

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

**THOMAS J. MOYLE, JR., INC.  
D/B/A MOYLE CONSTRUCTION**

**And**

**Case 18-CA-165458**

**TROY A. HAAPALA, an Individual**

**COUNSEL FOR GENERAL COUNSEL'S POST HEARING BRIEF TO  
ADMINISTRATIVE LAW JUDGE CHARLES MUHL**

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## I. INTRODUCTION<sup>1</sup>

This case centers on the discharge of 18-year employee Troy A. Haapala from Thomas J. Moyle, Jr., Inc. d/b/a Moyle Construction (Respondent) on October 6, 2015.<sup>2</sup> Prior to his termination, Haapala engaged in protected concerted activity by sending a letter to Respondent requesting that Respondent provide health insurance to its employees. Haapala prepared the letter with the assistance of Ironworkers Local No. 8 and his striking coworker, William Wanhala. On September 24, Respondent stamped Haapala's letter "Received." Four days later, on September 28, Thomas Moyle, Respondent's namesake and founder, called Haapala into his office. Once in his office, Thomas Moyle repeatedly threatened Haapala for having sent the letter and equated Haapala's conduct with disloyalty to Respondent. Just eight days later, on October 6, Thomas Moyle visited the jobsite where Haapala was working. Later that same day, Operations Manager Eric Laitenen terminated Haapala, generically citing to his lack of productivity. Until his termination, Haapala received positive appraisals for his work performance, including during his most recent annual appraisal in May 2015. Haapala had no prior discipline concerning his productivity and had just a day prior to his termination been assigned to a new job constructing decking on a nature trail.

Respondent attempts to distance itself from the unchallenged facts of this case by claiming that Operations Manager Laitenen was somehow insulated from any animosity or knowledge pertaining to Haapala's protected activity and terminated Haapala solely because of his history of poor performance. Respondent presented only

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<sup>1</sup> General Counsel's Exhibits will be referred to as (G.C. Ex. \_\_\_\_); Respondent's Exhibits will be referred to as (R. Ex. \_\_\_\_); and Transcript citations will be referred to by page number and line number as (Tr. \_\_\_\_:\_\_\_\_), unless the Transcript cite covers multiple pages.

<sup>2</sup> All dates are 2015 unless otherwise noted.

Laitenen to testify in support of these claims during the hearing. Respondent's arguments must fail because the Board has long held that it will consider circumstantial as well as direct evidence to infer discriminatory motive or animus. This case abounds with both direct and circumstantial evidence supporting that Haapala was terminated for his protected concerted activity—this includes the timing of his discharge; Respondent's animosity towards Haapala's protected activity; Thomas Moyle's unlawful threats to Haapala just days before his termination; and the pretextual reason offered for Haapala's discharge.

The evidence in this matter, much of which is undisputed, establishes that Respondent threatened and discharged Troy Haapala because of his protected concerted and union activity in violation of Section 8(a)(1) and (3) of the Act.

## **II. BACKGROUND**

### **A. Jurisdictional Matters and Labor Organization Status**

At all material times, Respondent has been a corporation with an office and place of business in Houghton, Michigan (Respondent's facility) and has been engaged as a contractor in the building and construction industry. (Respondent's Answer).<sup>3</sup> In conducting its operations during the calendar year ending December 31, 2015, Respondent purchased and received at its Houghton, Michigan facility goods valued in excess of \$50,000 directly from points outside the State of Michigan. (Respondent's Answer). At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (Respondent's Answer).

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<sup>3</sup> Please refer to the Motion filed on July 27, 2016 to include Respondent's Answer of April 12, 2016 in the formal papers, as well as a missing page to G.C. Ex. 4.

Ironworkers Local No. 8 (Union) is a labor organization as defined in Section 2(5) of the Act. (Tr. 204:12-22). (G.C. Ex. 10).

**B. Unfair Labor Practice Charges and Procedural History**

On December 4, 2015, Haapala filed an unfair labor practice charge against Respondent in Case 18-CA-165458, alleging that he was terminated in violation of Section 8(a)(1) and (3) of the Act. (G.C. Ex. 1(a)). The initial charge was amended on January 22, 2016 and on February 22, 2016, to include additional allegations concerning threats in violation of Section 8(a)(1) of the Act. (G.C. Ex. 1(c), (e)). All charges were timely served upon Respondent. (Respondent's Answer). On March 29, 2016, the Region issued Complaint and Notice of Hearing in this matter. (G.C. Ex. 1(g)). Respondent filed its Answer to Complaint on April 12, 2016. (Respondent's Answer). On May 23, 2016, the Region issued an Order Rescheduling Hearing, granting Respondent's request for a postponement and scheduling the hearing for June 28, 2016. (G.C. Ex. 1(i)). The Region issued an Amendment to Complaint on June 7, 2016 concerning alleged supervisors and agents of Respondent. (G.C. Ex. 1(k)). Respondent filed its Answer to the Amendment to Complaint on June 21, 2016. (G.C. Ex. 1(m)). The hearing was held in Houghton, Michigan before ALJ Charles Muhl on June 28 and June 29, 2016.

**C. Prior Unfair Labor Practice Finding**

Respondent was previously the subject of an administrative law judge's decision in 1999 in Case 30-CA-14150 (*Thomas J. Moyle Contracting*). At that time, Thomas Moyle, the same individual involved here, served as president of Respondent and co-owned Respondent. In that case, the ALJ found that Thomas Moyle unlawfully

interrogated and threatened an employee in violation of Section 8(a)(1) of the Act. 1999 WL 33454665.

### **III. SUMMARY OF FACTS**

#### **A. Respondent's Operations**

Respondent is a building and construction contractor based out of Houghton, Michigan. (Respondent's Answer). Its website identifies it as one of the largest developers and commercial contractors in the Upper Midwest. (G.C. Ex. 6). It maintains an office and nearby warehouse with equipment and supplies. (Tr. 350:15-16) (G.C. Ex. 19 at page 15). It performs a variety of construction work throughout the Upper Peninsula of Michigan. This includes the construction of schools, shopping centers, boat ramps, nature trails, factories, store outlets and roads. (Tr. 35-36). As part of these projects, Respondent employs a variety of employees, including laborers, carpenters and masons. (Tr. 33, 35). Respondent experienced a contraction of its operations over the course of Haapala's employment—going from nearly a hundred employees when Haapala was hired in 1997, to approximately thirty employees at the time of Haapala's termination. (Tr. 38:5-12). However, as of May 2015, it appears that Respondent was on the rebound, having recalled everyone back to work. (G.C. Ex. 8). During the entirety of Haapala's employment, no labor organization has represented employees at Respondent. (Tr: 33:15-19).

Thomas Moyle is the admitted founder and former president of Respondent. (G.C. Ex. 1(m)). Tom Helminen is the current president of Respondent. (G.C. Ex. 1(m)). William Heide is a Senior Vice President of Respondent. (G.C. Ex. 1(m)). Eric Laitenen has been the Operations Manager since May 2015, taking over the position from

William Heide at that time. (G.C. Ex. 1(m)) (Tr. 302:18-23). Kenneth Parker and Pat Pattison are both admitted supervisors and directly supervised Haapala on certain projects during 2015. (G.C. Ex. (m)) (Tr. 85:4-11, 135-136).

**B. Respondent's History and Integration with other Moyle Family Businesses**

Respondent is part of a larger group of businesses run by the Moyle family. Respondent's website refers to Respondent as a division of "Moyle Companies."<sup>4</sup> (G.C. Ex. 4). Respondent advertises its construction services as integrated with the other services offered by Moyle companies. Its promotional material identifies "construction" as one component of various services offered by what is generally referred to as "Moyle." (G.C. Ex. 6). Besides construction, the other components listed in the promotional material are "Real Estate Development," "Leaseback," and "Design/Build." (G.C. Ex. 6).

This integration is reflected on another portion of Respondent's website. (G.C. Ex. 5). That page, which denotes a copyright year of 2016, advertises that "[i]f you need a commercial construction company or looking for commercial property for sale or lease, Moyle offers a unique combination of both." (G.C. Ex. 5). That same page lists Tom Moyle as CEO of "Moyle, Inc.," which appears above the contact information for Andy Moyle, who is listed as president of "Moyle Real Estate & Development" and Tom Helminen, who is listed as president of "Moyle Construction." (G.C. Ex. 5). All three individuals listed on the site have the same email domain address of "moyleusa.com," which corresponds with the web address for Respondent's website, which Respondent shares with other Moyle companies. (G.C. Ex. 5, G.C. Ex. 6). In addition to the same

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<sup>4</sup>"Tom Moyle, CEO of Moyle Companies, and equal shareholders, Kim Moyle, Gary Moyle, and Andy Moyle, gave the responsibility for the control and management of the *construction division* to Thomas R. Helminen in 2009." (G.C. Ex. 4) (emphasis added).

email domain, Thomas Moyle, Andy Moyle and Thomas Helminen all share the same phone number. (G.C. Ex. 5).

