinafter referred to as the Union, for employment about June 27, 2014. Starting about April 2013, Wieresma and other Union representatives met with representatives of the Respondent and engaged in discussions about the Respondent entering into a collective-bargaining agreement with the Union. Despite these discussions, the Respondent ultimately refused to become signatory to the Union about late 2013. On February 18, 2014, Respondent's Superintendent Dean Sheedy informed Wieresma that EMCOR, the parent company of the Respondent, was looking to hire a project manager. Sheedy also informed Wieresma that, if he was interested, he should apply for the position of project manager. Starting about March 3, 2014, Wieresma and other Union representatives began bannerng the Respondent's fabrication shop and headquarters. They stood on a right-of-way near the Respondent's entrance carrying signs saying "Notice To Public. Shambaugh &

Son Does Not Employ Members Of Or Have A Contract With Local 41". They bannered until July 2014.

Starting about May 2014, Union Business Manager/District Organizer Wieresma began talking to Respondent's employees (insulators) about organizing the Respondent and asking them to sign authorization cards. Also, on May 27, 2014, Wieresma and other Union representatives went to Respondent's headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, the Respondent told them that Respondent was not hiring. On May 28, 2014, Wieresma and other Union representatives went to Respondent's headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, the Respondent told them that the Respondent was not hiring. On May 29, 2014, Wieresma and other Union representatives went to Respondent's headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, the Respondent told them that the Respondent was not hiring.

On June 9, 2014, Respondent entered into a Client Services Agreement with Tradesmen International to obtain mechanical insulators. Also, on June 9, 2014, Union Business Manager/District Organizer Wieresma saw that Tradesmen International had posted an online advertisement for a mechanical insulator position. On the same day, Wieresma applied for a mechanical insulator position through Tradesmen International. Wieresma completed and submitted an online application to Tradesmen International. He also emailed a copy of his resume to Tradesmen International. Wieresma's resume demonstrated his Union affiliation. His resume also demonstrated that he possessed more than 12 years of relevant experience. Later

that day, a representative of Tradesmen International sent Wieresma an email stating that Tradesmen International had received his application and someone would review his resume.

Sometime in June 2014, a representative of Tradesmen International informed Union Business Manager/District Organizer Wieresma that Tradesmen International wanted to interview him about June 12, 2014. About June 12, 2014, a representative of Tradesmen International interviewed Wieresma. During the interview, a representative of Tradesmen International told Wieresma that he was hired. After the interview, Wieresma called Tradesmen International on several occasions to check upon the status of the mechanical insulator position. He was told that the position was a few weeks out. Sometime in June 2014, Wieresma saw that Tradesmen International had posted another online advertisement for a mechanical insulator position. On June 27, 2014, a representative of Tradesmen International informed Wieresma that the client had withdrawn its request for a mechanical insulator and it was not going to work out. Starting about June 30, 2014, Tradesmen International referred around seven mechanical insulator applicants to Respondent for employment. Also, about June 30, 2014, Respondent directly hired around four mechanical insulators.

In August 2014, Wieresma went to Respondent's headquarters and attempted to apply for positions with Respondent. At the time, he wore shirts with Union insignia. However, the Respondent told him that Respondent was not hiring. On September 18, 2014, Union member Joe Koontz, Jr. sent a text message to Respondent's Superintendent Sheedy in which he asked if the Employer was hiring. In response, Sheedy asked if Koontz, Jr. was still in the Union. Koontz, Jr. stated that he was not. Sheedy then asked if Koontz, Jr. had written confirmation of his withdrawal from the Union. Koontz, Jr. stated that he did not.

Based upon the foregoing, Counsel for the Acting General Counsel alleges in the Consolidated Complaint that the Respondent, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, hereinafter referred to as the Act. Specifically, the General Counsel alleges that the Respondent violated Sections 8(a)(1) and (3) of the Act by failing to consider for hire or hire Ryan Wieresma for employment since about June 27, 2014 even though Respondent was hiring or had concrete plans to hire mechanical insulators since about June 2014.¹ Also, the General Counsel alleges that the Respondent violated Sections 8(a)(1) of the Act by interrogating applicants for employment about their Union membership, activities, and sympathies and requiring applicants for employment to provide written evidence of their withdrawal from the Union in order to receive consideration for employment about September 18, 2014².

