

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

BRISTOL INDUSTRIAL CORPORATION AND C.O.
SABINO CORPORATION (Single and Joint
Employers)

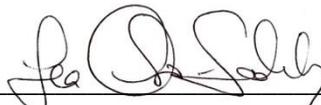
and

Cases 04-CA-148573 and
04-CA-153165

METROPOLITAN REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
SOUTHEASTERN PENNSYLVANIA, STATE OF
DELAWARE AND EASTERN SHORE OF
MARYLAND

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Dated: January 26, 2017



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I. STATEMENT OF THE CASE

This case involves two employees, Brian Dougherty and Thomas Boroughs, and the swift and unlawful retaliation taken against them by Respondents, two companies acting as one, after Dougherty and Boroughs tried to unionize their workplace.

The Regional Director issued an Order Consolidating Cases, Complaint and Notice of Hearing on August 4, 2015, (GCX 1(i)),¹ a copy of which was served the same day on Respondents Bristol Industrial Corporation (Bristol) and C.O. Sabino Corporation (Sabino). (GCX-1(j)) Respondents jointly filed an Answer to the Complaint on August 18, 2015. (GCX-1(k)) On January 27, 2016 the Acting Regional Director issued an Amended Consolidated Complaint (GCX 1(p)), a copy of which was served the same day on Respondents. (GCX-1(q)) Respondents jointly filed an Answer to the Amended Complaint on February 11, 2016. (GCX-1(r))

A hearing was held in this matter before Administrative Law Judge Susan Flynn (the ALJ) on February 16 and 17, 2016. At the hearing, Respondents stipulated to commerce. (T. 8-9) Counsel for the General Counsel made a Motion to Further Amend Consolidated Complaint (herein, the Motion). (GXC 2) Respondents admitted all allegations in the Motion.² (T. 106)

¹ Throughout this brief, abbreviated references are employed as follows: “ALJD” followed by page and line numbers to designate the ALJ’s Decision; “T” followed by page number to designate Transcript pages; “GCX” followed by exhibit number to designate General Counsel’s Exhibits; and “RX” followed by exhibit number to designate Respondent’s Exhibits.

² By admitting the allegations in the Motion, Respondents effectively amended their Answer to admit previously denied allegations, including, inter alia, that the full-time and regular part-time carpenters of Bristol and Sabino, (herein, the Unit) have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that since on or about February 3, 2016 and at all material times, based on Section 9(a) of the Act, the Northeast Region Council of Carpenters, United Brotherhood of Carpenters and Joiners of America has been the exclusive collective-bargaining representative of the Unit.

The ALJ issued her decision in this matter on December 2, 2016. This brief is filed in support of Counsel for the General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision.

II. STATEMENT OF FACTS

A. Background

Bristol is a Delaware Corporation engaged in the construction industry. It was founded in 2004 by Felicia Enuha, who at all times has owned 100% of the company and been the President and sole officer. While Bristol began as a supply provision entity, in 2009 it branched out into the construction industry. (T. 18 GCX-1(i),(k)) Since 2013, Bristol has maintained an office at 1010 River Road, New Castle, Delaware. Since 2013, this has also served as Enuha's personal residence. (T. 20, 59)

Sabino is also a Delaware corporation engaged in the construction industry. (T. 73) It was founded in 2007 by Valentine Verissimo, who has always owned 100 percent of the company and always served as its President and sole officer. (T. 73; GCX 1(i),(k)) Sabino maintains an office in Philadelphia, PA. Verissimo also maintains an office at BRISTOL's building at 1010 River Road, Newark, DE. According to the credited testimony of discriminatee Brian Dougherty, Verissimo told him he had an office in the Bristol facility. (T. 173) Union official San Noel testified that Verrissimo told him he works for Bristol. (T. 110) Sabino does not have a website nor does it advertise for work. (T. 75) During the time period June 1, 2015 until December 31, 2015 all of Sabina's work came from work it performed for Bristol. (T. 74 - 75)