The relationship between these companies is also represented in its employee handbook which identifies “the Company” as “Thomas J. Moyle, Jr. Inc, dba Moyle Construction, and its family of related companies.” (G.C. Ex. 19, at page 1). Consistent with its handbook, there is also overlap between Respondent and Moyle Development in the work Respondent’s employees perform. There were several examples of Respondent’s employees performing construction work on Moyle-owned properties.<sup>5</sup> This integration carries through to its management personnel. For example, Senior Vice President William Heide is an admitted supervisor and agent of Respondent (Moyle Construction). However, he was later identified as working for Moyle Development by Operations Manager Eric Laitenen. (G.C. 1(m)) (Tr. 302:16-23 and 351-352).

Respondent’s integration with other Moyle-run businesses is also reflected in its physical facility. Respondent shares its office building with Moyle Development and Valley View Quarry, another Moyle family business. (Tr. 351:20-21 and Tr. 352:2-4). Respondent’s warehouse is also located just 100 feet from the office building (Tr. 302:1-8 and 350:14-19).

### **C. Respondent’s Ties to Thomas J. Moyle and the Moyle Family**

Respondent promotes itself as a family-business, having been founded by Thomas Moyle and his wife Denise Moyle in 1976. (G.C. Ex. 4 and 6). Respondent’s namesake, Thomas Moyle, is the former owner and president of Respondent. (G.C. Ex.

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<sup>5</sup> For example, Respondent’s employees worked on at least two Moyle-owned properties during the summer of 2015. (Tr. 104-105, 134.) Prior to going on strike in December 2014, employee William Wanhala also testified to working on several Moyle-owned properties during his employment with Respondent. (Tr. 134:17-18.)

1(m)), G.C. Ex. 15 at 5). As discussed above, Thomas Moyle is still listed as an equal shareholder in “Moyle Companies” and CEO of “Moyle, Inc.” on Respondent’s website. (G.C. Ex. 4 and 5). He is also pictured in the promotional material maintained by Respondent. (G.C. Ex. 6).

Evidence of Thomas Moyle’s continuing involvement at Respondent is not limited to Respondent’s website. During the relevant time period at issue in this matter, Thomas Moyle visited Respondent’s jobsites on a regular basis—between two and three times a month—which included visits to jobsites on properties that were not owned by Moyle Development. (Tr. 42:1-21; 356-357). While visiting the jobsites, Thomas Moyle spoke with supervisors and employees about the progress of the job and gave pep talks to employees. (Tr. 44-45). Additionally, when on the jobsite, Thomas Moyle wears a white hardhat--which is same color hardhat that foremen, supervisors and office personnel wear. (Tr. 49:10-19). He also maintains a personal office at Respondent’s facility, where he has an “open door” and “was always happy to chat with employees.” (Tr. 39:6-21) (G.C. Ex. 15, page 5).<sup>6</sup> Respondent’s website identifies Thomas Moyle, Kim Moyle, Gary Moyle and Andy Moyle as equal shareholders of “Moyle Companies.” (G.C. 4). The relationship and role of each of these individuals is set forth below:<sup>7</sup>

- Kim Moyle is the owner of Respondent and the daughter-in-law of Thomas Moyle. (Tr. 50:9-11).

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<sup>6</sup> This is consistent with Respondent’s Employee Handbook which contains an “Open Door Policy” directing employees that have problems to report it either to their immediate supervisor “or anyone in management.” (G.C. Ex. 19, page 8.)

<sup>7</sup> Respondent did not call any members of the Moyle family to testify, nor did it introduce any documents related to the roles of these individuals.

- Andy Moyle is the president of “Moyle Real Estate & Development” and is Thomas Moyle’s son. (G.C. Ex. 5) (Tr. 51:2-5).
- Gary Moyle runs the Valley View Quarry and is Thomas Moyle’s son. (Tr. 352:1-5).
- William Heide is the Senior Vice President of Respondent and Thomas Moyle’s brother-in-law. He was also identified by Laitenen as working for Moyle Development. (Tr. 52:14:16; 302:16-23 and 351-352) (G.C. Ex. 1(m)).

**D. Haapala’s Employment History**

Haapala was hired by Respondent on April 25, 1997. (G.C. Ex. 15, page 2). Throughout his lengthy career with Respondent, Haapala worked as a laborer on a variety of jobsites. (Tr. 35-36). On many of these projects, he assisted masons and carpenters as needed with their various assignments. (Tr. 34-35). Haapala also operated a variety of equipment including site trucks, forklifts, scissor lifts and front-end loaders. (Tr. 34-35).

Throughout his career with Respondent, Haapala was regarded as a versatile and productive worker by those that were involved with evaluating his work performance. A review of the performance appraisals for Haapala, which Respondent represented were only maintained through 2010, are overwhelmingly positive. The appraisals reflect a consistent theme of Haapala’s versatility, quality of work and open attitude towards taking on challenging assignments. (G.C. Ex. 17). These praises were echoed in an issue of Respondent’s “Hard Hat Time” employee newsletter in August 2011, which highlighted Haapala’s work, stating “[E]veryone agrees that if you have the dirtiest, nastiest job, Troy is the best guy. He’ll get right to work and you’ll never hear a

complaint.” (G.C. Ex. 9.) Haapala’s most recent appraisal was performed in May 2015 by president Tom Helminen. During that appraisal, Helminen told Haapala he was doing a good job. (Tr. 99:9-19).

Consistent with these positive reviews, Haapala received numerous pay increases throughout his employment with Respondent. (G.C. Ex. 7 and G.C. 8).<sup>8</sup> As recently as May 18, 2015, Respondent awarded Haapala a pay increase of \$.55 per hour. (G.C. Ex. 8). Haapala also was kept employed by Respondent despite significant downsizing, which was finally on the rebound as of May 2015.<sup>9</sup> (G.C. Ex. 15, page 2; G.C. Ex. 8). Throughout his career with Respondent, Haapala received only one written warning, which related to a failure to display a safety card in November 2012. (G.C. Ex. 16) (Tr. 99-100).

Laitenen became Operations Manager in May 2015. Since becoming Operations Manager, Laitenen and other supervisors trusted Haapala to work independently and without immediate supervision. This included numerous instances during the spring and summer of 2015. During that time period, Haapala was assigned projects by himself that he had never previously performed, such as interior and exterior paint work at the Xpress Storage site. (G.C. Ex. 12). On that project, despite an initial setback on the interior painting due to conflicting instructions from Heide (the supervisor on the jobsite) and Laitenen (who was normally not present on the jobsite), Heide informed Haapala that the project had come in under budget and that “if the wheel is not broken, don’t

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<sup>8</sup> To the extent Respondent contends that Haapala’s raises are in no way indicative of his performance—this would contradict Respondent’s own policy. Respondent’s Employee Handbook states “Your salary or hourly wage and your advancement will be based on your performance...Your pay will be based on your performance, as determined through the annual review, plus other factors including the prevailing pay rates for your job.” (G.C. Ex. 19, page 25).

<sup>9</sup> Helminen’s May 18, 2015 letter announced that “2015 is off to a strong start with our current workload and we’ve been able to call everyone back to work.” (G.C. Ex. 8)

need to fix it.” (Tr. 113:1-15). Haapala was then assigned to an even more complicated exterior painting project, which included a metal awning at a J.C. Penney’s, which he was again assigned to complete alone. (Tr. 113:8-15).

Haapala was also assigned to time-sensitive projects—including a water damaged condo building, referred to as Canal Crossing, and to the Portage Health Systems job during the summer of 2015. The Canal Crossing project required immediate attention as a waterline had broken, causing water damage to several condos and threatening to mold. Haapala was called off from a job to immediately go to work at the Canal Crossing jobsite because, according to his foreman at the time who informed him of the assignment, “They don’t want someone they’ve got to babysit.” (Tr. 127-128). Once at Canal Crossing, Haapala was again called off his regular assignment to work on an extremely time sensitive project for Portage Health Systems, which had to be completed in two days. (Tr. 142-143). There, he was the only employee to work along foreman Randy Riutta and supervisor Mark Kivala. On that project, Haapala worked on numerous facets of the job—including demolition, hauling out material, mud work, taping, painting and putting down the baseboard. (Tr. 142-143).

When he returned to Canal Crossing, Haapala was again assigned to work independently—finishing out the project completely by himself. During that same project, at Heide’s request, Haapala and supervisor Pattison came in on the weekend to get the job done faster. (Tr. 139-140). Following the Canal Crossing project, on October 5, Laitenen assigned Haapala to his last job before his termination--the Watersmeet jobsite, which was supervised by Pattison. Watersmeet was considered a desirable job, due to it being a prevailing wage job. (Tr. 143-144).

### **E. Haapala, with Union Assistance, Prepares a Letter Requesting Health Insurance for Respondent's Employees.**

At the time of Haapala's termination, Respondent did not offer employees health insurance. (Tr. 52-53). Respondent had not offered health insurance to its employees since 2007, at which time it had been voted out by a majority of employees at an employee meeting. (Tr. 52-53). During the two years prior to his termination, Haapala spoke with other employees about the health insurance issue. (Tr. 54-55).