II. STATEMENT OF THE FACTS

A. Background

The Respondent, who is owned by a company named EMCOR, is a limited partnership corporation with an office and place of business in Fort Wayne, Indiana. The Respondent is engaged in the business of providing mechanical, electrical, plumbing, fire protection services, and engineering and design services to various customers. The Respondent operates several divisions: electrical, fire protection, plumbing, mechanical, and insulation division, which is a

¹ These allegations are alleged in paragraphs 6(a) and 6(b) of the Consolidated Complaint. (GCEx 1(g)).

² These allegations are alleged in paragraphs 5(a) and 5(b) of the Consolidated Complaint. (GCEx 1(g)).

part of the mechanical division. All of the employees employed in these divisions are unionized except for the insulation division. The insulation division, which was started in 2012, employs mechanical insulators who hang pipe and insulate pipe and ductwork. The Respondent hires between seven to ten mechanical insulators annually to perform work (TR 11-15; GC Ex 1(g)). William (Bill) Meyer is the Senior Vice President (TR 247). Gary Perkey is Vice President of the Mechanical Division (TR 35-36; 250). Dean Sheedy is the Superintendent (TR 11-12; GC Ex 1).

B. Discussions Between the Union and Respondent About Organizing Respondent's Mechanical Insulators.

Starting about April 2013, Union Business Manager/District Organizer Wieresma and other Union representatives attempted to organize the Respondent's mechanical insulators by utilizing the Union's "top-down" approach. The Union's "top-down" approach meant that the Union would approach management representatives of an employer and asked them to enter into a collective-bargaining agreement with the Union whereby the Union would provide the employer with skilled Union members to perform work for the employer. In effort to organize the Respondent's mechanical insulators, Wieresma and Former Union Business Manager Dave Marvin met with Senior Vice President Meyer, Vice President of the Mechanical Division Perkey, and Superintendent Sheedy on several occasions to discuss the possibility of having the Respondent enter into a collective-bargaining agreement with the Union whereby the Union would provide the Respondent with skilled Union mechanical insulators to perform work for the Respondent. Despite these discussions, the Respondent failed to become signatory to the Union. On July 16, 2013, Wieresma sent an email to Meyer and Perkey asking them to keep the

door open regarding future possibilities with the Union. On October 2013, Wieresma again sent an email to Meyer and Perkey asking them to keep the door open regarding future possibilities with the Union. The Respondent ultimately refused to become signatory to the Union despite Wieresma's attempts (TR 90-97, 166-188; GC Ex 2; Resp. Ex 2).

C. Discussion About A Project Manager Position With EMCOR, Respondent's Parent Company.

On February 18, 2014, Superintendent Sheedy informed Union Business Manager/District Organizer Wieresma that EMCOR, the parent company of the Respondent, had posted a position for a project manager with required, in relevant part, 10 years to 15 experience years in construction. Sheedy also informed Wieresma that, if Wieresma was he was interested, to let him know (TR 126-128; GC Ex 14; GC Ex 15).

D. The Union's Continued Efforts to Organize Respondent's Mechanical Insulators.

Starting about March 3, 2014, Union Business Manager/District Organizer Wieresma and other Union members began bannering at the Respondent's fabrication shop for a couple of weeks. Specifically, they stood on a right-of-way near the Respondent's entrance carrying signs saying "Notice To Public. Shambaugh & Son Does Not Employ Members Of Or Have A Contract With Local 41". After a couple of weeks, Wieresma and other Union members began bannering/picketing at the Respondent's headquarters carrying the same signs. While Wieresma was engaged in bannering, he saw Senior Vice President Meyer daily. Wieresma and other Union members engaged in bannering at Respondent's headquarters until early July 2014 (TR 97-103).

Starting about May 2014, Union Business Manager/District Organizer Wieresma attempted to organize the Respondent utilizing a “bottom-up” approach by talking to Respondent’s mechanical insulators about the benefits of organizing the Respondent and asking them to sign authorization cards (TR 191-192, 207-208). Also, as a part of Wieresma’s organizing efforts, he attempted to apply at the Respondent’s headquarters in an effort to get hired as an employee of Respondent. On May 27, 2014, Wieresma and other Union representatives went to Respondent’s headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, a representative of the Respondent told them that Respondent was not hiring. On May 28, 2014, Wieresma and other Union representatives went to Respondent’s headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, a representative of the Respondent told them that the Respondent was not hiring. On May 29, 2014, Wieresma and other Union representatives went to Respondent’s headquarters and attempted to apply for positions with Respondent. At the time, they wore shirts with Union insignia. However, a representative of the Respondent told them that the Respondent was not hiring (TR 103-110).

