

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

ADVANCED MASONRY ASSOCIATES, LLC  
d/b/a ADVANCED MASONRY SYSTEMS

and

Cases 12-CA-176715  
12-RC-175179

BRICKLAYERS AND ALLIED CRAFTWORKERS,  
LOCAL 8 SOUTHEAST

*Caroline Leonard, Esq.* for the General Counsel  
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(Thompson, Sizemore, Gonzalez & Hearing, P.A.),  
Tampa, FL for the Respondent  
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DECISION AND REPORT

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. These consolidated cases were tried in Tampa, Florida on February 6-10, 2017. The amended unfair labor practice complaint alleges that Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Company or Respondent) sought to undermine support for the Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union) by unlawfully interrogating, threatening, and discharging employees prior to a representation election that ended in a 16-16 tie vote in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act.<sup>1</sup> In the representation case, the Union seeks to have the challenged votes of 14 former employees counted. In addition, the Union contends that, if the challenged votes do not result in its favor, the Company's objectionable conduct, which consists of the alleged unfair labor practices and certain other conduct, warrants a rerun of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I make the following

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<sup>1</sup> 29 U.S.C. §§ 151-169.



During the relevant time period, the Company performed masonry work at several jobsites in central Florida: Bethune-Cookman University in Daytona Beach (Bethune); the Westshore Yacht Club in Tampa (Westshore); the University of Tampa (UT); the Hermitage in St. Petersburg (Hermitage); and the Holiday Inn Express in St. Petersburg (Holiday Inn).<sup>3</sup>

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### *B. Safety Training*

Fall protection for work by masons and other trades performing work above certain elevations are governed by construction industry standards and regulatory requirements of the Occupational Health and Safety Administration (OSHA). As such, the Company maintains safety rules relating to fall protection, along with any additional safety mandates invoked by its projects' general contractors.

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The Company's Employee Handbook, effective January 2015, lays out the Company's basic safety rules requiring employees to comply with them as a condition of employment. (8.1). The basic rule requires employees to "[a]lways wear or use appropriate safety equipment as needed. Wear appropriate personal protective equipment, like . . . fall protection, when working on an operation which is potentially hazardous." Potentially hazardous is further defined to encompass "all elevated locations." (8.3). Violations of these safety rules, including the failure to wear safety equipment, "can result in disciplinary action, including termination." (4.1).<sup>4</sup>

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The Company's safety rules are further implemented through its policies and procedures. In essence, an employee working at 6 feet or higher on a scaffold in a setting where a fall risk exists must use appropriate protective equipment.<sup>5</sup> Employees are required to "wear a full body harness with a lanyard or retractor in all elevated areas not protected by guardrails," and instructs that employees must never connect two lanyards, or a retractor and a lanyard to each other. The policy also warns that the Company has "zero tolerance" toward, and will discipline an employee who, violates the Company's fall protection rules after receiving the applicable safety training.<sup>6</sup>

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The Company Safety Director, Aleksei Feliz, and Safety Coordinator, Fernando Ramirez, are responsible for providing safety orientation to new employees at their jobsites. The training is supposed to include a demonstration of how to wear a safety harness in conjunction with other equipment used to tie the worker to an anchor point.<sup>7</sup> They, as well as the foreman on Company projects, are responsible for monitoring and enforcing compliance safe working conditions and equipment. Foremen also deliver weekly "toolbox talks." These talks are mandatory prework meetings where foreman discuss various safety topics. The employees are then supposed to be provided with safety harnesses and other safety equipment, if they do not already have them.

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<sup>3</sup> Jt. Stip. 4-6.

<sup>4</sup> R. Exh. 2.

<sup>5</sup> The Company's safety rule is stricter than the 10-foot requirement promulgated by OSHA.

<sup>6</sup> Nowhere is it written that the Company's enforcement of its "zero tolerance" policy is limited to violations observed by Company safety personnel and foreman, as opposed to violations observed by general contractors' representatives. (GC Exh. 2(a); R. Exhs. 4, 7. Nevertheless, that contention by Feliz was not disputed. (R. Exh. 2 at 8; R. Exh. 3; Tr. 80-81, 94, 98-100.)

<sup>7</sup> R. Exh. 5-6.

*C. Bethune-Cookman University*

At the Bethune jobsite, the Company's masons constructed four multistory dormitory buildings during the period of November 9, 2014, to June 19, 2016. The Company employed  
 5 between 50 and 70 masons at Bethune. The job had two phases, with each phase consisting of work in the interior and exterior of the structures, laying block, brick and concrete.

Robert Dutton was foreman on the Bethune project from May 2015 until April 24, 2016, when he was replaced by Brent McNett. By January 2016, most block work was completed and  
 10 only brickwork remained. The brickwork was completed by April 8, 2016. During that period, the mason workforce gradually diminished. Some were laid off, while others voluntarily quit for other jobs. Once the masonry work at Bethune was completed, the Company warranted the work for a 1-year period beginning on September 15, 2016.<sup>8</sup>

Of the 11 remaining individuals whose ballots were challenged, only one separated from the Company prior to January 2016. Robert Harvey was a mason employed on the Bethune  
 15 jobsite during 2015. He was one of numerous employees for whom the Company provided hotel lodging. On October 9, 2015, the Company terminated Harvey for poor time and attendance, and for "causing problems at the hotel."<sup>9</sup>

On January 15, 2016, the Company pared its Bethune work force to about 40 masons. At the time, the Company had nearly completed the block portion and was beginning the brickwork. McNett laid off several masons that day, including John Smith and David Wrench, and told them  
 20 to file for unemployment. The Company, however, generated Reason for Leaving (RFL) forms for each, incorrectly stating the grounds for their separation from the Company. Smith's RFL form stated that he was terminated for poor work performance and attendance,<sup>10</sup> while the RFL form for Wrench, who worked 121 days during the eligibility period and wore a union shirt on the job, stated that he voluntarily quit.<sup>11</sup>

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<sup>8</sup> McNett's testimony that the Company did not lay off anyone prior to April 8 was not credible. By that date, the "the last brick was laid" at the Bethune project and the work force was significantly down from the numbers in January and Carney conceded that the project essentially concluded in April 2016. (Tr. 652-654, 707, 712, 718, 721, 815-816, 896, 1005.) By his own admission, some workers "were going to different jobs because they wanted to work. They didn't want to quit working with [the Company]; they wanted to stay working when it was done." (Tr. 653; R. Exh. 43-53.)

