

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHAMBAUGH & SON, L.P.

and

Cases 25-CA-141001
25-CA-145447

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

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted by:

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 4

II. STATEMENT OF THE FACTS 5

 A. Background.....5

 B. Discussions Between the Union and Respondent About Organizing
 Respondent’s Mechanical Insulators.....6

 C. Discussion About A Project Manager Position With EMCOR, Respondent’s
 Parent Company.7

 D. The Union’s Continued Efforts to Organize Respondent’s Mechanical
 Insulators.7

 E. Nedra Corporation and the Concordia Lutheran Theological Seminary Jobsite.....10

III. ARGUMENT..... 11

 A. The Judge Correctly Concluded That Respondent Violated Sections 8(a)(1) and
 (3) of the Act By Refusing to Hire and Consider for Hire Union Business
 Manager/Organizer Ryan Wieresma Because He Engaged in Union and
 Protected Concerted Activities.11

 B. The Judge Correctly Concluded That The Respondent Violated Section 8(A)(1)
 of the Act By Interrogating Applicants for Employment About Their Union
 Membership and Requiring Applicants for Employment to Provide Written
 Evidence of Their Withdrawal From the Union In Order to Receive
 Consideration For Employment.20

IV. CONCLUSION..... 21

TABLE OF CASES

Cases

FES, 331 NLRB 9 (2000) 12
Limestone Apparel Corp., 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982))..... 20
M.J. Mechanical Services, Inc., 324 NLRB 812, 813 (1997) 21
Southside Hospital, 344 NLRB 634 (2005)..... 20
Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)..... 19
Toering Electric Co., 351 NLRB 225 (2007) 13

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Comes now Counsel for the General Counsel and respectfully submits to the Board this Answering Brief to the Exceptions to the Administrative Law Judge's Decision filed by Shambaugh & Son, L.P, hereinafter referred to as Respondent. Counsel for the General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's Decision in instant cases, which issued on September 17, 2015, be affirmed. In support of this position, Counsel for the General Counsel offers the following:

I. STATEMENT OF THE CASE

On March 31, 2015, Region 25 issued a consolidated complaint and notice of hearing in the instant cases alleging that the Respondent has violated Sections 8(a)(1) and (3) of National Labor Relations Act (Act) by failing 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. On July 7 and July 8, 2015, an administrative hearing was held before Administrative Law Charles Muhl regarding the instant cases. On August 12, 2015, the parties filed post-

hearing briefs. On September 17, 2015, the Judge issued his decision. In his decision, the Judge correctly concluded that the Respondent failed to consider for hire or hire Wieresma for employment about June 27, 2014 because he engaged in Union activities in violation of Sections 8(a)(1) and (3) of the Act (Decision, p. 10, l. 17 – p. 13, l. 15). The Judge also correctly concluded that the Respondent interrogated applicants for employment about their Union membership, activities, and sympathies and required applicants for employment to provide written evidence of their withdrawal from the Union in order to receive consideration for employment about September 18, 2014 in violation of Section 8(a)(1) of the Act (Decision, p. 13, l. 17 – p. 14, l. 30). On October 15, 2015, the Respondent filed exceptions to the Judge’s Decision.

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 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 bannerering 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 bannerering/picketing at the Respondent's headquarters carrying the same signs. While Wieresma was engaged in bannerering, he saw Senior Vice President Meyer daily. Wieresma and other Union members engaged in bannerering 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 the 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 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 Judge Correctly Concluded That Respondent Violated Sections 8(a)(1) and (3) of the Act By Refusing to Hire and Consider for Hire Union Business Manager/Organizer Ryan Wieresma Because He Engaged in Union and Protected Concerted Activities.

In its exceptions, the Respondent argues that the Judge erroneously concluded that the

Respondent violated the Act by refusing to hire and consider for hire Union Business Manager/District Organizer Wieresma because he engaged in Union and protected concerted activities.

The Respondent also argues that the Judge erroneously concluded that the Respondent harbored animosity toward Wieresma because he engaged in Union and protected concerted activities.

The Respondent further argues that the Judge erroneously dismissed Wieresma's history of violence at the Concordia Lutheran Theological Seminary Jobsite. Moreover, the Respondent argues that the Judge erroneously concluded that Wieresma continued to work at the Concordia jobsite after he threatened Employee Shane Shepherd with a knife in 2007.