On June 9, 2014, Respondent entered into a Client Services Agreement with Tradesmen International to obtain mechanical insulators for employment (TR 19-24; GC Ex 3(a); GC Ex 3(b)). Also, on June 9, 2014, Union Business Manager/District Organizer Wieresma saw that Tradesmen International had posted an online advertisement for a mechanical insulator position. On the same day, Wieresma applied for mechanical insulator position through Tradesmen International. Wieresma completed and submitted an online application to Tradesmen International which indicated that he possessed over 12 years of relevant experience. He also

emailed a copy of his resume to Tradesmen International, which indicated that he possessed over 12 years of relevant experience. His resume also indicated his Union affiliation. Later that day, a representative from Tradesmen International sent Wieresma an email stating that Tradesmen International had received his application and someone would review his resume (TR 110-112; GC Ex 9; GC Ex 10; Resp. Ex 3).

Sometime in June 2014, Donielle Lefever, a representative of Tradesmen International, informed Union Business Manager/District Organizer Wieresma that Tradesmen International wanted to interview him about June 12, 2014. About June 12, 2014, Joey Tippmann, a representative of Tradesmen International, interviewed Wieresma. During the interview, Tippmann told Wieresma that he was hired. After the interview, Wieresma called Tradesmen International on several occasions to check upon the status of the mechanical insulator position. He was told that the position was a few weeks out. About June 24, 2014, Wieresma saw that Tradesmen International had posted another online advertisement for a mechanical insulator position (TR 112-115). Sometime in June 2014, Tippmann called Superintendent Sheedy to let know that he had received Wieresma's application. Sheedy told Tippmann that he was not interested in Wieresma (TR 23, 38-39). On June 27, 2014, Tippmann informed Wieresma that the client had withdrawn its request for a mechanical insulator and the position was not going to work out (TR 117-121, 324-325) .

Starting about June 30, 2014, Tradesmen International referred seven mechanical insulator applicants to Respondent for employment. Tradesmen International referred the following individuals to Respondent for employment: Michael Burdette on June 29, 2014; Brian Carmichael on August 3, 2014; Kevin Vancamp on August 3, 2014; Keith Mallott on August 24,

2014; Steven Roebuck on August 31, 2014; Tyler Thacker on September 7, 2014; and Douglas Harper on October 19, 2014. Mallott possessed less than five years of relevant work experience at the time that he was hired. Burdette possessed no more than five years of relevant work experience at the time that he was hired (TR 23-26; 223-224; 230-231; GC Ex 4).

Also, starting about June 30, 2014, Respondent hired directly four mechanical insulators: Jared Hill on September 15, 2014; Mitchell Burdette on September 26, 2014; Andrew Krieg on October 27, 2014; and Jonathon Krieg on October 30, 2014. Mitchell Burdette, Hill, and Andrew Krieg and did not possess any relevant work experience at the time that they were hired (TR 26-30; 214-215; 230; GC Ex 5).

In August 2014, Wieresma went to Respondent's headquarters and attempted to apply for positions with Respondent. At the time, he wore shirts with Union insignia. However, a representative of the Respondent told him that Respondent was not hiring (TR 205). On August 27, 2014, Wieresma saw that Tradesmen International had posted an online advertisement for a mechanical insulator position (TR 122-123, 130-131, 205-206; GC Ex 13). On September 18, 2014, Union member Joe Koontz sent a text message to Superintendent Sheedy in which he asked if the Employer was hiring. In response, Sheedy asked if Koontz was still in the Union. Koontz stated that he was not. Sheedy then asked if Koontz had written confirmation of his withdrawal from the Union. Koontz stated that he did not (TR 50-55, 78-81; GC Ex 7; J Ex 1).