<sup>9</sup> I based this finding on the somewhat inconsistent, but unrefuted, testimony of McNett and Feliz, as corroborated by the termination form, which referred to an "[a]ttached T.S." (presumably referring to Harvey's timesheet) and "causing problems at the hotel." (Tr. 656-657, 913-919, 926, 941-950; R. Exh. 29, 32, 60, 60(a).)

<sup>10</sup> The testimony of McNett and Feliz, as well as the written entry on the RFL form, that Smith was terminated for poor work performance and attendance on January 15, 2016, were not credible for several reasons. (Tr. 655-657, 1057-1058; R. Exh. 32.) First, Smith, who worked fulltime on Bethune project since July 2015, has since been rehired by the Company for other masonry jobs and, in fact, is currently working for the Company. (CP Exh. 19; Tr. 714, 997-1000, 1004-1005). Secondly, the Company's identification of Smith as laid-off on the official voter eligibility list was consistent with his testimony. (CP Exh. 2-3; Tr. 999-1005.)

<sup>11</sup> I based this finding on Wrench's credible testimony, as corroborated by his uncontested filing for unemployment compensation benefits. (Tr. 985-991, 1019; R. Exh. 27 at 1; CP Exh. 18.)

Robert Baker and Mark France, known union members, voluntarily quit the Bethune project on February 11, 2016.<sup>12</sup> Robert Pietsch, another known union member, worked as a mason on the Bethune project from September 2015 until he voluntarily quit on March 18, 2016.<sup>13</sup>

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Another group of masons, including Jacob Barlow and Dustin Hickey, were laid off on or around April 1, 2016, as the Bethune project wound down. Barlow and Hickey, known union members, worked for the Company on and off over a long period of time. McNett, however, incorrectly listed his separation from the Company as “VQ”, i.e., voluntarily quitting. In fact, McNett has continuously attempted to get Barlow, who is currently on another job, to return.<sup>14</sup>

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Forest Greenlee also worked as a mason for the Company on and off over a period of years. He worked on the Bethune project until he was laid off “with a group of people” on April 2, 2016. He left with a reasonable expectation of recall and has since been rehired by the Company.<sup>15</sup>

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Jeremy Clark, another known union member, worked for the Company on and off over a long period of time. He worked on the Bethune job until the project started winding down and he was laid off on April 4, 2016. He left with a reasonable expectation of recall.<sup>16</sup>

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George Reed, a known union member, has worked for the Company as a mason on an off over a period of years. He was referred to work on the Bethune job by Bontempo and worked 82

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<sup>12</sup> I credit the Company’s entries in the forms for Baker and France. They were generated by Phelps based on information provided by McNett. He conceded that he had made disparaging remarks about the Union. Baker would have been eligible to vote based on his hours worked prior to the election. (CP Exh. 14.) However, there was an absence of evidence to refute McNett’s testimony that Baker and France voluntarily quit. Moreover, the fact that France’s RFL form was signed by Ron Karp, who lacked personal knowledge about France’s departure, does not detract from the fact that the form was otherwise created by Phelps in the ordinary course of recording reports called in by foreman. (Tr. 654–655, 887–888, 891; R. Exh. 27 at 2, 28 at 1; CP Exh. 24(c) and (g).)

<sup>13</sup> Pietsch, who did not testify, was a known union member. (CP Exh. 17 and 27.) He would have been eligible to vote based on his hours worked in the critical period. (CP Exh. 14.) However, I credit the statements in Pietsch’s RFL form that he “[l]eft for another job (cash pay job)” as made by Phelps based on information conveyed to by telephone by Dutton. (R. Exh. 27 at 3.) That the form was signed-off by another foreman on the project does not otherwise negate the rest of the record as one made in the Company’s regular course of business. (Tr. 705–707.)

<sup>14</sup> I do not credit McNett’s vague testimony that Barlow and Hickey voluntarily quit. It is highly unlikely that a “large group” simply quit on April 1 and find it likely that they were told to find other employment. The Company initially identified Barlow and Hickey, who it employed on and off over a long period, as laid off in its voter eligibility lists. (CP Ex. 2, 3 and 26(a) and (c); Tr.707–708, 815–816, 1019, 1027; R. Exh. 27 at 4, 6; CP Exh. 2–3, 26(a), (c) and (d).)

<sup>15</sup> The Company’s entry in the RFL form stating that Greenlee quit was incorrect. (R. Exh. 27 at 7.) First, the Company initially identified him as laid off in its voter eligibility lists. (CP Exh. 2–3, 26(d)). Second, Greenlee was part of a “group” that left the project at the beginning of April, an unlikely coincidence. Third, Greenlee has since been rehired by the Company. (Tr. 815–816.)