Among those Haapala spoke to about the health insurance issue was William Wanhala. Haapala spoke to Wanhala about health insurance both while Wanhala was working for Respondent and after Wanhala went on strike in December 2014. (Tr. 57-60). After Wanhala went on strike, Wanhala bannered at Respondent's jobsites with banners concerning the need for health insurance. (Tr. 57-60). While bannering, Wanhala was accompanied by individuals from various trade unions, including Lucas Bradshaw, an organizer for Ironworkers Local 8. (Tr. 251-252). During his strike, Wanhala made house visits to Haapala, accompanied by union representatives, where they would discuss the lack of health insurance. (Tr. 254-255).

In early 2015, the health insurance issue reached a tipping point for Haapala. At this time, without health insurance, kidney stones cost Haapala \$5,500. On top of this, his young son had a serious health scare and his fiancée, forced to make her diabetes medicine stretch, experienced a miscarriage. (Tr. 63:1-23). Deciding enough was enough, Haapala determined it was time to take a stand. (Tr. 63-64).

Haapala first wrote some notes on paper and did a voice-by-text on his phone in drafting a letter to Respondent to request health insurance for its employees. He then contacted Wanhala, on strike at the time, to arrange a meeting. (Tr. 64:7-9). In August

2015, Haapala met with Wanhala and union organizer Bradshaw. (Tr. 64-65). The parties met at the Ramada Inn. At the first meeting, they spoke generally about the importance of health insurance and Haapala shared with Wanhala and Bradshaw his prepared thoughts on the letter, while Bradshaw typed out a draft. (Tr. 66:17-24). The following week, Haapala scheduled another meeting at the Ramada with Wanhala and Bradshaw, along with another union organizer. (Tr. 67:19-23). At the second meeting, Haapala reviewed the letter which had been reviewed and revised by the Union. (Tr. 68-69). They then discussed how the letter should be sent to Respondent, agreeing that it would be best sent through registered mail. (Tr. 142-143). Haapala signed the letter at the meeting. (Tr. 70:7).<sup>10</sup>

The letter is dated September 21 and addressed to Tom Moyle. (G.C. Ex. 2). The letter specifically mentions then-striking employee Wanhala's house visits to Haapala's home and Wanhala's banners in front of Respondent's jobsites about health insurance. Haapala's letter goes on to state:

I know we work hard and I believe we deserve health insurance. Which is why I would like you to consider Moyle Construction providing me and my coworkers a reliable, affordable, group healthcare plan. I believe providing healthcare to employees would be beneficial to the company, as well as all of the employees. It would provide an incentive to employees to work hard and show loyalty to the company, as well as alleviate the headaches workers face with the ever-changing healthcare laws and healthcare mandates.

I have spoken to my coworkers about this and would like to meet with you, my available coworkers, and any other parties who would be interested in sitting down to discuss options for obtaining health insurance as soon as possible.

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<sup>10</sup> It is not clear who actually ended up sending the letter, though Haapala testified that he did receive the registered mailing receipt. He later lost the mailing receipt. (Tr. 70:16-18, 176:16-17.)

(G.C. Ex. 2). Haapala then provides his home address and states he looks forward to hearing from Thomas Moyle. Haapala concludes the letter “with respect” followed by his signature. (G.C. Ex. 2).

**F. On September 24, 2015, Respondent Receives Haapala’s Letter**

On September 24, 2015, Respondent received the letter, as reflected in G.C. Ex. 2. The letter contains a “Received” stamped followed by the date of September 24, 2015 and words “Thomas J. Moyle, Jr., Inc.” Respondent stipulated that the version of the letter entered into the record was the version of the letter provided by Respondent to the Region during the investigation. (Tr. 15-16) (G.C. Ex. 2). Additionally, Respondent admits in its position statement that “A letter addressed to Mr. Moyle from Charging Party was date stamped “Received” by Moyle Construction on September 24, 2015.” (G.C. Ex. 15, page 5).

**G. On September 28, 2015, Thomas Moyle Responds to Haapala’s Letter with Threats and Other Coercive Statements.**

On September 28, just eight days before Haapala was terminated, Thomas Moyle spoke with Haapala about the letter. On that date, Haapala was at Respondent’s office to drop off his time card. (Tr. 70-71). After dropping off his timecard and speaking to employee John Buzzo outside the building, he was called into the office by Thomas Moyle. (Tr. 73-74). Haapala and Thomas Moyle met in Thomas Moyle’s personal office. (Tr. 75). Once situated, Thomas Moyle and Haapala spoke initially about the departure of John Buzzo due to his health conditions. (Tr. 74-75). Thomas Moyle, changing the subject, then stated to Haapala, “What’s up? Friends don’t send friends a registered letter.” (Tr. 75:16-18). Haapala explained to Thomas Moyle that even before the Union was picketing or bannering, the healthcare issue was a concern of his and that he had

spoken to other employees about it. Haapala also told Thomas Moyle that he supported the banner related to healthcare. Thomas Moyle responded by reminding Haapala that health insurance had been voted out by employees, which Haapala had not recalled at the time. Thomas Moyle then asked Haapala about the health exchange. Haapala explained that he had considered that as an option and explained that it was expensive. Thomas Moyle replied by offering how much he pays for his family's health insurance and that Haapala's quoted costs were less than what he pays for his family. In response, Haapala explained that he also had an issue with the health exchange's website, and that people's identities were being stolen and that he would feel better having something deducted from his paycheck. Thomas Moyle replied he had some people looking into it. The conversation then took a turn:

Haapala: And I told him that this was getting a little frustrating that – you know, on how to go about doing this. And I assured him that this was about the healthcare for us, and this was not a tactic or the—about going union; that this is about the healthcare. And so anyways, he goes—just referred—He goes, well what has the union ever done for us? They've always been a thorn in our side causing problems. And I apologized and said, Well, this is about the healthcare.

And then he goes, You know, the union came in last week and—or just a while ago and asked about—or offered—made an offer to us, and I didn't like it, so I sent them away. And, you know, if – Then he was mentioning about – He goes, if you're doing this to cause problems, you don't want to be burning your bridges, and that if you're looking – if you're offered a better job or a better employment, to take it. I suggest—I recommend it for anyone – any of my employees, if you could better yourselves, just do it. But if you're doing this to cause problems, then you don't need to be burning your bridges.

Then he kind of paused. He's like, I don't like being fucked with, not from the union, or any of my employees. Again, I was nervous, and I just said, Well, I apologize. This ain't trying to get the company to go union. This is about healthcare insurance issue, and that's the whole focus of my letter. And so he goes, Well – He seemed frustrated and angry at the time, and he goes, I don't—You know, they come in—or—If I have to—He just

mentioned during the conversation – He was just talking about, If I have to I would shut this place down. I would micromanage everything and let things go, if I had to. I don't like being bullied by anyone. And I apologized again, and told him that this is about—I apologized. I said. This is about health care and I'm not trying to do anything about the union. And so he said, Well, You don't want to –Don't be burning your bridges Troy. And I informed him that I had a meeting later on that night, I was running late to be with my fiancée with my son's get-together at the school, and I apologized and told him I had to leave. And he just—And he said, Well, have a good day. (Tr: 75-78.)

Haapala left the office to attend his son's school event. Haapala's son's school records support the date of this conversation as September 28. (G.C. Ex. 11). Haapala's fiancée, Wendy Smith, corroborates that when Haapala arrived home on that day he was visibly upset and told her about his conversation with Thomas Moyle. (Tr.:197:8-11).

In the days following his conversation with Thomas Moyle, but prior to his termination, Haapala also spoke to Wanhala and union organizer Bradshaw. Both Wanhala and Bradshaw testified that Haapala told each of them about his conversation with Thomas Moyle. Bradshaw testified that when Haapala called him and explained what had transpired with Thomas Moyle, Haapala said he was scared for his job and no longer wanted to work on the health insurance issue. (Tr. 220:6-17). Bradshaw's phone records support that this conversation with Haapala occurred on September 30, just two days after Haapala's meeting with Thomas Moyle. (G.C. 13, page 12.).<sup>11</sup> Respondent called no witnesses to refute Haapala's testimony as to this conversation.