E. Nedra Corporation and the Concordia Lutheran Theological Seminary Jobsite.

Union Business Manager/District Organizer Wieresma began working for Nedra Corporation, a mechanical insulation company, in 2004 as an insulator (TR 131-132). At that

time, Dean Sheedy was employed as a superintendent at Nedra Corporation. The other superintendent was Marty Crouch (TR 140). In the Summer of 2007, Wieresma was performing insulation work on the Concordia Lutheran Theological Seminary jobsite (“Concordia jobsite”) in Fort Wayne, Indiana. During the Summer of 2007, Shane Shepherd, an employee of the Respondent who was also working at the Concordia jobsite, made derogatory comments toward Wieresma. Specifically, Shepherd asked Wieresma how his wife and kids were doing. Shepherd also told Wieresma to tell Wieresma wife that he would be right over later to fuck her good. Shepherd further told Wieresma to tell his wife to keep it wet for him. Wieresma told Shepherd that, if he said another word, he would knock his teeth down his throat. However, Wieresma did not pull out a knife on Shepherd or threaten to gut Shepherd. Nedra Corporation employee Gary Stanton was also present. He testified that Wieresma told Shepherd that, if he said another word, he would knock his teeth down his throat. However, Wieresma did not pull out a knife and threaten to gut Shepherd. After the incident, Wieresma continued to work at the Concordia jobsite until about September 21, 2007 when he left to work on another project. On March 5, 2008, Wieresma returned to the Concordia jobsite to perform work. He also remained employed by Nedra Corporation until April 1, 2008 when he went to work for the Union (TR 61-78; 133-138; 141-143; Resp. Ex 5; Resp. 8).

III. ARGUMENT

A. The Respondent Failed to Consider for Hire or Hire Ryan Wieresma.

In FES, 331 NLRB 9 (2000), the Board set forth a framework for analysis of cases involving alleged refusals to hire or consider for hire based on union activity or membership.

Also, in FES, the Board held that in order to establish a discriminatory refusal to hire, the General Counsel must first show the following:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that 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) that antiunion animus contributed to the decision not to hire the applicants. Id.

Once the General Counsel has established the above, the burden then shifts to respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In addition to the above-described standard for determining a violation in refusal to hire cases, the Board in FES also established a framework for analysis in refusal-to-consider-for-hire cases. The Board held that, in order to establish a discriminatory refusal to consider for hire, the General Counsel must show the following: "(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment." Id. Once this is established, the burden will shift to the respondent to show that it "would not have considered the applicants even in the absence of their union activity or affiliation." Id.

In the instant case, the General Counsel has clearly met its burden in establishing a prima facie case under FES. First, Respondent was hiring at the time Union Business Manager/District Organizer Wieresma, a member of the Union, applied for a mechanical position. On June 9, 2014, Respondent entered into a Client Services Agreement with Tradesmen International to obtain mechanical insulators for employment (TR 19-24; GC Ex 3(a); GC Ex 3(b)). Also, on

June 9, 2014, Wieresma saw that Tradesmen International had posted an online advertisement for a mechanical insulator position. On the same day, Wieresma applied for mechanical insulator position through Tradesmen International. Wieresma completed and submitted an online application to Tradesmen International which indicated that he possessed 12 years of relevant experience. He also emailed a copy of his resume to Tradesmen International, which indicated his Union affiliation. Later that day, a representative from Tradesmen International sent Wieresma an email stating that Tradesmen International had received his application and someone would review his resume (TR 110-112; GC Ex 9; GC Ex 10; Resp. Ex 3).

Starting about June 30, 2014, Tradesmen International referred seven mechanical insulator applicants to Respondent for employment. Tradesmen International referred the following individuals to Respondent for employment: Michael Burdette on June 29, 2014; Brian Carmichael on August 3, 2014; Kevin Vancamp on August 3, 2014; Keith Mallott on August 24, 2014; Steven Roebuck on August 31, 2014; Tyler Thacker on September 7, 2014; and Douglas Harper on October 19, 2014. Mallott possessed less than five years of relevant work experience at the time that he was hired. Burdette possessed no more than five years of relevant work experience at the time that he was hired (TR 23-26; 223-224; 230-231; GC Ex 4).

Also, starting about June 30, 2014, Respondent hired directly four mechanical insulators: Jared Hill on September 15, 2014; Mitchell Burdette on September 26, 2014; Andrew Krieg on October 27, 2014; and Jonathon Krieg on October 30, 2014. Hill, Andrew Krieg, and Burdette did not possess any relevant work experience at the time that they were hired (TR 26-30; 214-215; 230; GC Ex 5). Based on the above, the General Counsel has clearly demonstrated that the

Respondent was hiring at the time the Respondent failed and refused to consider for hire or hire Union Business Manager/District Organizer Wieresma.