<sup>16</sup> In light of the admissions in the Company’s initial Excelsior lists that Clark was laid off, I do not credit McNett’s vague testimony that he voluntarily quit. Clark had worked intermittently for the Company since 2014. (Tr. 710; CP Exh. 2–3, 24(f), 26(b); R. Exh. 27 at 5.)

days between December 2015 and April 15, 2016, when he was laid off. Dutton subsequently sought to recall Reed but, by then, he had been referred to another job by Bontempo. Reed did, however, return to the Company's employ on August 22, 2016.<sup>17</sup>

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*D. Westshore Yacht Club*

The Westshore condominium project in Tampa, Florida lasted from July 27, 2014, to September 18, 2016. The initial foreman, Todd Wolosz, oversaw the block work until February 2016, when he was replaced by Coy Hale. Foreman Brian Canfield oversaw the two concurrent projects in St. Petersburg, the Hermitage and the Holdiay Inn jobsites.

On February 9, Ramirez presented a 75-minute safety orientation at the Westshore jobsite parking lot. Ramirez conducted the training without any scaffolding by showing and demonstrating the use of safety equipment. The fall protection portion of the training lasted about 30 minutes. Ramirez, who is bilingual and fluent in Spanish, placed a harness on a dummy and himself. He did not, however, attach a harness to scaffolding and employees never had a chance to hook any of their equipment to the scaffolding during the training.

Ramirez explained during the training that work at 6 feet or higher, combined with exposure to a fall, required use of fall protection at the Company, and demonstrated the proper way to tie off using various pieces of protective equipment. He also showed employees how not to tie off. Referring to the illustration, Ramirez instructed employees that the Company used retractable lifelines when tying harnesses off to scaffolding in order to have at least 3 feet of clearance from the ground following a fall. A safety strap could be used when the employee's anchoring point was above his shoulders or on the scaffold in conjunction with the lifeline if the employee looped the strap inside of itself. These techniques, which Ramirez demonstrated, also gave the same minimum clearance.

Employees were instructed to drill a hole in the floor of the building and insert a tie that springs open, locking the anchor into the concrete.<sup>18</sup> They were to then attach one end of their retractor, to the loop in the tie, and attach the other end of the retractor to their body harness.<sup>19</sup> If needed, employees could hook a nylon strap to the tie as an extension before attaching the retractor. Employees were also shown a short lanyard with a hook and told not to hook the short strap and the long nylon strap together; only to hook the retractor to the long strap. If employees could not use the tie in the floor, they were instructed instead to find something above them to hook into. Employees were also told not to hook the retractor directly to scaffold., but were not otherwise instructed on how to safely tie off to scaffolding.<sup>20</sup>

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<sup>17</sup> The RFL signed by Ron Karp while compiling documents for this case stated that, according to Dutton, Reed voluntarily quit on April 15, 2016, because "he found a better job." (R. Exh. 28 at 2; Tr. 887-888, 891.) That representation was not credible. First, by April 15, the Bethune project was winding down. (Tr. 713, 907, 815-816.) Moreover, Dutton testified, but failed to refute Bontempo's credible testimony that Dutton told him that Reed "was laid off, put on the couch temporarily." In addition, Bontempo's testimony was corroborated by the Company recalling him on August 22. (Tr. 894-910, 1017-1019, 1034, 1039-1045, 1049.)

<sup>18</sup> GC Exh. 20.

<sup>19</sup> GC Exh. 24.

<sup>20</sup> Ramirez and Alvarez provided similar estimates as to the duration of the fall protection orientation.

Discriminatees Luis Acevedo and Walter Stevenson commenced work as bricklayers on the Westshore project on January 25, 2016, the former having referred by the Union.<sup>21</sup> Both attended the aforementioned safety training session. Acevedo told Ramirez that he did not need a harness issued by the Company because he had his own, but needed only a safety strap and a concrete anchor. Ramirez inspected Acevedo's harness, approved it, and later provided Acevedo with the additional equipment needed. Several employees, including Acevedo and Stevenson, asked questions during the orientation. Acevedo asked how to tie off to anchor points, especially using the 6-foot strap, which Ramirez explained. And in response to a question from Stevenson, Ramirez emphasized to everyone in attendance that anyone caught by the Company working at 6 feet or higher without proper use of fall protection would be terminated pursuant to the Company's zero tolerance policy on this point. Both Acevedo and Stevenson signed the orientation attendance sheet, as did the other employees in attendance at Westshore that day.<sup>22</sup>

Raymond Pearson, another former employee whose ballot was challenged, worked as a mason on the Bethune and Westshore projects. He worked 615 hours for the Company from October 2015 through February 2016, which would be the equivalent of 76 days during the eligibility period. Pearson, a union member who wore union insignia on his hard hat and shirts, was directed by foreman Coy Hale to correct faulty blocks laid by another mason, who was terminated because of the defective work. Pearson, however, failed to completely straighten, or make plumb, the block columns at issue. As a result, on February 10, 2016, Hale gave Pearson his final check and told him he was no longer needed on the Westshore job. Pearson was not discharged for cause, however, nor was he told that he was not eligible for rehire. In fact, Hale later told him that the Company would call him when it started another job.<sup>23</sup>

#### *E. University of Tampa*

The University of Tampa (UT) project entailed the construction of a two story sports complex, with work on both the inside and outside of the structure. The Company employed masons at that location from April 17 to July 24, 2016. McNett, assisted by another foreman, Mario Morales, remained on the project until its completion in July.<sup>24</sup>

Masons, working in pairs, initially worked on the outside of each building for about 2 weeks, laying a brick veneer over the new 40 to 50 foot high wall. Employees were not required to wear harnesses or otherwise utilize personal fall protection. They utilized scaffolding as they worked their way up the wall, and had metal railings on the other three faces. The work was

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(R. Exh.7; GC Exh. 2(a)-(b); (Tr. 414-17, 580, 583).