Despite the Respondent's arguments, the Judge correctly concluded that the Respondent violated Sections 8(a)(1) and (3) by refusing to hire and consider for hire Union Business Manager/Organizer Wieresma because he engaged in Union and protected concerted activities (Decision, p. 13, l. 9-15). In his decision, the Judge cited FES, 331 NLRB 9 (2000), which sets forth the Board's framework for analyzing cases involving alleged refusals to hire or consider for hire based on union activity or membership. The Judge explained that, 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 (Decision, p. 10, l. 19-27). In his decision, the Judge also noted that, 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 Judge explained that 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. (Decision, p. 10, l. 36 – p. 11, l. 2). Additionally, the Judge cited Toering Electric Co., 351 NLRB 225 (2007) in which the Board held that, before an employer's motivation for a refusal to hire can be considered, the General Counsel must establish that the job applicant was genuinely interested in seek to establish an employment relationship in order to considered an employee within the meaning of the Act (Decision, p. 10, l. 29-34)

In his decision, the Judge correctly concluded that the Respondent was hiring or had concrete plans to hire (Decision, p. 11, l. 11-13). The Judge also correctly concluded that the applicants had the experience or training relevant to the announced or generally known requirements of the positions for hire (Decision, p. 5, l. 19-26). The Judge found that, in its answer to the consolidated complaint and notice of hearing, the Respondent admitted that, at certain times since June 2014, it had been hiring or had plans to hire (Decision, p. 11, l. 11-16). The Judge also found that, on June 9, 2014, Union Business Manager/District Organizer Wieresma completed an online application through Tradesmen International seeking a position as a mechanical insulator. His application indicated that the Union was his current employer.

His application also indicated that he had 12 years of relevant experience (Decision, p. 5, l. 19-26). The Judge further found that, after Wiersema submitted his application, Joey Tippman, a representative at Tradesmen International, called Superintendent Sheedy on a date in June 2014. Tippman advised Sheedy that one person had put in an application for work, he was unemployed, and he had previous experience in insulating. Tippman told Sheedy that the applicant was Wiersema. Sheedy advised Tippman he did not want to hire Wiersema (Decision, p. 5, l. 33-37). Moreover, the Judge found that Tradesmen International did not end up hiring Wiersema. Instead, on June 24, 2014, Tradesmen International reposted the mechanical insulator job opening online. Also, on June 29, 2014, Tradesmen International hired Michael Burdette as a temporary employee and Burdette went to work for the Respondent (Decision, p. 6, l. 1-6). Additionally, the Judge found that Tradesmen International hired five additional temporary employees that were assigned to the Respondent from August 3, 2014 to September 7, 2014 and, in addition to Burdette, the Respondent directly hired four permanent employees from September 2, 2014 to October 27, 2014 (Decision, p. 6, l. 1-22; p 11, l. 13-16).

Record evidence demonstrates that, 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 the 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 him 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 its exceptions, the Respondent asserts that Superintendent Sheedy refused to hire Union Business Manager/District Organizer Wieresma because Wieresma allegedly pulled out a knife and threatened to gut Employee Shepherd at the Concordia jobsite in the Summer of 2007 as noted above. However, in his decision, the Judge correctly concluded that antiunion animus contributed to the Respondent's refusal to hire and consider for hire and the reasons proffered by the Respondent for refusing to hire and consider for hire Wieresma were pretextual (Decision, p. 11, l. 18 – p. 13, l. 15). The Judge found that, during the hearing, Counsel for the General Counsel asked Sheedy whether he told Wieresma about a project manager job posting at EMCOR in February 2014. Sheedy denied that he did so in three, successive questions. However, unbeknownst to Sheedy, Wiersema had recorded the phone conversation he had with Sheedy, where Sheedy had done exactly that. Once Counsel for the General Counsel noted on the record that he intended to impeach Sheedy's denial with the recording, Sheedy interrupted

that discussion, without any question posed, and erroneously claimed he had just said “I don’t recall.”

The Judge also found that, after being impeached by Counsel for the General Counsel, Superintendent Sheedy’s testimony changed. The Judge noted that, prior to being impeached by Counsel for the General Counsel, Sheedy had been forthright and direct in responding to questions. However, after being impeached by Counsel for the General Counsel, Sheedy subsequently retreated and instead equivocated in his testimony following this exchange. Sheedy repeatedly answered questions by stating he did not recall or by qualifying his responses with phrases such as “I may have,” “I believe,” “possibly,” and “something to the effect of.” (Decision, p. 11, l. 34 – p. 12, l. 6). The Judge further found that the obvious dishonesty in Sheedy’s initial denial to a key question concerning whether he had advised Union Business Manager/District Organizer Wieresma of a job opening with the Respondent’s parent company, despite claiming that Wieresma was violent and unfit for employment coupled with his hedging of responses thereafter, called into question the credibility of Sheedy’s entire testimony (Decision, p. 12, l. 8-11). Moreover, the Judge found that the only intervening events between Sheedy’s and Wieresma’s discussion concerning the EMCOR job opening and Sheedy’s refusal to hire Wieresma was Wieresma’s participation in the Union’s bannering campaign from March 2014 to July 2014 at the Respondent’s fabrication shop and headquarters as well as Wieresma’s talking to Respondent’s mechanical insulators about organizing the Respondent. Additionally, the Judge found that the Respondent knew about Wieresma’s Union activities (Decision, p. 12, l. 45 – p. 13, l. 7). As discussed more fully below, the Judge also found that the Respondent unlawfully interrogated Union member Joe Koontz concerning his Union membership on

September 18, 2014 (Decision, p. 13, l. 32- p. 14, l. 10). Such conduct is further evidence of Respondent's antiunion animus.