In addition, it is clear that the General Counsel has sufficiently demonstrated that Business Manager/District Organizer Wieresma had experience and training relevant to the position for mechanical insulator. Superintendent Sheedy testified that the minimum qualifications for the position of apprentice and journeyman mechanical insulators are that they possess some knowledge of insulating and some insulating experience, but it did not matter how much work experience (RE 19-23). Despite Sheedy's testimony, it clear that the Respondent hired Mitchell Burdette, Jared Hill, and Andrew Krieg, mechanical insulators who possessed no relevant work experience (TR 230-231; GC 5). Either way, Wieresma indicated on his application and resume that he possessed more than 12 years of relevant insulation experience. (TR 110-112; GC Ex 9; GC Ex 10). Thus, based on the above, the General Counsel has shown that Wieresma had experience relevant to the generally known requirements for the position of mechanical insulator.

Finally, the General Counsel clearly demonstrated that antiunion animus contributed to Respondent's decision not to consider for hire or hire Union Business Manager/District Organizer Wieresma. The Respondent asserts that it did not hire Wieresma because Wieresma allegedly pulled a knife on one of Respondent's former employees about six or seven years ago. Specifically, Superintendent Sheedy testified that, sometime in June 2014, he informed Tradesmen International Tippmann that he did not want to hire Wieresma. Sheedy also testified that he did not hire or consider for hire Wieresma because Wieresma allegedly pulled a knife on Respondent's employee Shane Shepherd at the Concordia jobsite about six or seven years ago in

the Spring or Summer. Sheedy further testified that he was told to remove Wieresma from the Concordia jobsite (TR 39-43). However, record evidence demonstrates that the alleged incident did not occur. Record evidence also demonstrates that the real reason that Respondent did not consider for hire or hire Wieresma was because the Employer harbored hostility toward Wieresma since he tried to organize Respondent's mechanical insulators as discussed below.

First, Respondent's witness Shane Shepherd testified that he worked for the Respondent in 2007 and 2008 as a plumbing apprentice. Shepherd also testified that, about July or August 2007, he approached Union Business Manager/District Organizer Wieresma while they were working at the Concordia jobsite and asked Wieresma how his wife and kids were doing. He also testified that Respondent's employee Cody Love was also present. Shepherd further testified that, at that point, Wieresma pointed a knife at him and threatened to gut him.

Additionally, Shepherd testified that he reported the incident to Respondent's former foreman Ed Love, the father of Cody Love. Moreover, Shepherd testified that Wieresma was removed from the Concordia jobsite, but he did not know the date. Finally, Shepherd testified that he saw Wieresma at the Concordia jobsite picking up his tools, but he did not know the date (TR 294-298).

Respondent's witness and current employee Cody Love testified that, during the Summer of 2007, he was working at the Concordia jobsite. While he was working, Respondent's former employee Shepherd asked Wieresma how his wife and kids were doing. While he was working, he saw that employee Shepherd and Wieresma were having words. Then, Wieresma pointed a knife at Shepherd and threatened to gut him. Shepherd also testified that he and Love reported

the incident to Respondent's former foreman Love. He further testified that he never saw Wieresma at the Concordia jobsite after the incident (TR 287-292).

Respondent's witness Ed Love testified that he worked for the Respondent from the late 1990's until 2014. In 2007, he served as a foreman for the Respondent. He also testified that, during the Summer of 2007, Respondent's employee Cody Love and Respondent's former employee Shepherd informed him that Union Business Manager/District Organizer Wieresma pulled a knife on Shepherd and threatened him at the Concordia jobsite. He immediately called Dean Sheedy, who was one of Nedra Corporation's Project Managers at the time, and told Sheedy to remove Wieresma from the Concordia jobsite. Love further testified that Wieresma was removed from the Concordia jobsite on that day. Additionally, he testified that he never saw Wieresma at the Concordia jobsite ever again (TR 299-304).

Respondent's witness Marty Crouch testified that, in 2007, he was employed by Nedra Corporation as one of two project managers. Sheedy was the other project manager. Crouch also testified that, in the Summer of 2007, he and other management representatives of Nedra Corporation determined that Wieresma needed to be removed from the Concordia jobsite because of an incident at the jobsite (TR 281-285).