<sup>21</sup> Stevenson has never been a union member, although he became aware of the Union's campaign through information sent to him by the Company in 2016. [Tr. 128].

<sup>22</sup> GC Exh. 2(c).

<sup>23</sup> It is undisputed that Pearson failed to satisfactorily complete the assignment given him by Hale. However, there is insufficient credible evidence that Hale actually informed Pearson that he was being terminated for cause, like the coworker whose work he was trying to fix, for poor work performance. (Tr. 505-508, 781-782, 790, 796-798, 837, 1008-1013; GC Exh. 12; CP Exh. 25(a)-(b); R. Exh. 31.)

<sup>24</sup> *Id.* at 7-9.

followed by work on the building's interior columns, which were 12 to 14 feet tall. No safety orientation was conducted for the employees at the UT jobsite.

5 In mid-April, the Company transferred Acevedo and Stevenson to the UT site at the start of the brickwork phase. Acevedo initially worked on the construction of the exterior walls of the sports. After 2 or 3 weeks working on the exterior, Acevedo was moved inside and started working on the building's interior columns. Stevenson worked with different masons as the project progressed.

10 Acevedo, an active union supporter, met with Union Representative Mike Bontempo during visits to the site and openly wore union shirts and stickers. He spoke with other employees about the benefits of the Union, including insurance and retirement. Acevedo also spoke with his foreman about union dues not being deducted from his paycheck even though he had submitted a dues authorization card. He spoke out at a meeting with his supervisor and other  
15 employees in favor of the Union when the supervisor spoke against the Union.<sup>25</sup>

#### F. *The Union Files for 9(a) Labor Representation*

20 The Company and the Union were parties to a collective-bargaining agreement formed pursuant to Section 8(f) of the Act covering the Company's masons from at least May 1, 2004, and until at least April 30, 2016.<sup>26</sup> Pursuant to that agreement, the Company paid masons an agreed-upon wage, and made monetary contributions to the union health, retirement and other funds based on hours worked by union masons, and later, for hours worked by non-union masons as well. The Company expressed its intention not to renew the Section 8(f) agreement when it  
25 expired, causing the Union to file a petition on April 29, 2016, for certification as the labor representative of the Company's skilled work force pursuant to Section 9(a) of the Act.

30 Pursuant to a Stipulated Election Agreement, approved on May 6, 2016, an election was conducted via U.S. Mail to determine whether employees of the Company wished to be represented for purposes of collective bargaining by the Union. The voting unit consisted of:

35 All bricklayers and/or masons employed by the [Company], excluding all other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

40 Voter eligibility was defined pursuant to the Board's construction industry formula set forth in *Steiny & Co.*, 308 NLRB 1323 (1992), reaffirming *Daniel Construction Co.*, 133 NLRB 264 (1961). Under the *Steiny-Daniel* formula, any mason employed (1) for at least 30 days during the 12-month period preceding April 29, 2016, or (2) for at least 45 days during the 24-month period preceding April 29, 2016, could vote, with two exceptions: employees terminated for cause, and employees who quit voluntarily prior to the completion of the last job on which they were employed.<sup>27</sup>

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<sup>25</sup> Acevedo's testimony regarding protected concerted activity was not disputed. (Tr. 392-412.)

<sup>26</sup> GC Exh. 14.

<sup>27</sup> RD Exh.1(c) at 1-2.

In preparation for the representation election, the Company relied on its human resource records, including personnel files, in generating its initial and amended *Excelsior* lists with the names and contact information of eligible voters. The Union generated its own list of eligible employees based on its copies of the Company's fringe benefit reporting forms.

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Although the Company provided a voter list within the required 2 business days of the Stipulated Election Agreement, the list did not include seven employees—Raymond Pearson, Robert Baker, Mark France, Robert Harvey, Robert Pietsch, George Reed and David Wrench—who worked a sufficient number of hours for the Company in order to satisfy the *Steiny/Daniel* eligibility formula agreed to by the parties. However, four of these employees—France, Baker, Harvey and Pietsch—voluntarily resigned from Company projects prior to the election and, thus, they were rendered ineligible to vote. The remaining three employees—Pearson, Reed and Wrench were laid off and clearly satisfied the *Steiny/Daniel* eligibility formula.<sup>28</sup>

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On May 17, 2016, the Company filed and served an amended *Excelsior* list. On at least three other occasions by electronic communication with Region 12, the Company attempted to amend the *Excelsior* list, including on May 20, 2016, to add an eligible voter;<sup>29</sup> on May 23 to exclude six eligible voters;<sup>30</sup> and finally on May 24, 2016 to exclude six eligible voters.<sup>31</sup>

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### G. The Preelection Period

#### 1. The Union Campaign

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Since 2013, Michael Bonetmpo, a former Company employee and foreman, has served as the Union's field representative. He developed a good working relationship with Ron Karp and Carney, and the Company would contact Bontempo to refer union members to work on Company projects. The Company hired many of Bontempo's referrals. Commencing in 2014 during the Bethune project, Bontempo, with Carney's agreement, was permitted to meet with employees at the jobsite during breaks, at lunchtime, and before and after work. After the Union filed its petition for Section 9(a) representation, Bontempo's visits took on a new meaning.