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<sup>11</sup> The ALJ asked that the parties address the admissibility of the testimony of witnesses Smith, Wanhala and Bradshaw concerning what Haapala told each of them about his conversation with Thomas Moyle. Haapala's testimony about what transpired in this meeting was not contradicted by any other witness or evidence at trial. As a result, these witnesses' testimony on this point is now less critical. Regardless, to the extent Respondent argues Haapala should be discredited, these witnesses' testimony support the fact that Thomas Moyle threatened Haapala on September 28. There are really two levels to the statements at issue—(1) the statements by Thomas Moyle to Troy Haapala; and (2) the statements by Haapala to the three individuals about his conversation with Thomas

## H. On October 6, 2015, Respondent Terminates Haapala.

On October 5, the day prior to his termination, Haapala first reported to the Watersmeet job, where Respondent was building a boardwalk. (Tr. 84-85). Laitenen assigned Haapala to the Watersmeet job following the conclusion of Respondent's Canal Crossing project. (Tr. 85:20-22). On the Watersmeet site, Haapala's immediate supervisor was Pat Pattison, an admitted supervisor. (Tr. 85:5-11, 15-19) (G.C. Ex. 1(m)). Haapala worked with employees A.J. (last name unknown) and another employee, whose name Haapala could not recall. (Tr. 85:1-14). On October 5, when Haapala arrived to the job, the understructure of the boardwalk had already been erected and Haapala was assigned to fill in the screws in the fields that were missing in order to complete the structure. (Tr. 86:11-20). Haapala finished his assigned work at the end of his first day on the job. At the end of the first day, Pattison remarked to the crew, including Haapala, that things were looking good and that they would work on

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Moyle. On the first level, FRE 801(d)(2) provides that a statement made by an opposing party which is being offered against that party, is not considered hearsay. Thomas Moyle is an opposing party, as an agent of Respondent which is further described below. His statements to Haapala are being offered against Respondent. Therefore, Thomas Moyle's statements are *not* hearsay. The second level—Haapala's statements to the individuals about what was said by Thomas Moyle—is also not hearsay under FRE 801(d). FRE 801(d)(1)(B)(i) provides that a statement that “is consistent with the declarant's testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying” is also *not* hearsay. Here, Respondent has expressly denied that the conversation Haapala described took place, implying that this was something Haapala invented after his termination to bolster his case. (Respondent's Answer) (G.C. Ex. 15, pages 5-6). Respondent also extensively cross-examined Haapala on this conversation in an attempt to impeach Haapala. (Tr. 172-181). Every witness—Smith, Wanhala and Bradshaw—testified that Haapala's statements to them about what Thomas Moyle said on September 28 occurred *before* Haapala's termination. Because Respondent denied this conversation and Haapala's statements to the other witnesses occurred prior to his termination, those witnesses' testimony meets the test for FRE 801(d)(1)(B)(i) and is *not* hearsay. See *Pagerly Detective Agency*, 273 NLRB 494, fn. 1 (1984) for a discussion of how the majority of the Board in that matter interpreted FRE 801(d)(1)(B)(i). As to Haapala's conversation with Wendy Smith, which occurred immediately following his meeting with Thomas Moyle, in addition to meeting the requirements of FRE 801(d)(B)(i), it also falls under two exceptions to the hearsay rule—present sense impression (FRE 803(1)) and excited utterance (FRE 803(2)). Finally, regardless of the above, the Board frequently admits even hearsay evidence when it is “rationally probative and corroborated by something other than the slightest amount of evidence.” *Midland Hilton & Towers*, 324 NLRB 1141, fn. 1 (1997).

laying down the deck the following day. (Tr. 87:4-7). Eric Laitenen was not present on the jobsite during that day. (Tr. 91:5-7).

The following day, on October 6, Pattison told employees, including Haapala, that Laitenen would be showing up that evening and that A.J. and the other employee would likely be headed to Respondent's SEMCO jobsite. (Tr. 18:12-13). Pattison informed Haapala that he would remain working with Pattison on the Watersmeet job the following day. (Tr. 88:14-24). On October 6, Haapala worked with the other employees on laying down the decking. As the two employees were setting the planks in place by fastening two corners of each plank, Haapala fastened the planks by adding between eight to ten screws in each board between the two corners and into the center of the boards. (Tr. 89-90). Haapala had to keep up with the employees laying the planks, staying only three or four boards behind. (Tr. 89-90). When there was a break, those employees laying down the plank, would jump up to assist Haapala. (Tr. 90:11-13). Towards the middle of the day, Pattison said that it was looking good and that they were making progress. (Tr. 90:20-22).

Thomas Moyle stopped by the jobsite that day before lunch for approximately twenty minutes. (Tr. 91:1-13). As he was refilling his screws, Haapala overheard Thomas Moyle say to the other employees that the project was looking good and that they were doing a good job. (Tr. 91:15-18).

Later that day, Haapala saw Laitenen arrive to the jobsite at around 4 to 4:30 pm. Laitenen spoke with Pat Pattison about the steel bridge which was scheduled to arrive to the jobsite. (Tr. 92-93). As it got closer to quitting time, Haapala went to remove the barrels and signage from the roadway. During that time, Laitenen was speaking to two

of the employees on the jobsite. (Tr. 94:6-18). Haapala headed to his car, making sure he did not leave too early. (Tr. 94-95). Once at his vehicle, Laitinen approached him.

Haapala describes their conversation as follows:

Haapala: Well, Eric just informed me -- He goes, Well -- He goes, I need to talk to you. I said -- He goes -- Well, you might have not been noticing, but I've been watching you on the side, and I just want to let you know that -- He goes, I asked for you to step up and to pull your weight in the company, and I'm just letting you know that today is your last day. You're no longer with Moyle Construction. And I was surprised, and I said, You mean I'm fired? And he goes, Yes. You no longer work for Moyle Construction. And he goes -- I said, Oh. And he goes -- He goes, Well, I just wish you the best of luck, and maybe there's something better out there for you.<sup>12</sup>

(Tr. 95:9-22.) Haapala further testified that at some point during this conversation, he told Laitinen that he understood. (Tr. 156:5-17).<sup>13</sup> Following his conversation with Laitinen, Haapala called Pattison to see about retrieving some of his tools left in Pattison's van. (Tr: 96-97). However, Pattison never returned his call. Haapala went into the office next day to fill out paperwork related to his termination. (Tr. 97:16-19).

#### **IV. CREDIBILITY AND ADVERSE INFERENCES**

##### **A. Haapala's Detailed Testimony Should be Credited over Laitinen's Unsupported Conclusions.**

Haapala testified with specificity about each of his work assignments during the time period that Laitinen was Operations Manager. Haapala recounted the specific tasks he was assigned on each jobsite and who he was assigned to work with. Haapala

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<sup>12</sup> Laitinen's reference to Haapala finding "better" employment during this conversation mirrors Thomas Moyle's statement to Haapala eight days earlier that he would encourage him to find a better job.

<sup>13</sup> While Haapala acknowledged stating that he understood during this conversation, he unequivocally denied that he brought up any aspirations for a nursing career during this conversation with Laitinen. (Tr. 156-157.) Haapala credibly testified that this was something that occurred to him only after he was terminated. While Laitinen testified that Haapala mentioned nursing during the course of this conversation on October 6, this is not supported by Haapala, Laitinen's own notes of this conversation, nor by Laitinen's termination memo. (R. Ex. 1; R. Ex. 3). It is also absent from Respondent's position statement submitted during the investigation of this matter. (G.C. Ex. 15).

also provided upfront and specific testimony about various difficulties he encountered on certain jobs. Haapala also testified specifically about various conversations he had with foremen and supervisors while on the job. This included conversations he had with Laitenen about timeliness of certain projects he worked on. Finally, Haapala's testimony about the project he was terminated from was similarly detailed and precise.

Respondent called only Operations Manager Eric Laitenen to testify during the course of the hearing. Eric Laitenen became Operations Manager in approximately May 2015 (Tr. 302:18-21). Laitenen assigned employees, including Haapala, to various projects as needed. While working on those projects, Haapala reported to a variety of different foremen and job supervisors depending on the project he was assigned. Since his rise to Operations Manager, Laitenen has not been the onsite supervisor or foreman of Haapala on any given project. Laitenen's own testimony also reflects that he did not regularly observe Haapala's work, since he had to check on various jobsites throughout the course of the day. (Tr. 322-323). Throughout his testimony, Laitenen's lack of actual observation of Haapala's work was revealed. For example, as it related to the Canal Crossing jobsite described below, Laitenen testified on direct:

Q: Did you supervise—did you see—get occasion to watch Mr. —to see how Mr. Haapala performed his job?

A: Yes – Well, I would know what the task on a given day was. And I may not have been there in the daytime. I may have been there early or in the evenings as well. You know, a lot of my projects--- You know, I work 60 to 70 hours a week. So a lot of the time when I give a task, I will check in the evenings or when people sometimes aren't around. But I can assure you that I'm always watching.

...

Q: Beyond just a pure evaluation of the amount of work done, were you able to observe [Haapala] working on this project?

A: Maybe on a couple of occasions, yes.

(Tr. 322-323).

Laitenen testified only to five specific projects that Haapala worked on during his direct examination, which was not exhaustive of even the jobs Haapala worked on while Laitenen was Operations Manager. His testimony as it relates to those projects is expectedly devoid of any detailed description of actual problems he observed of Haapala's work performance. Rather, Laitenen testified generally about his conclusion that Haapala was slow on certain projects, without explanation as to what led him to reach those conclusions.<sup>14</sup> Throughout, Laitenen vaguely testified that certain projects took longer than he expected them to and attributed that solely to Haapala being a slow worker, without any actual description of what he observed of Haapala's alleged slowness. At no point did Laitenen account for why any alleged delay would be solely attributable to Haapala and no other employee or unanticipated issue on the project.

Laitenen's log book entries do little to support his cursory assertions about Haapala's performance. Even assuming these logbook entries were made at the time as Laitenen asserts, they mimic his testimony in the lack of actual details and facts concerning alleged deficiencies actually observed. While Laitenen may have been upset by the timing of certain projects, the logbook does not reflect any indication that Laitenen thought Haapala was such a poor performer so as to merit his immediate dismissal at any point. In fact, Laitenen never disciplined or otherwise put Haapala on notice that his job was in jeopardy due to what he now asserts were historical performance problems. As already described, as Operations Manager, Laitenen

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<sup>14</sup> For example, when asked an open-ended question by Respondent counsel, Laitenen testified as follows about his evaluation of Haapala at the Canal Crossing project:

Q: And when you observed him actually working, what was your evaluation of his effort or his work?