Union Business Manager/District Organizer Wieresma testified that, in the Summer of 2007, Wieresma was performing insulation work at the Concordia jobsite. During the Summer of 2007, Respondent's former employee Shepherd, made derogatory comments toward Wieresma. Specifically, Shepherd asked Wieresma how his wife and kids were doing. Shepherd also told Wieresma to tell Wieresma wife that he would be right over later to fuck her good. Shepherd further told Wieresma to tell his wife to keep it wet for him. Wieresma told

Shepherd that, if he said another word, he would knock his teeth down his throat. However, Wieresma did not pull out a knife on Shepherd or threaten to gut Shepherd. Gary Stanton, a former employee of Nedra Corporation, was also present. Stanton testified that Wieresma told Shepherd that, if he said another word, he would knock his teeth down his throat. However, Wieresma did not pull out a knife and threaten to gut Shepherd. After the incident, Wieresma continued to work at the Concordia jobsite until about September 21, 2007 when he left to work on another project. On March 5, 2008, Wieresma returned to the Concordia jobsite to perform work. He also remained employed by Nedra Corporation until April 1, 2008 when he went to work for the Union (TR 133-138; 320-321; Resp. Ex 5; Resp. 8).

Gary Stanton testified that, about the Summer of 2007, Respondent's former employee Shepherd approached Union Business Manager/District Organizer Wieresma and made some comment regarding Wieresma's kids and asked Wieresma if he knew who the father was. Stanton also testified that Shepherd insinuated that he might be the father. Stanton further testified that Wieresma told Shepherd that he was going to punch Shepherd's teeth down his throat. Additionally, Stanton testified that Wieresma never pulled a knife on Shepherd or threatened to gut Shepherd. Finally, Stanton testified that Wieresma continued to work at the Concordia jobsite one or two weeks after the incident (TR 61-78).

Michael Cox, owner of Nedra Corporation, testified that he was never informed that Union Business Manager/District Organizer Wieresma had pulled a knife on Respondent's former employee Shepherd and threatened him. Cox also testified that he was never informed that Wieresma had been removed because of this alleged incident. Cox further testified that Wieresma was a good employee and had never been disciplined. Additionally, Cox testified that

Wieresma resigned his employment with Nedra Corporation to work for the Union about seven or eight years ago (TR 141-143).

Respondent's witnesses Crouch, Cody Love, Respondent's former employee Shepherd, and Ed Love testified that the incident between Respondent's former employee Shepherd and Wieresma occurred in the Summer of 2007 (TR 282, 288, 298, 302). Ed Love testified that Wieresma was removed from the Concordia jobsite on the day of the incident. Ed Love also testified that he never saw Wieresma again after the incident (TR 302). Cody Love further testified that he never saw Wieresma at the Concordia jobsite after the incident (TR 287-292). Despite the testimony of Respondent's witnesses, documentary evidence demonstrates that Wieresma worked at the Concordia jobsite until around September 21, 2007, which is the Fall of 2007 (Resp. Ex 5). Also, documentary evidence demonstrates that Wieresma returned to the Concordia jobsite to perform insulation work on March 5, 2008 (Resp. Ex 10).

Furthermore, record evidence demonstrates that, on February 18, 2014, Superintendent Sheedy informed Business Manager/District Organizer Wieresma that EMCOR, the parent company of the Respondent, had posted a position for a project manager with required, in relevant part, 10 years to 15 years in construction. Sheedy also informed Wieresma that, if Wieresma was interested, to let him know (TR 126-128; GC Ex 14; GC Ex 15). This conversation took place almost seven years after the alleged incident. Even though Sheedy testified that the February 18, 2014 conversation did not take place, a recording of this conversation was played during the hearing. This recording clearly demonstrated that such conversation took place and that Sheedy clearly lied about it (TR 43-44; GC Ex 14; GC Ex 15). Thus, it can be concluded that, if Wieresma had pulled a knife on Respondent's former employee

Shepherd and threatened to gut him in the Summer of 2007, Sheedy would not be talking to Wieresma about Wieresma's possible interest in a project manager position with EMCOR. It does not make sense that Sheedy would talk to Wieresma about his possible interest in a project manager position or any position for that matter if Wieresma truly had pulled a knife on Shepherd and threatened to gut him.