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On or about April 18, 2016, shortly after the UT job commenced, Bontempo visited the jobsite at about 3:30 p.m. after first calling foreman Mario Morales. He informed Morales that he had drinks and shirts to distribute to the workers. Bontempo spoke to Acevedo, who told him that they were working overtime that day and asked Bontempo to come back around 5 p.m. Bontempo returned at 5 p.m. with beverages and union shirts to distribute to any employees who wanted them. Acevedo took two of the shirts. During the visit, Acevedo signed papers Bontempo brought for him regarding the union insurance plan. Bontempo also distributed union membership applications to several masons, and Acevedo helped explain the benefits of joining the Union to nonmember masons during the visit.

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<sup>28</sup> It is undisputed that employees typically work an 8-hour workday.

<sup>29</sup> CP Exh. 4.

<sup>30</sup> CP Exh. 5.

<sup>31</sup> CP Exh. 6.

Bontempo's interaction with Alvarez did not go unnoticed by Morales. The following morning, Morales approached Acevedo in the parking lot and asked him what papers he had signed for the Union. Acevedo did not respond.<sup>32</sup>

5 After the representation petition was filed, Bontempo became more aggressive in his efforts to reach out to the Company's masons. He began to visit the Company jobsites during work periods, not just during break and lunchtime. He was asked by McNett on one occasion to leave the UT jobsite because it was working time. He was asked at the Holiday Inn jobsite by Canfield to speak to the workers after work. When Bontempo ignored the request, saying he would be brief, Canfield renewed the request and Bontempo acquiesced by waiting in the parking lot until after work. On two occasions at the Westshore jobsite, Hale caught Bontempo speaking to masons during worktime. He told him that he could only speak to the employees during lunchtime or after work and told Bontempo to leave.<sup>33</sup>

## 15 2. Antiunion flyers distributed

Following the filing of the representation petition, both parties actively campaigned for their respective positions. Company flyers urged a vote against union representation and were mailed to employees or provided along with their paychecks. Some company flyers highlighted that Florida is a "right-to-work" state and accused the Union of corrupt practices, including the misappropriation of union dues. The Union was referred to as the enemy and it was noted that the Company recently lost a \$6 million contract to a nonunion company.<sup>34</sup> The Union mailed flyers to its members and distributed union paraphernalia to those interested in wearing them.

## 25 3. Threats of reduced wages

One day during early May 2016, with Feliz interpreting, Richard Karp spoke to masons on the UT job about the upcoming representation election. He explained that they would be receiving a ballot, and that the Company wanted employees to vote. In response to a mason's question as to whether wages would go down if they decided not to unionize, Richard Karp answered that wages are determined by the market.<sup>35</sup>

At lunchtime that day, Feliz followed up Richard Karp's remarks with his own meeting with eight Spanish-speaking masons, including Alvarez. Feliz explained why the Company opposed unionization and urged the employees to "vote for no, no union, because the Union is taking our money." He added that a union victory would result in hourly wages dropping from \$22 to about \$18 per hour. Acevedo challenged that assertion, resulting in a silent glare from

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<sup>32</sup> I credit Acevedo's version of his encounter with Morales. Morales' denial that he asked about the papers was not credible. He initially testified that Bontempo called him about handing out drinks and shirts, and he acquiesced. However, he then attempted to walk that back by attributing his knowledge about Bontempo's activity to another mason who was not called to testify. (Tr. 297-298, 406-407, 726-731, 740-747, 760-762, 765, 770-772, 787; GC Exh. 12.)

<sup>33</sup> Bontempo did not credibly dispute the testimony of several foreman—McNett, Canfield and Hale—regarding his visits to their jobsites during worktime. (Tr. 276, 308, 643-644, 647-648, 822-823, 831-832, 643-647, 698-699, 725-732, 736-739, 743, 786-88, 822-824.)

<sup>34</sup> GC Exhs.7(a)-(m).

<sup>35</sup> This finding is based on Feliz's credible and undisputed testimony. (Tr. 103-106, 111-112.)

Feliz. Another mason asked whether the Company would provide employees with health insurance. Feliz responded that he did not have that information, but that, under the Affordable Care Act, he believed that employers had to offer insurance to all employees. Feliz concluded by imploring the employees not to vote for the Union.<sup>36</sup>

5 During the May 16 pre-work safety meeting with masons on the UT job, McNett, who regularly disparaged the Union, mentioned the Union campaign that was underway. He shared his opinion that it probably “won’t be good for wages” if the Union won.<sup>37</sup>

#### 10 *H. Acevedo and Stevenson are Suspended for a Fall Protection Violation*

15 On Monday, May 16, 2016, employees began the day by attending the mandatory prework safety meeting led by the UT general contractor. That meeting was followed by a Toolbox Talk led by McNett and Morales. Acevedo and Stevenson were present. During the meeting, McNett reminded employees of the Company’s fall protection rule. He explained that some were being moved from outside work to inside work, and that employees would have to tie off once at elevations of higher than 6 feet.<sup>38</sup> McNett also warned that anyone not properly tied off would be fired. Neither McNett nor Morales, however, issued instructions or demonstrated how to tie off under the circumstances.

20 Prior to this meeting, neither Alvarez nor Stevenson had been tying off. Nor did anyone say anything to them about tying off. Neither Acevedo nor Stevenson asked any questions about the need for fall protection, or how to tie off properly, and neither alleged that OSHA regulations prohibited tying off to scaffolding.