A: It was the same as I always evaluate him, he was working without a purpose. He was there. (Tr. 11-14).

continued to assign Haapala to projects which required quickness and the ability to work independently. These continued assignments contradict the gravity Laitenen and Respondent now wish to attribute to these logbook entries.

Likewise, Laitenen's testimony as it relates to what he observed of Haapala's performance on October 6 is also not credible. Laitenen testified he arrived to the jobsite later in the morning or early afternoon, but did not account for what he was doing during the several hours he would have been on the jobsite. (Tr. 376-377). Laitenen did not testify about how long he observed Haapala's performance on the date he terminated Haapala—whether it was few minutes or a few hours. Laitenen never testified why what he claims to have observed Haapala do on that job—screwing the deckboards--merited his immediate termination.<sup>15</sup> Nor did Laitenen explain why he singled Haapala out, given that there were other employees and a jobsite supervisor working on that project. While he claimed to have observed Haapala talking with other employees on the job, Laitenen also never testified what other employee he observed Haapala speaking with, what they were speaking about or for how long they were speaking. Nowhere in either his logbook or his termination memo does Laitenen refer to Haapala speaking with other employees as either a consistent problem or a problem he observed on October 6. Finally, Laitenen did not testify as to why, only at this juncture,

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<sup>15</sup> Laitenen's testimony on direct about his observations of Haapala on this date is as follows:

Q: Okay. And do you recall what his assignment was at that job? What was he in particular—What was—

A: Yes, he was there. He was putting deckboards on. Yes.

Q: And did you see him do that work?

A: Yes.

Q: And what was your evaluation of his performance?

A: My evaluation that he was installing screws on deckboards, doing a lot of talking, which was typical of Troy, to the other employees. And there was certainly—if there was a time where he would have caught up, there was a lot of other tasks that needed to be done: Bringing boards to the job down the highway, laying out the deckboards behind people. Again I saw that Troy was there to keep the work as simple and as limited as he could. (Tr. 325-326).

after only two days of working on the job, he independently decided that an eighteen-year employee must be terminated, despite having testified that he thought very little of Haapala's performance throughout his employment with Respondent.

Laitenen's cursory approach to Haapala's termination is likewise reflected in the note he made in his log book in the entry dated October 10 (which he crossed out to replace it with a six). (R. Ex. 1.) That entry reads "Troy's last day. Discussed his lack of performance at end of day. He had no comments or indicated he would improve." (R. Ex. 1). Laitenen never testified that he asked Haapala for a commitment or assurance that he would improve, which makes this entry all the more puzzling. The termination memo prepared by Laitenen dated October 8, two days after Haapala's termination, contains the same superficial information. In this memo he vaguely refers to "achievable production goals" and that at no time did he see an increase in "task productivity." (R. Ex. 3). Again, consistent with his testimony, there is a complete absence of any actual information as to what was being observed and why he considered October 6 as the tipping point which necessitated Haapala's immediate termination.

Finally, Laitenen was evasive when questioned about facts that contradicted his narrative of having only a pure motivation in terminating Haapala. For example, Laitenen claimed not to have ever had a positive impression of Haapala's work performance, until confronted with his own log book entry. (Tr. 372-373.) Laitenen claimed to be friendly with the Moyle family like he is with everyone in a small town and denied being friends with Thomas Moyle on social media, until confronted by his own Facebook page. (Tr. 371:1-12) (G.C. 20). Despite testifying to a very general familiarity with the employee handbook, he claimed he did not know of Respondent's policy

towards unions, which is the first substantive policy of the employee handbook. (Tr. 348-349).<sup>16</sup>

**B. An Adverse Inference Should be Made Based on Respondent's Failure to Call Thomas Moyle on Several Critical Factual Issues.**

Respondent failed to call Thomas Moyle to testify during the hearing. Given his undisputed relationship to Respondent, an adverse inference based on Respondent's failure to call him is warranted. "When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. It may be inferred that the witness, if called, would have testified adversely to the party on that issue." *Champion Rivet Co.*, 314 NLRB 1097, 1116 fn. 9 (1994).

Thomas Moyle may reasonably be assumed to be favorably disposed to Respondent for numerous reasons including his admitted position as founder, past president and namesake of Respondent; his current position as CEO of Moyle companies; his family's substantial interest in Respondent and its sister companies; his current involvement with Respondent as detailed above; his cooperation with Respondent in its defense during the investigation of this matter (G.C. Ex. 15, pages 5-6); and his undisputed present role in Respondent's sister-company, Moyle Development. Respondent provided no explanation for his absence during the course of the hearing.

Thomas Moyle would have knowledge of the following key issues: (1) the extent of his role at Respondent; (2) his September 28, 2015 conversation with Haapala; (3)

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<sup>16</sup> This seems even more incredible when considering there was a union-supported public banner campaign at Moyle jobsites at the time Laitenen was Operations Manager.

Respondent's knowledge of Haapala's protected concerted and union activity; (4) his involvement with Haapala's termination on October 6, 2015; and (5) Haapala's work performance. Based on Respondent's failure to call Thomas Moyle, it should be inferred that Thomas Moyle, if called, would have testified adversely to Respondent on all of the above issues.

**C. An Adverse Inference Should be Made Based on Respondent's Failure to Call Admitted Supervisors to Corroborate its Position that Haapala was a Poor Performer.**

Respondent claims it terminated Haapala based on his history of poor work performance over the course of many years. (Tr. 30:12-14; 30:24-25; 312-313; 324:11-13). However, it failed to call Haapala's immediate jobsite supervisors to corroborate its position. As noted above, Laitenen could testify only in a vague manner given his limited observation of Haapala's work performance over the spring and summer of 2015. Respondent could have called several admitted supervisors that worked directly with Haapala over the course of his employment. More specifically, Respondent failed to call admitted supervisors and agents Tom Helminen, William Heide, Kenneth Parker and Pat Pattison.

Helminen is the admitted president of Respondent and conducts employee appraisals. He would have been able to testify to Haapala's work history at the Respondent. Heide previously held Eric Laitenen's position and supervised Haapala on several projects during the summer of 2015, including the Canal Crossing and Xpress Storage project which Laitenen testified being dissatisfied with. Heide would have knowledge of Haapala's performance predating Laitenen's promotion to Operations Manager. He would also have been able to testify to Haapala's performance on the

projects he oversaw in the summer of 2015. Respondent also never called admitted supervisor Kenneth Parker despite evidence that he supervised Haapala on the Canal Crossing project during the summer of 2015. Perhaps most critically, Respondent failed to call Pat Pattison who supervised Haapala on the Watersmeet project, where Haapala was terminated. As the immediate supervisor on the job, Pattison could have testified about Haapala's performance on that project. Moreover, he could have corroborated Laitenen's extremely critical assessment of Haapala's performance on that job.

Given that all of these individuals are admitted supervisors and agents of Respondent, they may reasonably be considered favorably disposed to Respondent and within Respondent's control. Respondent offered no explanation as to why these individuals were not called. Based on Respondent's failure to call these individuals, General Counsel asks that an adverse inference be made as it relates to Respondent's claims about: (1) Haapala's work performance as a whole; (2) Haapala's work performance over the spring and summer of 2015; and (3) Haapala's work performance the day Laitenen terminated Haapala.

## **V. LEGAL ARGUMENT**

### **A. Haapala Engaged in Section 7 Activity by Sending the September 21 Letter and Accepting Drafting Assistance from the Union.**

By sending the September 21 letter to Respondent, Haapala engaged in protected activity under Section 7 of the Act. The Board has held that an employee who raises collective concerns with company officials is engaged in a concerted act, "particularly when the first person plural is used by the employee." *Grimmway Enterprises, Inc.*, 315 NLRB 1276, 1279 (1995). Haapala makes clear in the letter itself that this is an issue he shared with other employees at Respondent and that his request

is not limited to himself, but encompasses all other employees. The letter also uses “we” multiple times and makes repeated reference to his coworkers. (G.C. Ex. 2).

Haapala also engaged in union activity by meeting Union organizer Bradshaw in August or September 2015 on two occasions to prepare this letter. Bradshaw was accompanied by striking employee Wanhala at these meetings, who received support from the Union in his strike against Respondent. In accepting assistance with the drafting of this letter from the Union, Haapala engaged in union activity.