Based upon the foregoing, the testimony of Union Business Manager/District Organizer Wieresma, Stanton, and Cox, documentary evidence, and Wieresma's discussion with Sheedy about the project manager position with EMCOR demonstrate that Wieresma never pulled a knife on Stanton and threatened to gut him in the Summer of 2007 or any other time. Thus, since it can be concluded that the alleged incident never occurred, the Respondent's proffered reason for failing to consider for hire or hire Wieresma because of the alleged Summer 2007 incident, is false and pretextual. Since Respondent's proffered reason for failing and refusing to consider hire or hire Wieresma is pretextual, it can be inferred that antiunion animus motivated the Respondent's actions toward Wieresma because he engaged in Union and protected concerted activities by bannering the Employer's fabrication shop and headquarters, talking to Respondent's mechanical insulators about unionizing, and applying directly with the Respondent in an attempted to organize Respondent's mechanical insulators. Southside Hospital, 344 NLRB 634 (2005) (citing Limestone Apparel Corp., 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982)).

Second, record evidence demonstrates that, on September 18, 2014, Union member Joe Koontz, Jr. sent a text message to Respondent's Superintendent Sheedy in which he asked if the Employer was hiring. In response, Sheedy asked if Koontz, Jr. was still in the Union. Koontz,

Jr. stated that he was not. Sheedy then asked if Koontz, Jr. had written confirmation of his withdrawal from the Union. Koontz, Jr. stated that he did not (TR 50-55, 78-81; GC Ex 7; J Ex 1).

By questioning Koontz, Jr. about his Union membership, Sheedy engaged in unlawful interrogation which violated Section 8(a)(1) of the Act. Adco Electric, 307 NLRB 1113, 1116-1117 (1992). Pleasant Manor Living Center, 324 NLRB 368 (1997). Sheedy also violated Section 8(a)(1) of the Act by requiring written confirmation of Koontz, Jr.'s withdrawal from the Union as a condition of employment. The Board has held that employers may not legally condition employment on union membership considerations and statements which impose such restrictions on employment are coercive within the meaning of Section 8(a)(1) of the Act. Parkview Gardens Care Center, 280 NLRB 47 (1986). Respondent's actions clearly demonstrate that the Respondent harbored hostility toward the Union.

Third, the Respondent knew that Union Business Manager/District Organizer Wieresma was trying to organize its mechanical insulators starting about March 2014. Superintendent Sheedy testified that he knew Wieresma had engaged in bannering at the Respondent's headquarters starting about March 2014 (TR 46-48). Senior Vice President Meyer also testified that he was aware that Wieresma had engaged in bannering about March 2014. Meyer further testified that he was aware that Wieresma had been talking to the Respondent's mechanical insulators about joining the Union (TR 279-280).

Given all of the above, the General Counsel has clearly demonstrated a *prima facie* case of unlawful refusal to consider hire or hire. Under FES, the burden now shifts to Respondent to establish that it would not have considered for hire or hired the alleged discriminatee even in the

absence of his Union activity or affiliation. However, Respondent cannot to meet that burden. First, Superintendent Sheedy testified that he did not consider for hire or hire Union Business Manager/District Organizer Wieresma solely because he pulled a knife on Respondent's employee Shane Shepherd and threatened him at the Concordia jobsite in the Summer of 2007 (TR 38-43). However, as discussed above, the testimony of Wieresma, Stanton, and Cox, documentary evidence, and Wieresma's discussion with Sheedy about the project manager position with EMCOR demonstrate that the alleged 2007 incident never occurred. Since the Respondent's proffered reason for failing and refusing to hire Wieresma is false and pretextual, it may be concluded that Wieresma was not considered for hire or hired because of his Union activities. Southside Hospital, supra. Limestone Apparel Corp., supra. Thus, Respondent cannot now show that it would not have hired Wieresma even in the absence of his Union activity or affiliation. Furthermore, the Respondent has failed to produce any evidence showing that Wieresma was not qualified for the position of mechanical. Therefore, the Respondent has failed to meet its burden that it would not have considered for hire or hired the Wieresma even absent his Union affiliation and activities, and Respondent's refusal to consider for hire or hire Wieresma therefore violates Section 8(a)(1) and (3) of the Act.