25 Shortly after the conclusion of the toolbox talk on May 16, Morales toured the jobsite. Morales observed Acevedo and Stevenson working on a column on open scaffolding above 6 feet, with neither man wearing his safety harness. Morales asked Acevedo and Stevenson whether they attended the meeting where McNett reminded workers to tie off above six feet. 30 Acevedo replied dismissively, saying that he hadn’t been tied off when working on the outside part of the building. Morales responded that those circumstances were different, since Acevedo and other masons had used a different type of scaffold and had a wall in front of them. Acevedo then brushed off Morales’ concern for the second time, saying that he wasn’t going to fall. Morales made Acevedo and Stevenson climb down from the scaffold and retrieve their 35 harnesses.<sup>39</sup>

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<sup>36</sup> I credited Acevedo’s detailed testimony over that of Feliz. Feliz’s denial that he spoke about wages was contradicted by Gerardo Luna, a mason who has been consistently employed by the Company over the past 10 years. (Tr. 45–47, 92–93, 103–06, 409–12, 846–50, 911–12.)

<sup>37</sup> McNett, who accused the Union of tricking employees into signing up and then stole their dues, essentially corroborated Stevenson’s version of what he said at the meeting regarding the impact that unionization would have on wages. (Tr. 129–130, 648.)

<sup>38</sup> Under the Company’s fall protection rule, outside work required protection only at the open ends of the scaffolds; otherwise, employees working at elevation had a wall in front of them and guardrails behind them. In contrast, any inside work done at elevation needed fall protection, because the individual scaffolds were not as elaborate, and because the 7-foot width of the scaffolds, set against to the narrower columns under construction, left the sides and ends open.

<sup>39</sup> Except for Acevedo’s selective memory in failing to recall whether fall protection was discussed in

Morales proceeded to speak with McNett, who was doing some paperwork, at about 8 a.m. on May 16. Morales reported that Acevedo and Stevenson were on a scaffold and not tied off, and that he had directed them to retrieve their harnesses. At approximately 8:30 a.m.,  
 5 McNett returned to the second floor through a stairwell that opened most closely to the column where Acevedo and Stevenson were working. He immediately admonished them for improperly tying the harness and warned that they were at risk for falling. McNett asked Acevedo and Stevenson if they had received safety harness orientation. Both denied receiving any training on how to tie off while working on a scaffold. McNett unhooked the strap and retractor from  
 10 Acevedo's harness, then wrapped the strap around the scaffolding. McNett then reattached the retractor to the strap and to Acevedo's back, and repeated the procedure for Stevenson. Acevedo told McNett that it was against OSHA regulations to prohibit employees from tying off on scaffolding. McNett did not reply and walked away.<sup>40</sup>

15 McNett called Feliz and recounted what had happened. In particular, he related that he had two employees who were claiming that the Company had not trained them on how to tie off and use harnesses. When Feliz asked where the two employees had come from, McNett said that they had come from Westshore. Feliz answered that everyone on that job had been trained. He told McNett that he would have Ramirez investigate, and if the employees in fact had been  
 20 trained, they would be dismissed. Feliz and Ramirez then spoke by telephone. Feliz relayed the information from McNett that two masons at UT, formerly at Westshore, violated the Company's fall protection rule. He directed Ramirez to visit the UT jobsite and ascertain whether the two masons had been trained properly on fall protection.<sup>41</sup>

25 Ramirez returned to UT jobsite around 12 p.m., with the Westshore orientation booklet. He showed McNett the booklet and the signatures in it. McNett said that he and another supervisor had observed Acevedo and Stevenson working at elevation above 6 feet and not using fall protection correctly, and that both had claimed no one had ever trained them on fall  
 30 protection. Ramirez walked over to where Acevedo and Stevenson, who had descended from their scaffold, had been working. He observed that the scaffold had places where a fall risk existed, and that the scaffold was appropriate to tie off to, with a place on the frame for that purpose. Holding the orientation booklet in his hand, Ramirez asked the employees whether they remembered being trained on fall protection at Westshore, as part of an hour and fifteen minute orientation. Both Acevedo and Stevenson confessed that they did. Ramirez showed them their  
 35 signatures on the attendance page.<sup>42</sup>

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that meeting, there is no dispute that McNett and Morales issued that safety directive on May 16. (Tr. 137-41, 153, 158-60, 396-97, 418-22, 620-23, 670-71, 700, 762-65; R. Exh. 14.)

<sup>40</sup> I credit testimony by McNett and Morales that Alvarez and Stevenson were tied off incorrectly. However, McNett's generalized testimony failed to credibly refute Alvarez's contention that other masons were tied up in different ways, with some tied to the scaffold and others to the cross-bracers. (Tr. 139-40, 158-60, 396-97, 422-25, 475-78, 624-30, 670-71, 764-68, 675-76.)

<sup>41</sup> It is undisputed that Feliz and Ramirez quickly established that Alvarez and Stevenson received fall protection training on the Westshore job. (Tr. 89-90, 111, 534-535, 567,630-31, 700-01).

<sup>42</sup> Neither Alvarez nor Stevenson disputed this encounter with Ramirez. (Tr. 41-42, 76, 90-91, 111, 535-540, 567-570, 631-632, 701; GC Exh. 5-6.)