Also, the Judge found that Union Business Manager/District Organizer Wieresma worked for Nedra Corporation, a mechanical insulation company, as an insulator in 2007. At that time, Dean Sheedy was employed as a superintendent at Nedra Corporation (Decision, p. 3, l. 1-7). From the Summer of 2007 to September 21, 2007, Wieresma performed insulation work on the Concordia jobsite in Fort Wayne, Indiana (Decision p. 8, l. 35-45). Despite the Respondent's assertions that Wieresma was removed permanently from the Concordia jobsite in the Summer of 2007, the Judge found that Wieresma returned to the Concordia jobsite about March 5, 2008. In support of his conclusion, the Judge relied on the invoices of Nedra Corporation which demonstrates that Wieresma returned to the Concordia job on March 5, 2008 and performed eight hours of work (Decision, p. 9, l. 7-13).

Record evidence demonstrates that 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. 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).

Also, 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).

Furthermore, starting about March 3, 2014, Union Business Manager/District Organizer Wieresma and other Union members began bannerng 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 bannerng/picketing at the Respondent's headquarters carrying the same signs. While Wieresma was engaged in bannerng, he saw Senior Vice President Meyer daily. Wieresma and other Union members engaged in bannerng at Respondent's headquarters until early July 2014 (TR 97-103).

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence does not support those credibility resolutions. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). As discussed above, the clear preponderance of record evidence supports the Judge's conclusions and credibility findings that Superintendent Sheedy did not rely on Concordia jobsite incident when he refused to hire and consider for hire Union Business Manager/District Organizer Wieresma. Also, the clear preponderance of record evidence also supports that Judge's conclusions and credibility findings that the Respondent's asserted reasons

for refusing to hire and consider for hire Wieresma were pretextual and sufficient to demonstrate Respondent's antiunion animus. Southside Hospital, 344 NLRB 634 (2005) (citing Limestone Apparel Corp., 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982)). Therefore, the Judge correctly concluded that the Respondent refused to hire and consider for Wieresma because he engaged in Union and protected concerted activities (Decision, p. 13, l. 9-15).

Additionally, In his decision, the Judge correctly concluded that Union Business Manager/District Organizer Wieresma was an employee pursuant to Section 2(3) of the Act (Decision, p. 11, l. 4-5). The Judge found that Wieresma testified that he intended to work for the Respondent or Tradesmen International as long as possible and his application to Tradesmen International was entered into evidence at the hearing. The Judge also found that the Respondent presented no evidence disputing the fact that Wieresma's interest in going to work for the Respondent or Tradesmen International was genuine (Decision, p. 11, l. 5-9). As noted above, record evidence supports that Judge's conclusions that Union Business Manager/District Organizer Wieresma was an employee pursuant to Section 2(3) of the Act.

B. The Judge Correctly Concluded That The Respondent Violated Section 8(A)(1) of the Act By Interrogating Applicants for Employment About Their Union Membership and Requiring Applicants for Employment to Provide Written Evidence of Their Withdrawal From the Union In Order to Receive Consideration For Employment.

Record evidence demonstrates that, 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). The Respondent argued that Sheedy's

statements did not violate the Act because Sheedy offered Koontz a job four days later. Despite the Respondent's contentions, the Judge correctly concluded that Sheedy's questions constituted unlawful interrogation (Decision, p. 13, l. 32 – p. 14, l. 5). The Judge also correctly concluded that questioning a job applicant about his union membership is inherently coercive and unlawful, even when the applicant is hired. M.J. Mechanical Services, Inc., 324 NLRB 812, 813 (1997) (Decision, p. 14, l. 7-10).

IV. CONCLUSION

For the reasons stated above, the Counsel for the General Counsel respectfully requests that Respondent's exceptions be denied in their entirety and that the Administrative Law Judge's Decision be affirmed and her recommended order adopted.

DATED at Indianapolis, Indiana, this 27th day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was filed with the Division of Judges electronically and was electronically served upon the following person on this 27th day of October 2015:

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