As the ALJ correctly found, the operations of Bristol and Sabino were substantially interrelated to the point where both companies could be considered a single employer. (ALJD 8:13-47)

B. The Hiring of Brian Dougherty and Thomas Boroughs and the Union Campaign

In December 2014, Enuha met with Brian Dougherty, an experienced carpenter, to discuss hiring him some upcoming work she had. (T. 39-40, 141) Dougherty and Enuha had been recommended to one another by Ralph Shelby, then Bristol's superintendent at its Wilmington Housing Authority (WHA) worksite. (T. 24, 40, 141; GCX-4) Dougherty stopped by Bristol's office one evening on the way home from work in order to meet with Enuha. Shelby was present as well. (T. 40, 141) Enuha told Dougherty that he was being interviewed to work as a carpenter I installer for Bristol. She also told Dougherty he was hired and agreed to pay him \$20 per hour at the WHA site. (T. 40, 142-143) Part way through this meeting, a friend and co-worker of Dougherty's, Thomas Boroughs, joined the meeting. Enuha asked Boroughs to fill out an interview packet as well, telling him she would call him if she decided to hire him. (T. 212-231) Both Dougherty and Boroughs filled out tax forms and an application for Bristol (T. 142, 213)

During the week of December 13, 2014, Dougherty began working at the WHA work site. (GCX 15) Shelby, the Bristol superintendent, was Dougherty's direct supervisor. (T. 144, 147, GCX 27) Shelby coordinated the work assignments and materials and spoke directly to Dougherty. (T. 144) When Dougherty first started working at WHA, he and Shelby were the only full-time employees. (T. 144) About ten days later, Boroughs also began working full-time at the WHA site. His pay rate was \$18.75 an hour. (T. 145, 213-214; GCX 14)

During the week of December 14, 2014, Dougherty also began working at Bristol's Cooke Elementary School (Cooke) work site in Wilmington, Delaware, and he was joined during the week of January 4 by Boroughs. (GCX-3; GCX-10, GCX-11) Both began installing framing material as well as drywall. (T. 148, 219) The site was governed by the prevailing wage rates.

When they performed carpentry work Dougherty and Boroughs were paid \$50.60 an hour and when performing finishing work they earned \$40.02 an hour. (T. 263 264, GCX 10, GCX 11)

In mid-February Dougherty became interested in joining the Union. (T. 158) Dougherty spoke with Union Council Representative Sam Noel on the phone to see what his options were in terms of joining the Union.³ (T. 158) Boroughs, in turn, spoke with Dougherty about joining the Union because he knew Dougherty had gotten a business card with Noel's name on it. (T. 222-223) Thereafter, on February 25, Dougherty went to the Local 626 Union Hall. Boroughs and Shelby went as well, each driving his own vehicle. Dougherty and Boroughs each signed two Union authorization cards dated February 25, 2015. One card was for Union representation at Bristol, and the other was for Union representation at Sabino.⁴ (T. 159-160, GCX 18, GCX 19)

On March 10, 2015 the Union filed a Petition with the NLRB to represent a bargaining unit at Bristol consisting of "all full time and regular part time carpenters." (GCX 7) A copy of this Petition was received via fax by the Bristol office at 9:59 a.m. on March 11. (GCX 9) Enuha testified and the ALJ credited her testimony that around March 9, 2015 Shelby told her that he, Dougherty and Boroughs had gone to the Union and that he had signed a union card. (ALJD 4:33-35; T. 261, 269-270)

C. The Unlawful Interrogations and Unlawful Layoffs

The ALJ correctly credited Boroughs' testimony that on March 11, 2015, shortly after Bristol received the Petition, he was standing outside a unit at the WHA site in the late morning when Verissimo asked him whether Boroughs had signed a union card. (ALJD 4:43-48, 5:1-3; T.