Ramirez contacted Feliz. He confirmed the fall protection violation; related that he had trained the two masons personally; conveyed that he had documented their training; and described how the masons had conceded their attendance. Feliz, who wanted to review the training documentation himself before making a final decision, advised Ramirez to fill out Employee Warning Notices for the employees, which Ramirez did. The Employee Warning Notices provided to Alvarez and Stevenson each stated that “the employee was not tie-off (sic) properly.” They also indicated that they were a level “1” offense of a scale ranging from “1” to “2” to “3” to “FINAL.”<sup>43</sup>

At lunchtime, McNett and Ramirez, who had come to the site a little after 12 p.m., found Acevedo on his break. McNett accused Acevedo of lying to him about getting safety orientation. Acevedo conceded receiving a safety orientation during the Westshore job, but not to tie off behind him, and that “by law, nobody’s supposed to tie it up to the scaffold.” Acevedo continued, saying that no one had been using a harness, even outside, working at the height they had been, risking their lives, and now he was being required to wear it working at only 7 feet high. McNett told Acevedo that they were not supposed to use the harness when working facing towards the wall. Stevenson came by during this conversation and McNett told him to come over. McNett and Ramirez told Acevedo and Stevenson to sign the warnings Ramirez had filled out, because they were being sent home for the day for tying off incorrectly. Referencing the “cinnamon bun” method McNett had done with their straps, Stevenson asked, “Why weren’t we told that before we got up there? You just said tie off.” McNett replied, “It’s not in my hands. I was told to send you home, and you’re in review.” Both men signed the papers, which were their first and only warnings for fall protection violations—and, in fact, their first discipline of any kind while working for the Company—and went home.<sup>44</sup>

#### *I. Feliz Discharges Acevedo and Stevenson after Discussions with Senior Management*

Aware that Acevedo was a union member and the representation election was coming up, Feliz discussed the discipline of Alvarez and Stevenson with the Company’s owners, Ron and Richard Karp.<sup>45</sup> The decision was then made to discharge Acevedo and Stevenson. Feliz communicated that decision to McNett.<sup>46</sup> Feliz then filled out Reason for Leaving Forms for indicating that Alvarez and Stevenson were terminated.<sup>47</sup>

<sup>43</sup> GC Exh. 5–6.

<sup>44</sup> I credit the testimony of Alvarez and Stevenson that other masons were also working at elevated heights over 6 feet without being tied off. The conclusory and overly generalized testimony of McNett and Morales to the contrary did little to counter their assertions. (GC Exh. 5–6; Tr. 89, 139–142, 424–429, 539–540, 632–633).

<sup>45</sup> Bontempo’s testimony merely confirmed interaction between foreman and upper management regarding increases or decreases in staffing projects. However, that interaction did not extend to individual personnel actions which Bontempo was authorized to undertake on his own. (Tr. 188.)

<sup>46</sup> I do not credit Feliz’s testimony that he did not mention the names of the employees involved. Unlike other employees disciplined for fall protection violations, this communication with the owners before taking disciplinary action was unprecedented. It was precipitated, in Feliz’s words, because Alvarez was a member of the Union and Feliz, who had made antiunion remarks in the past, knew that the election was looming. (Tr. 89–94, 119, 541, 633–635, 874, 879–881.)

<sup>47</sup> GC Exh. 9–10.

Acevedo arrived at work the following day, May 17 and was informed by McNett that he was being let go. In response to Acevedo's request for an explanation, McNett said he was being fired for violating safety regulations. Once again, Acevedo responded that it is an OSHA violation to tie off to scaffolding. McNett responded by calling him a liar and telling him that he was fired. Acevedo asked McNett if he was firing him because he is a union guy. McNett responded "this is America; fight for your rights."<sup>48</sup>

Acevedo then returned to the parking lot, called Stevenson and told him that both of them were fired. Acevedo then called Feliz, who replied "that's the way it is, there's nothing that we can do. I'm sorry, that's what it is." Stevenson still proceeded to go to the jobsite and spoke with McNett, who told him that the decision "came from above, it's not me."<sup>49</sup>

Both employees called Feliz the next day. Acevedo asked that his termination be changed to a layoff, so that he might receive unemployment. Feliz declined, but Alvarez filed for unemployment compensation benefits anyway. The Company opposed Alvarez's claim with the Connecticut Department of Labor, but it was granted. Stevenson also called Feliz. Contrite, he told Feliz that "we were wrong," adding that he hoped for another chance on a future job.<sup>50</sup>

#### *J. Other Fall Protection Violations on Respondent's Jobsites*

In the months preceding the discharges of Alvarez and Stevenson, four employees were disciplined for safety violations involving fall protection. Two of them, Brandon Carollo and Timothy Golphin, were discharged on February 10, 2016. Richard Haser was suspended on February 19, 2016. Timothy Bryant was suspended on March 8, 2016. In addition, Jaswin Leonardo was discharged on May 26, 2016, 10 days after Alvarez and Stevenson were discharged.

Carollo, a laborer on the Bethune job, was discharged after being observed working without a safety harness and hurling an expletive at McNett when the latter spoke to him about the violation. The incident was Carollo's third fall protection violation. Previously, he received a warning and 2-day suspension on June 24, 2015, after being observed working at an elevated level on a scaffold without fall protection equipment in place. On August 10, 2015, Carollo was again warned and suspended for 3 days after he was observed by the general contractor's representative walking on scaffolding without being tied by a harness.<sup>51</sup>

<sup>48</sup> I base this finding on the credible testimony of Alvarez. McNett may have been a former union member, but as a supervisor he expressed antiunion sentiment here and on several other occasions. (Tr. 428-431, 477-479, 634-635).

<sup>49</sup> Feliz did not refute Alvarez's credible testimony regarding their conversation after the latter was fired. (Tr. 94, 430.) Similarly, McNett did not refute Stevenson's credible testimony that the former admitted that the order to suspend was not in his hands and the order to fire him "came from above, it's not me." (Tr. 140-141, 633-636.)

<sup>50</sup> R. Exh. 20-21; Tr. 94, 478.

<sup>51</sup> Notwithstanding the confusion as to whether Dutton or McNett terminated Carollo, the evidence indicates that Carollo's termination was predicated on a third fall protection violation and insubordination. (GC Exh. 8(a)-(e); Tr. 542-543, 571-572, 638-640, 899.)