**B. Thomas Moyle is an Agent of Respondent under Section 2(13) of the Act and Respondent Is Accountable for his Statements and Actions.**

Faced with undisputed evidence of Thomas Moyle’s knowledge and animus, Respondent now wishes to distance itself from Thomas Moyle by claiming that he was not an agent of Respondent at the time these statements were made. Section 2(13) of the Act provides that:

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

The Board applies the common law principles of agency in determining whether an individual is acting with apparent authority when making a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305, 305 (2001).<sup>17</sup> The Board’s test for agency status is whether, under all of the circumstances, employees would reasonably believe the person in question to be reflecting company policy and speaking and acting

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<sup>17</sup> Under the doctrine of apparent authority, an agency relationship is established where a principal’s manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question. *Id.* Either the principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Id.*

for management. *Waterbed World*, 286 NLRB 425, 426 (1987). The Board has considered various factors in reaching its conclusions about agency status such as:

- family ties to admitted supervisors or agents, *Southland Knitwear, Inc.*, 260 NLRB 642, 644 (1982);<sup>18</sup>
- the position and duties of the individual, *Jules V. Lane*, 262 NLRB 118, 119 (1982);
- the context in which the behavior occurred, *Id.*; and
- whether the alleged agent's statements or conduct were consistent with those of the employer, *In re D&F Industries, Inc.*, 339 NLRB 618, 619 (2003).

Furthermore, an individual may be considered an agent whether or not they are technically "employees" of a respondent-employer. See *Blakenship and Associates*, 306 NLRB 994 (1992) (Board finds labor consultants to be agents of employer).

The evidence in this matter establishes that employees reasonably believed Thomas Moyle to be reflecting company policy and speaking and acting for management, as shown by Haapala directing his letter to Thomas Moyle. Thomas Moyle is the namesake of Respondent. He is the admitted founder and past president of Respondent. He is listed as CEO of "Moyle Companies" and "Moyle, Inc." on Respondent's website. His daughter-in-law, Kim Moyle, is the owner of Respondent.<sup>19</sup> Regardless of his own ownership interest, it is undisputed that he maintained an active role in Respondent during the relevant period. This includes visiting Respondent's jobsites and checking on the progress of jobs several times each month. When doing

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<sup>18</sup> In *Southland Knitwear, Inc.*, the Board adopted the ALJ's decision which included a finding that certain individuals were agents of Respondent. The ALJ reached that conclusion, in part, by noting that the individuals enjoyed a "special status" with Respondent as a result of their family ties. *Id.* at 644-645.

<sup>19</sup> To the extent Respondent relies on Thomas Moyle's lack of ownership interest in Respondent, there is no evidence that this information was disseminated to employees at any point.

so, he wears a hard hat identifying him as a member of supervision. He is also held out to the general public as the face of Moyle Construction. (G.C. Ex. 6, 18). He maintains an office at Respondent's facility, where he has an "open door" for employees.<sup>20</sup>

Thomas Moyle's unchallenged statements to Haapala on September 28, 2015 cement his status as Respondent's agent. During that conversation, Thomas Moyle reveals that he has ultimate authority over Respondent—stating he would shut down or micromanage Respondent if a union were to come in. (Tr. 78:11-15). He also speaks to his authority by stating that he sent a union away because he did not like its offer. (Tr. 77:16-19). The anti-union sentiment he expresses during this conversation is consistent with Respondent's anti-Union policy in its handbook. (Tr: 77-78, G.C. Ex. 19, Section 1.2). Furthermore, during that conversation, Thomas Moyle refers to Respondent exclusively as "us" and "we." (Tr. 77: 12-13, 18). He also referred to employees of Respondent as "my employees." (Tr. 77:24 and 78:4). The location of this conversation also establishes Thomas Moyle as an agent at the time. Haapala was called into the Respondent's facility by Thomas Moyle, whose own office is located in the epicenter of Respondent.

With the exception of Laitenen's unsupported denial that Thomas Moyle was an officer or director of Respondent at the time of the hearing, Respondent presented no evidence on the role of Thomas Moyle during the relevant time period. Respondent did not contradict or explain the information contained on its own website or the evidence

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<sup>20</sup> The ALJ excluded testimony concerning Thomas Moyle's own statements about taking on a larger role in Respondent on the basis that they were remote in time to the events of the Complaint—having occurred in 2014. (Tr: 267-270). However, General Counsel respectfully requests that such evidence be admitted given that there is no evidence that Thomas Moyle's role changed subsequent to those conversations. Without any intervening changes or observable differences in Thomas Moyle's position following those conversations, employees would reasonably consider Thomas Moyle as continuing to take on a larger role in Respondent at the time of these events, consistent with his prior statements.

presented by employees about Thomas Moyle's continued role in Respondent. Respondent introduced no evidence to contradict Thomas Moyle's statements to Haapala about his authority on September 28. Furthermore, it did not call Thomas Moyle or any other witnesses to provide testimony to corroborate its position that he was not an agent of Respondent during the relevant time period.

**C. On September 28, Respondent Unlawfully Threatened and Coerced Haapala, in violation of Section 8(a)(1) of the Act.**

On September 28, Respondent, through Thomas Moyle, made numerous threats and coercive statements in response to Haapala's letter. This conversation occurred in Thomas Moyle's office during a one-on-one conversation. In determining whether a statement constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire & Auto. Testing of Tex.*, 308 NLRB 72, 72 (1992). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Throughout his meeting with Haapala on September 28, Thomas Moyle conveyed that Haapala's efforts to obtain health insurance for himself and other employees was considered a betrayal of their long relationship. Not only was this letter unwelcome, but Thomas Moyle made clear to Haapala that he viewed the letter as an attempt by Haapala to start problems. Thomas Moyle's statements cited below, with their corresponding complaint paragraph, would reasonably tend to interfere with employee Section 7 activity.

<b>Complaint Allegation (Paragraph 6)</b>	<b>Thomas Moyle’s Statements during September 28 Meeting as testified to by Haapala</b>
(i) Accusing employees of disloyalty;	“Friends don’t send friends a registered letter.” (Tr. 75:16-18).
(ii) Repeatedly threatening employees with unspecified reprisals	“If you’re doing this to cause problems, you don’t want to be burning your bridges, and that if you’re looking – if you’re offered a better job or a better employment, to take it.” (Tr. 77:20-23). “But if you’re doing this to cause problems, then you don’t need to be burning your bridges.” (Tr. 78:1-2.)
(iii) Equating the conduct in paragraph 5 to bullying; and	“... I don’t like being fucked with, not from the union, or any of my employees... I don’t like being bullied by anyone.” (Tr. 78: 3-15).
(iv) Threatening employees that it would cease or subcontract its operations	“If I have to, I would shut this place down. I would micromanage everything and let things go, if I had to.” (Tr. 78:4-15).

Thomas Moyle’s statements repeatedly equate Haapala’s protected activity with disloyalty to Respondent. First, he implies that by sending the letter, their friendly relationship had come to an end. Second, he compares Haapala’s activity, and the Union’s involvement in that activity, to bullying and “fuck[ing] with” Respondent. Equating Haapala’s conduct with disloyalty to the company violates Section 8(a)(1). See *Carrier Corp.*, 336 NLRB 1141, 1148 (2001) (supervisor stating that an employee “stab[bed] [him] the back” unlawful in the context of protected activity).<sup>21</sup> Thomas Moyle’s repeated statements to Haapala that his protected activity will lead to burning his bridges with Respondent, further violated Section 8(a)(1). The Board has found nearly identical language unlawful. *Audubon Regional Medical Center*, 331 NLRB 374, 379 (2000) (Board uphold’s ALJ’s finding of 8(a)(1) violation where supervisor told employees that a fellow employee had “burned her bridges” by engaging in union

<sup>21</sup> See also *Sea Breeze Health Center*, 331 NLRB 1131, 1132 (2000) (supervisor’s statement that they were “highly disappointed with an employee” for supporting a union and not informing the supervisor of that support unlawful); *House Calls, Inc.*, 304 NLRB 311, 313 (1991) (“We find that, by stating that the employees were ingrates who were hitting him when he was down, Corcoran equated union activity with disloyalty to the Respondent, and we find that this conduct violated Section 8(a)(1).”.)

activity). Thomas Moyle's invitation to Haapala that he accept new employment is similarly unlawful. An employer violates Section 8(a)(1) when it invites employees to quit their employment rather than continue to engage in union or protected concerted activities. *McDaniel Ford*, 322 NLRB 956, fn.1 (1997).

Moreover, Thomas Moyle's statements that if a union were to organize employees at Respondent that he would shut it down or micromanage everything violates Section 8(a)(1) of the Act. An employer's threat to shut down its operations because of organizing activity is coercive and violates Section 8(a)(1). E.g., *Ace Heating & Air Conditioning Co., Inc.*, 364 NLRB No. 22 slip op. at 7 (2016) ("the Board has long considered plant closing threats to be "hallmark violations."). Thomas Moyle's statement that he would micromanage everything is similarly a threat of adverse action based on employees' union activity. E.g., *Equitable Resources Energy Co.*, 307 NLRB 730, 731 (1992) (threats that unit work would be subcontracted or performed by supervisors violate Section 8(a)(1)).

**D. On October 6, 2015 Respondent Unlawfully Created an Impression of Surveillance.**

Respondent, through Laitenen, unlawfully created an impression of surveillance by informing Haapala that he had been watching him on October 6. Right before informing Haapala that he was terminated, Laitenen told Haapala "I've been watching you on the side." (Tr. 95:9-12). In determining whether an employer has unlawfully created an impression of surveillance, the Board looks to whether the employee would reasonably assume from the statement that their protected activities had been placed under surveillance. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993). Actual surveillance of those activities is not necessary to find a violation. *Id.* Given that Laitenen's

conversation occurred a mere eight days following Thomas Moyle's threats about his protected concerted activity, Haapala would reasonably assume that Laitenen was singling him out to be watched because of his protected concerted activity.