B. Discriminatees Are Entitled to Search for Work and Work-Related Expenses Regardless Of Whether These Amounts Exceed Interim Earnings.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. Deena Artware, Inc., 112 NLRB 371, 374 (1955); Crossett Lumber Co., 8 NLRB 440, 498 (1938). These expenses might include:

increased transportation costs in seeking or commuting to interim employment³; the cost of tools or uniforms required by an interim employer⁴; room and board when seeking employment and/or working away from home⁵; contractually required union dues and/or initiation fees, if not previously required while working for respondent⁶; and/or the cost of moving if required to assume interim employment.⁷

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. See W. Texas Utilities Co., 109 NLRB 936, 939 fn.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); see also N Slope Mech., 286 NLRB 633, 641 fn.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full

³ D.L Baker, Inc., 351 NLRB 515, 537 (2007).

⁴ Cibao Meat Products & Union of Needle Trades, Indus. & Textile Employees, 348 NLRB 47, 50 (2006); Rice Lake Creamery Co., 151 NLRB 1113, 1114 (1965).

⁵ Aircraft & Helicopter Leasing, 227 NLRB 644, 650 (1976).

⁶ Rainbow Coaches, 280 NLRB 166, 190 (1986).

⁷ Coronet Foods, Inc., 322 NLRB 837 (1997).

expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work⁸, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." Jackson Hosp. Corp., 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." Phelps Dodge Corp. v NLRB, 313 U.S. 177, 194 (1941); see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting Phelps Dodge). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); Hobby v. Georgia Power Co., 2001 WL 168898 at *29 (Feb. 2001), aff'd Georgia Power Co. v. US. Dep 't of

⁸ In Re Midwestern Pers. Servs., Inc., 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment").

Labor, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." Don Chavas, LLC, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.⁷ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See Jackson Hosp. Corp., 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).⁹

IV. CONCLUSION

For the above-stated reasons, the Counsel for the General Counsel respectfully requests that the Administrative Law Judge find the aforementioned conduct of the Respondent to be in violation of the Act and recommend an appropriate remedy for said violations. Specifically, the Respondent's interrogation of applicants for employment about their Union membership, activities, and sympathies and the requirement that applicants for employment provide written evidence of their withdrawal from the Union in order to receive consideration for employment

⁹ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. Knickerbocker Plastic Co., Inc., 104 NLRB 514, 516 at *2(1953).

about September 18, 2014 should be found violative of Sections 8(a)(1) of the Act. Also, the Respondent's failure and refusal to consider for hire or hire Ryan Wieresma because of his Union activities should be found violative of Sections 8(a)(1) and (3) of the Act as a matter of law.

The Counsel for the General Counsel also respectfully requests that the Administrative Law Judge order the Respondent to post at its offices, notices containing assurances that Respondent shall not repeat the unfair labor practices found herein, and shall remedy them as ordered. The Counsel for the General Counsel further requests that the Administrative Law Judge order the Respondent to make whole Ryan Wieresma for any loss of earnings and other benefits as a result of the Respondent's failure and refusal to consider him for hire or hire him about June 27, 2014 and any difference in taxes due to the lump-sum payment and notification to the Social Security Administration so that the payments will be allocated to the appropriate periods. Additionally, the Counsel for the General Counsel requests that the Respondent reimburse the discriminatee for all search for work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. Additionally, the Counsel for the General Counsel requests that such notice include the language found in "Attachment A".

Attachment A

Proposed Notice To Employees

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 do anything to prevent you from exercising the above rights.

WE WILL NOT ask job applicants about their union membership or support or require them to provide written evidence of their withdrawal from the International Association of Heat and Frost Insulators and Allied Workers, Local #41, or any other union, in order to receive consideration for employment.

WE WILL NOT refuse to hire job applicants or refuse to consider for hire job applicants because of their union membership or union support.

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

WE WILL offer to Ryan Wiersema the job he applied for in June 2014, or a similar job, and give him his seniority and other benefits from the date he should have been hired.

WE WILL make Ryan Wiersema whole for any loss of wages and benefits and any search-for-work and work-related expenses he incurred because we failed to hire him.

WE WILL reimburse Ryan Wiersema for all search for work and work-related expenses regardless of whether he received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL remove from our files all references to our failure to hire Ryan Wiersema in June 2014 and **WE WILL** notify him in writing that this has been done and that our failure to hire him will not be used against him in any way.

WE WILL compensate Ryan Wiersema for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

DATED at Indianapolis, Indiana, this 12th day of August, 2015.

Respectfully submitted,

/s/ Raifael Williams

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing GENERAL COUNSEL'S POST-HEARING BRIEF was filed with the Division of Judges electronically and was electronically served upon the following person on this 12th day of August 2015:

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