³ At all material times up until February 2, 2016 Noel's assigned Local was Local 626, and its geographic territory was the State of Delaware and Kent County, Maryland (T. 101 - 102, GCX 17) On or about February 2, 2016 Local 626 was merged into Local 173 and the geographic area expanded to include additional territory. (GCX 17)

⁴ They signed two cards because neither they, nor the Union, were certain who their actual employer was. (T. 160, 239, 119)

225- 226) Although not mentioned specifically by the ALJ, Verissimo also asked Burroughs who had been talking to the Union. Burroughs responded that he did not know what Verissimo was talking about. (T. 225) Later that morning, Verissimo told Boroughs five to six times "I don't want no fucking union on my job site" and "I don't want a union here" while waving his hands in frustration. (T. 225) The ALJ correctly did not credit Verissimo's denials of not being aware of the Union finding it likely "that Enuha would have advised Verissimo of Shelby's confession as well as her receipt of the petition." (ALJD 5:1-3)

On March 13, 2015, Dougherty and Boroughs were working in one of the units at the WHA site after lunch when Enuha approached them. (T.161, 187, 226) The ALJ credited Enuha that she came to the jobsite because she had concerns about Dougherty's behavior and asked Dougherty if he was behaving as he was because he had signed something with the Union, and that he had to stop his behavior with Andrew Johnson, the owner of the WHA site, as it was making her look bad and she needed the work. (ALJD 5:14-16) Enuha also testified that he denied signing a card. (T. 257, 268) The ALJ correctly credited Dougherty and Boroughs, that Enuha gave her opinion that the Union would not be helpful to the employees although Enuha did not testify to this.⁵ (ALJD 5:31, 5:34, 5:44-45)

On March 20, 2015, as the ALJD correctly found, both Dougherty and Boroughs were unlawfully laid off by Respondents because of their Union activity. (ALJD 11:11-12) Then on March 30, 2015, as the ALJ correctly found, after calling Dougherty and Boroughs back to work, Respondents unlawfully discharged Dougherty and Boroughs because of their Union activity. (ALJD 11:39-41)

⁵ Specifically, Dougherty testified that Enuha made it clear that she did not have a high opinion of unions. She told them that there was "no benefit to joining the Union because sometimes people work and sometimes they don't, and the Union picks who gets to work and who doesn't." (T. 162) Boroughs testified similarly that she told them the Union did not have anything to offer them. (T. 226)

III. ARGUMENT

A. The Administrative Law Judge failed to find that Respondents violated Section 8(a)(1) of the Act by interrogating Dougherty as to whether he had signed a union card.

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd.* sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors: (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; and (4) the place and method of the interrogation. The Board has also considered the truthfulness of the interrogated employee's reply. As to this factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), *affd.* mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), *enfd.* as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Grass Valley Grocery Outlet*, *supra*. These factors “are not to be mechanically applied”; they represent “some areas of inquiry” for consideration in evaluating an interrogation's legality. *Rossmore House*, *supra*, 269 NLRB at 1178 fn. 20.

1. The Judge failed to find that Verissimo unlawfully interrogated Boroughs

On March 11, 2015, shortly after Bristol received the Petition, Boroughs was standing outside a unit at the WHA site in the late morning when Verissimo asked him who had been

talking to the Union. As credited by the ALJ, Verissimo also asked whether Boroughs had signed a union card which Boroughs denied. (ALJD 4:43-48; T. 225-226) Later in morning, Verissimo told Boroughs five to six times "I don't want no fucking union on my job site" and "I don't want a union here" while waving his hands in frustration. (T. 225)

Contrary to the ALJ, Verissimo's questions and comments were a hostile confrontation in the workplace, and contained a clear message that Boroughs' union activity was not wanted at Sabino. They also contained a veiled threat regarding Boroughs, and Union activity. While acknowledging that neither Boroughs nor Dougherty were open Union supporters, the ALJ wrongly determined that the circumstances were not coercive because there were only two carpenters on site and the employees were aware that the petition was being filed. First, Verissimo was a high-ranking official of Respondent. Second, Verissimo had no legitimate reason to question Boroughs. Third, Boroughs was clearly reluctant to respond as shown by his untruthful response that he had not signed a union card. Thus, under long-standing precedent, Verissimo's questioning of Boroughs and the comments that followed had a reasonable tendency to restrain or coerce Boroughs in engaging in union activities and therefore constituted a coercive interrogation in violation of the Act. *Sproule Construction Co.*, supra, 350 NLRB at 774 n. 2; *Portola Packaging, Inc.*, 361 NLRB No. 147, slip op. at 21 (2014). Accordingly, it is respectfully urged that the Board find that Respondents violated Section 8(a)(1) of the Act by Verissimo's unlawful interrogation of Boroughs.