**E. Respondent Discharged Haapala Because of his Section 7 Activity in Violation of Section 8(a)(1) and (3) of the Act.**

*1. Basic Legal Standard*

In determining whether an adverse employment action is attributable to unlawful discrimination in violation of Section 8(a)(1) and (3) of the Act, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden to show that the employee's union or other protected activity was a motivating factor in the employer's action against the employee by showing: (1) the employee's protected activity; (2) respondent's knowledge of that activity; and (3) respondent's animus towards that activity. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 67 (2d Cir. 2009). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. See *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011). An employer cannot meet its burden by merely showing that it had a legitimate reason for its action. *Alternative Energy Applications Inc.*, 361 NLRB No. 139, slip op. at 3 (2014).

*2. Respondent Knew of Haapala's Protected Concerted and Union Activity.*

As already described above, Haapala engaged in both protected concerted and union activity in drafting and sending the September 21 letter to Respondent. There is no dispute that Respondent received this letter on September 24, as already addressed above. Furthermore, Respondent read and reviewed the letter, as reflected by Thomas Moyle's threats to Haapala.

The context of this letter establishes that Haapala was also engaged in union activity and that Respondent knew of that union activity. In the letter, Haapala expresses his support for Wanhala's position on health insurance. Haapala specifically references the banners related to health insurance and references "Bill and his supporters," which refers to the union support Wanhala received with his banner--a fact which would have been well known to Respondent given that this banner was out in the open. Respondent's knowledge of Haapala's union support is confirmed by Thomas Moyle's repeated references and threats related to the Union during his meeting with Haapala.<sup>22</sup>

Respondent may argue that Laitenen, who it claims was the sole decision maker in this matter, had no knowledge of the protected activity and therefore the knowledge element of the *Wright Line* analysis has not been met. However, this argument fails under well-established Board law which provides (1) absent a credible denial, a supervisor or agent's knowledge of protected activity may be imputed to the employer; and (2) that knowledge of protected activity may be established by circumstantial evidence from which a reasonable inference of knowledge may be drawn.

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<sup>22</sup>Respondent concedes that it believed Haapala received outside assistance with this letter in its position statement which states that "Given the tenor of the language in this letter it does not appear that Charging Party drafted this letter himself." (G.C. Ex. 15, page 5.)

The Board has held that a supervisor or agent's knowledge of protected activities is imputed to an employer absent a credible denial. See *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006), citing to *Dobbs International Services*, 335 NLRB 972, 973 (2001).<sup>23</sup> Thomas Moyle's role at the time of the relevant events makes the imputation of knowledge to Respondent even more appropriate. Rather than being a lower-level supervisor, Respondent advertises Thomas Moyle as its CEO. Thomas Moyle also claimed ultimate authority over Respondent—the ability to shut it down in the event employees unionized. Additionally, unlike the cases cited, Thomas Moyle has an undisputed familial relationship with Respondent, whose owner is his daughter-in-law. In *State Plaza, Inc.*, the Board imputed knowledge to Respondent on far less. In that matter, the supervisor and agent with the knowledge of the protected activity was a front desk manager at a hotel whose employment ended the day after he learned of the protected concerted activity at issue. *Id.* Despite those facts, the Board found it appropriate to infer his knowledge to the employer as a whole because the employer failed to establish that the supervisor kept the information of the employee's protected activity to himself. *Id.* Here too, there is a lack of any credible denial by Respondent. Instead, there are only the self-serving denials by Laitenen in response to leading questions by Respondent counsel. (Tr. 346-347). Respondent also failed to address who within its organization opened and stamped Haapala's letter. More critically, Respondent failed to call its namesake Thomas Moyle or any other witnesses to deny that Thomas Moyle shared the contents of that letter with anyone in the organization.

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<sup>23</sup> *State Plaza, Inc.*, involved an individual who was both an agent and supervisor. However, the Board specifically stated “Since Aouli was an *agent* of the Respondent at the time, his knowledge may be imputed to the Respondent.” 347 NLRB 755, 756 (2006) (emphasis added).

Second, even if Thomas Moyle's knowledge were not imputed to Respondent, knowledge may still be established through circumstantial evidence. *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 4 (2016). Factors that may establish knowledge include the timing of the adverse action in relation to the protected concerted activity, general knowledge of union activity or protected concerted activity, the size of the facility involved, and the pretextual reasons offered for the discharge.<sup>24</sup> All these factors are present here. Respondent received Haapala's letter and stamped it "received" on September 24. Haapala was terminated twelve days later, a mere eight days after his conversation with Thomas Moyle. Regardless of Thomas Moyle's agency status, it is undisputed that his family has an interest in Respondent, that his office is the same building as Respondent's management, and that he had some level of involvement with Respondent, having visited Respondent's jobsite the very day Haapala was terminated. Additionally, at the time of his termination, Respondent's operation was relatively small, estimated at approximately 30 employees at the time, making it more likely the contents of the letter would have been shared with managers, including Laitenen. These facts, coupled with the pretextual reasons for Haapala's discharge, further described below, establish Respondent's knowledge of Haapala's protected activity.

3. *Respondent Discharged Haapala Because of its Animosity Towards Haapala's Protected Activity.*

On October 6, Respondent discharged Haapala because of its animosity towards his protected concerted and union activity. The Board has held that improper motivation

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<sup>24</sup> See, e.g., *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer's general knowledge of union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given); *Medtech Security, Inc.*, 329 NLRB 926, 929-930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge).

may be inferred from several factors, including, but not limited to: statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010); statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee, *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996); the close timing between discovery of the employee's protected activities and the adverse action, *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); and evidence that the employer's asserted reason for the employee's discharge were pretextual, e.g., proffering a non-discriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB No. 43 (2014) and cited cases. If the evidence establishes that the reasons given for the Respondent's action are pretextual--that is, either false or not in fact relied upon--Respondent fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Nearly all of the above factors indicative of an unlawful motive are present in this case.

*a. Respondent's Animosity Towards Haapala's Protected Activity is Explicit and Undisputed.*

Thomas Moyle's undisputed threats and coercive statements to Haapala on September 28 establish Respondent's animus. As described above, throughout that conversation, Thomas Moyle made clear that Haapala's protected activity was incompatible with Haapala's continued employment with Respondent—repeatedly warning Haapala not to burn his bridges and equating his conduct with disloyalty to the

company.<sup>25</sup> Respondent's threats to Haapala are also consistent with the general evidence of animosity towards protected activity in the form of Respondent's anti-union handbook policy, which it considered important enough to include as the first substantive provision of its handbook. (G.C. Ex. 19, Section 1.2).<sup>26</sup>

*b. Consistent with its Threats, Respondent Terminates Haapala Just Eight Days after Being Threatened by Thomas Moyle.*

Respondent acted consistently with Thomas Moyle's threats only *eight days* later.<sup>27</sup> Haapala was terminated within two weeks of Respondent's receipt of his letter. The Board has long held that where an adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. See *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003) (citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed. Appx. 441 (5<sup>th</sup> Cir. 2003)). In addition to the timing, the Board will also consider the abruptness of the adverse action. See *Dynabil Industries*, 330 NLRB 360 (1999) (Board adopts ALJ finding of unlawful discharge where ALJ cites to timing and abruptness of discharge). Respondent's termination of Haapala, an 18-year employee, without prior notice that his job was in jeopardy is tellingly abrupt.

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<sup>25</sup> Moyle's statements are indicative of Respondent's unlawful motive regardless of whether Laitenen specifically knew of these statements. *Willamette Indus., Inc.*, 341 NLRB 560, 562 (2004) ("However, it is not necessary for the General Counsel to show that the decision makers had direct knowledge of those statements in order to show that the decision was motivated by animus.").

<sup>26</sup> See *Overnite Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001) (employer statements in employee handbooks indicating that the employer values union free working conditions are indicative of union animus).

<sup>27</sup> See, e.g., *Excel-Container, Inc.*, 325 NLRB 17, 27 (1997) (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's actions.")). Also see *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (finding that an employee's discharge, which occurred 2 months after his protected activity "substantially adverse" to his employer, suggests that the motivation behind his termination was his protected activity.)

Additionally, the Board will infer animus when an employer seizes upon its “first opportunity” to take an adverse employment action against an employee upon learning of the employee’s protected activity. See *Carriage Hill Foods*, 322 NLRB 127, 130-131 (1996). Haapala had not received any prior warning that his job was in jeopardy prior to his termination on October 6. Instead, after a visit to the jobsite by Thomas Moyle and Laitenen, Respondent seized upon its first opportunity to terminate Haapala.