2. *The Judge failed to find that Enuha unlawfully interrogated Dougherty*

On March 13 Dougherty and Boroughs were working in one of the units at the WHA site after lunch when Enuha approached them. (T. 161, 226) Enuha admits and the ALJ properly found that she asked Dougherty "did you sign a union card?" (ALJD 9:24; T. 268) The ALJ also

credited Dougherty that Enuha also asked about his reasons for contacting the Union. (ALJD 9:24-25) Although not discussed by the ALJ, Enuha also admitted that Dougherty denied signing a card. (T. 268) The ALJ also credited Dougherty and Boroughs, that Enuha gave her opinion that the Union would not be helpful to the employees although Enuha did not testify to this. (ALJD 5:33-34; 9:34; T. 161-162, 226, 257)

The ALJ wrongly determined that Enuha's questioning of Dougherty was not unlawful under *Rossmore House*, supra, despite the fact that Enuha was one of the owners of Respondent and Dougherty was not an open Union supporter, because the ALJ concluded that Dougherty would not have been intimidated since Enuha treated him like a son. (ALJD 9:28-36) However, as Enuha's own testimony shows, Dougherty clearly did not feel comfortable with the question and denied that he signed a union card. This is one of the factors that the Board considers in determining whether an interrogation is unlawful. *Colonial Parking* 363 NLRB No. 90, slip op. at 7 (Jan. 5, 2016). Furthermore, the ALJ wrongly placed the responsibility on Dougherty for Enuha's questioning of Dougherty about signing something for the Union. The Judge found it was not coercive because it flowed from Dougherty's statement regarding "being covered." (ALJD 5:41-42) Contrary to the ALJ, Enuha's questions and comments were a hostile confrontation in the workplace, and contained a clear message that Dougherty's Union activity was not wanted. Indeed, Respondent went on to unlawfully lay off and then discharge Dougherty. Moreover, as correctly found by the ALJ, Enuha did not just question Dougherty—she made anti-union remarks as well, which while not unlawful in and of themselves, showed her anti-union animus. Thus, Enuha's questioning of Dougherty had a reasonable tendency to restrain or coerce Dougherty in engaging in union activities and therefore constituted a coercive interrogation in violation of the Act. *Colonial Parking & Unite Here Local 23*, supra; *Hoffman*

Fuel, supra. Accordingly, it is respectfully urged that the Board find that Respondents violated Section 8(a)(1) of the Act by Enuha's unlawful interrogation of Dougherty.

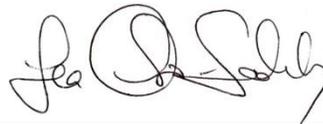
B. The Administrative Law Judge's Notice inadvertently omitted the remedy of a Gissel bargaining order although it was in the Order.

To remedy the unlawful actions by Respondents, the ALJ properly determined that a Gissel bargaining order was appropriate and provided for it in her Order. (ALJD 12-13, 14) However, the Administrative Law Judge's Notice inadvertently omits the bargaining order. (ALJD Appendix) Accordingly, it is respectfully urged that the Notice be revised to conform with the Order.

IV. CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to find that the Administrative Law Judge: (1) erred in failing to find that Respondent violated Section 8(a)(1) by Vissimo's interrogation of Boroughs on March 1, 2015; (2) erred in failing to find that Respondent violated Section 8(a)(1) by Enuha's interrogation of Dougherty on March 13, 2015; and (3) inadvertently omitted the bargaining order remedy from the Notice to Employees.

Respectfully submitted,



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