*c. Respondent’s Proffered Reason for Haapala’s Discharge is Pretextual.*

Furthermore, Respondent’s reason for discharging Haapala on October 6 is pretextual. Throughout the hearing in this matter, Respondent put forth the theory that it terminated Haapala based on Haapala’s *overall* history of poor work performance, which could no longer be tolerated during “lean times.” (Tr. 30:12-14; 30:24-25; 312-313; 324:11-13). While it is true that Respondent experienced significant downsizing over the course of Haapala’s employment, Respondent put forth no evidence that it was experiencing a “lean time” at the time of Haapala’s termination. Rather, the letter from Respondent’s president dated May 18 indicates the opposite was true.<sup>28</sup>

Respondent’s suggestion that Haapala managed to squeak by when there was a larger workforce is completely unsupported and contradicted by the evidence. Haapala received numerous positive appraisals during the course of his employment, including a positive performance evaluation from president Helminen as recently as May 2015. (G.C. Ex. 8, 17) (Tr. 99:10-19). He also received numerous pay increases from Respondent, including a \$.55 per hour increase in May 2015. (G.C. Ex. 7, 8). Haapala was even one of two employees featured in Respondent’s employee newsletter in

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<sup>28</sup> That letter states that Respondent was “able to call everyone back to work” and that Respondent “anticipate[d] another successful year ahead of [it].” (G.C. Ex. 8).

September 2011, which claimed he was the “best guy” for the “dirtiest, nastiest job.” (G.C. Ex. 9). This article was published during the same year that Laitenen claimed he would have terminated Haapala had he the authority to do so. (Tr. 313:4-9 and Tr. 389:7-8). All of this evidence directly contradicts Laitenen’s testimony and Respondent’s claims of a sub-par employee able to skate below the radar during his many years working at Respondent. Laitenen’s testimony about Haapala’s poor work performance over the years should not be credited, for reasons already described. However, his exaggerated testimony is indicative of Respondent’s unlawful motive. See, e.g., *Lucky Cab*, above; *Key Food*, 336 NLRB 111, 114 (2001).

Additionally, Laitenen testified that he never consulted with any of Haapala’s immediate supervisors or jobsite managers prior to terminating Haapala. (Tr.346:8-10.) This is also indicative of pretext and unlawful motive. The Board has long held that an inference of unlawful motivation is strengthened when an employer fails to consult with an employee’s immediate supervisor before taking action against the employee. See, e.g., *Lancer Corp.*, 271 NLRB 1426 (1984). Laitenen’s failure to speak to those individuals most involved with supervising Haapala’s job performance supports an inference that Haapala’s termination was unlawful.

There is no indication in Laitenen’s testimony or logbook that Laitenen put Haapala on notice that his job was in jeopardy due to his performance issues—which one would expect given the many years Haapala worked for Respondent.<sup>29</sup> Laitenen also did not follow Respondent’s progressive disciplinary policy as outlined in Respondent’s handbook. (G.C. Ex. 19 at 26). Such a deviation is also indicative of

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<sup>29</sup> Laitenen has had occasion to speak with employees in his office about their performance issues, rather than in the field. This was not done in Haapala’s case. (Tr. 375:13-24).

animus. See, e.g., *Santa Fe Tortilla Co.*, 360 NLRB No. 130, slip op. at 4 (2014).

Finally, Respondent failed to support its assertion that Haapala was an underachiever by calling any of its supervisors, who supervised Haapala on a day-to-day basis on various jobsites. As argued above, Respondent should be subject to an adverse inference on that basis.

4. *Even if Haapala's Termination is not Found to be Pretextual, Respondent is Unable to Meet its Wright Line Burden.*

Because Haapala's discharge was pretextual, Respondent's *Wright Line* defense must fail. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). However, even if not found pretextual, Respondent fails to meet its burden under *Wright Line*. Because General Counsel has made a strong showing of discriminatory motivation in this matter, Respondent's rebuttal burden is substantial. E.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011). To meet its burden of persuasion, Respondent must establish that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).

First, Respondent introduced no evidence that it has treated other employees in a similar fashion. Second, even if Laitenen's claims about Haapala's performance problems were credited, Respondent still fails to meet its burden under *Wright Line*. An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015) (Hirozawa, concurrence), citing *Diversified Bank Installations*, 324 NLRB 457, 476 (1997). According to Laitenen's own testimony, he tolerated Haapala's performance problems for several months, including several projects which he believed took Haapala substantially longer than they should

have. At no point did he take any adverse employment action against Haapala during that time. Nor did he warn Haapala that his job was in jeopardy following those projects. If Laitenen's testimony were credited, Haapala's lack of production on those earlier projects would have been much more egregious than the lack of production he observed over the course of, at most, a few hours on October 6. As a result, Respondent cannot meet its burden under *Wright Line*.

## **VI. REMEDY**

### **A. Search-for-Work and Work-Related Expenses Should be Awarded**

In addition to the customary make-whole remedies for employees discharged in violation of Section 8(a)(1) and (3) of the Act, the Board should award 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 employment<sup>30</sup>; the cost of tools or uniforms required by an interim employer<sup>31</sup>; room and board when seeking employment and/or working away from home<sup>32</sup>; contractually required union dues and/or initiation fees, if not previously required while

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<sup>30</sup>*D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007)

<sup>31</sup>*Cibao Meat Products*, 348 NLRB 47, 50 (2006);

<sup>32</sup>*Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

working for respondent<sup>33</sup>; and/or the cost of moving if required to assume interim employment.<sup>34</sup>

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.<sup>35</sup> 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 expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.<sup>36</sup>

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, slip op. at 3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have

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<sup>33</sup> *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

<sup>34</sup> *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

<sup>35</sup> 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 n.19 (1987).

<sup>36</sup> *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.")

[occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (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 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, slip op. at 3 (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.<sup>37</sup> 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 6, at 6 (2010) (interest is to be compounded daily in backpay cases).

## **B. Reimbursement for Consequential Economic Harm Should be Awarded**

While not specifically plead in the Complaint, reimbursement for consequential economic harm should likewise be awarded in order to fully remedy the unfair labor practices in this matter.<sup>38</sup> Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. E.g., *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7<sup>th</sup> Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require respondents to compensate employees for all the consequential economic harms that they sustain, prior to full compliance, as a result of its unfair labor practices.

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<sup>37</sup> 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 fn. 2 (1953).

<sup>38</sup> For example, an unlawfully terminated employee may be unable to pay his or her mortgage or car payment as a result of the unlawful termination. That employee should be compensated for the resulting late fees, foreclosure expenses, repossession costs, moving costs, legal fees and any costs associated with obtaining a new house or car for the employee. However, an employee would not be entitled to a monetary award that would cover the mortgage or car payment itself as those expenses would have existed in the absence of any employer unlawful conduct.

This is within the Board's "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014). The Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

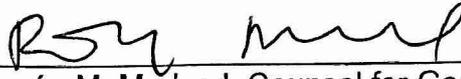
## **VII. CONCLUSION**

Counsel for General Counsel respectfully submits that the evidence and law establish that Respondent violated Section 8(a)(1) and (3) of Act as alleged in the Complaint. Accordingly, Counsel for General Counsel requests that the ALJ issue a Recommended Order to reinstate Troy Haapala and make him whole. Counsel for General Counsel also requests that the ALJ issue an appropriate Notice to Employees to remedy Respondent's violation of the Act.<sup>39</sup>

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<sup>39</sup> Attached as Appendix A is a proposed Notice to Employees.

Respectfully submitted this 3<sup>rd</sup> day of August, 2016.



Renée M. Medved, Counsel for General Counsel  
National Labor Relations Board  
Region 18 – Sub-Region 30  
310 West Wisconsin Avenue, Suite 450W  
Milwaukee, Wisconsin 53203

## APPENDIX A

### PROPOSED NOTICE TO EMPLOYEES

(To be printed on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives 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** accuse employees of being disloyal when they bring shared concerns about their terms and conditions of employment to our attention.

**WE WILL NOT** threaten employees in response to their raising shared concerns about the terms and conditions of their employment, including the need for health insurance.

**WE WILL NOT** accuse employees of bullying because they support a union, received support from a union or tried to improve working conditions for themselves and others.

**WE WILL NOT** threaten to close down or subcontract work if employees decided to unionize.

**WE WILL NOT** give you the impression that we are watching your union activity or your discussions with other employees about your terms and conditions of employment.

**WE WILL NOT** fire employees because of their support for Ironworkers Local 8, or any other union.

**WE WILL NOT** fire employees because they raise collective concerns about their working conditions, including trying to secure health insurance.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

**WE WILL** remove from our files all references to the October 6, 2015, discharge of Troy Haapala.

**WE WILL** notify Troy Haapala in writing that we have removed his termination from our files and that it will not be used against him in any way.

**WE WILL** offer Troy Haapala immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges he previously enjoyed.

**WE WILL** pay Troy Haapala for the wages and other benefits he lost because we fired him.

**AFFIDAVIT OF SERVICE**

**I hereby certify that copies of Counsel for General Counsel's Brief to the Administrative Law Judge** have been filed electronically and sent via electronic and regular mail on August 3, 2016, to the following parties of record:

Served Via E-Filing

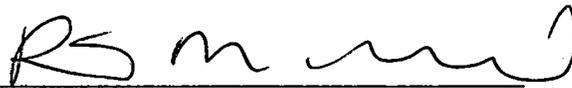
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