Golphin, a scaffold builder/laborer on the Bethune job, was discharged on February 10, 2016, because he was talking on his cellular phone while working and was not tied off at an elevation of 38 or 40 feet.<sup>52</sup>

5 Haser was observed by the general contractor's representative to be working above 6 feet on the Bethune jobsite while not tied off. It was his second offense. He was sent home and was required to complete the general contractor's safety orientation before being permitted to return to the job.<sup>53</sup>

10 Bryant, a mason who attended Westshore training along with Alvarez and Stevenson was observed by Ramirez not wearing a harness or otherwise connected to his anchor point as he lay block 18 feet off the ground. Ramirez sent Bryant home, but he returned to work 2 days later. Bryant was subsequently terminated for insubordination a little over a month later.<sup>54</sup>

15 Leonardo was discharged from the Midrise project after failing to use fall protection at an elevation of about 10 feet and improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder.<sup>55</sup>

#### *K. The Representation Election*

20 The election was conducted by mail, with approximately 110 eligible voters. The Board mailed the ballots on May 26, 2016, and tallied them on June 9, 2016. The ballot tally showed 16 votes cast for the Union, 16 votes cast against the Union, 2 votes voided, and 22 challenged ballots. The challenged ballots were sufficient in number to affect the election results.

25 By Stipulation, approved on November 17, 2016, the Company and Union resolved 8 of the 22 determinative challenged ballots. The challenged ballots cast by David Almond, Brian Canfield, Marc Carney, Robert Dutton, Coy Hale, Brett McNett, Mario Morales and Todd Wolosz were disqualified and those individuals were deemed ineligible to vote. As a result, the  
30 Tally of Ballots was revised on November 17, 2016, showing 14 challenged ballots. Five of the challenged ballots are from employees alleged by the Company to have been terminated for cause: Acevedo, Stevenson, Raymond Pearson, Robert Harvey and John Smith. The remaining 9 employees were alleged by the Company to have quit voluntarily during the Bethune project:  
35 David Wrench, Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pietsch, and George Reed.

40 On June 16, 2015, the Union timely filed 10 Objections to conduct affecting the results of the election. The objections substantially mirror the unfair labor practice charges in the complaint. On December 13, 2016, after a preliminary investigation of the Challenged Ballots and Objections, the Regional Director's Report on Objections and Challenged Ballots found that the 14 challenged ballots and Objections 1 through 6, 8 and 9 raised substantial and material

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<sup>52</sup> R. Exh. 33.

<sup>53</sup> GC Exh. 3.

<sup>54</sup> Although Bryant's form had the "Dismissal" box marked, Ramirez admitted that he "made a mistake" and was supposed to check "Suspension." Box, which is consistent with the disciplinary action taken. (GC Exh. 2(c), 4(a)-(c); Tr. 433-434, 495, 500, 546-548, 787-789.)

<sup>55</sup> R. Exh. 34.

issues of fact, referred and consolidated them for a hearing in conjunction with the above-captioned unfair labor practice charges.

## Legal Analysis

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### I. THE 8(A)(1) ALLEGATIONS

#### *A. Interrogation*

10 The amended complaint and Objection 3 of the petition allege that statutory supervisor Morales, on a date in April or early May 2016, interrogated employees about their union activities at the Westshore jobsite. Morales denied making such an inquiry, insisting that he actually welcomed Bontempo to the jobsite in order to distribute union shirts and beverages.

15 On or about April 18, Morales, witnessed Acevedo at the jobsite signing papers while in the company of Bontempo. At the time, Acevedo was signing insurance documents provided to him by Bontempo. During that same visit, Morales handed out union shirts, beverages and union applications. The following day, Morales asked Acevedo what papers he signed for Bontempo.

20 The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964):  
 25 whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator sought information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. The *Bourne* factors should not be mechanically applied or used as a prerequisite to a finding of coercive questioning, but rather used as a starting  
 30 point for assessing the totality of the circumstances. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

The Company disseminated antiunion propaganda during the preelection period. However, prior to the filing of the representation petition, there was no history of hostility to the  
 35 Union. To the contrary, the Company frequently requested referrals from the Union pursuant to an 8(f) relationship. The Company did express its intention not to renew that agreement when it expired on April 30. However, that decision was based on the Company's disagreement as to whether it was bound by an industry wide agreement and not by union animus. Moreover, the conversation took place prior to the Union's filing of its representation petition on April 29.

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With respect to the nature of the information sought, there was no reasonable indication that Morales sought information upon which to take action against Acevedo. From Acevedo's  
 45 perspective, Morales was asking about a transaction in which Acevedo signed insurance documents. Morales, Acevedo's foreman, merely approached in Acevedo in the parking lot prior to the start of work and Acevedo was not intimidated in the least by the inquiry, walking away without even answering Morales.

Under these circumstances, Morales's interrogation of Acevedo on or about April 18 was not unlawfully coercive. Accordingly, that complaint allegation is dismissed and Objection 3 of the petition is dismissed.

5

*B. Threats*

The complaint, as amended, and Objection 8 of the petition allege that during the preelection period in May 2016, Statutory Supervisor Feliz threatened a group of employees at the Westshore jobsite with reduced wages if they voted for the Union.

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Feliz, an admitted statutory supervisor, told a group of seven or eight Spanish-speaking masons that they should vote against the Union, because the Union was taking their money. Feliz went on to say that if they "vote yes for union," their rate would go down to approximately \$18 per hour. Luna, who testified at the behest of his employer, admitted that Feliz told the masons "the reasons why the Company did not want us to be with them..." Feliz's statement to employees that their wage rates would be reduced to \$18 and change if the employees chose to be represented by the Union violated Section 8(a)(1) of the Act, as alleged in paragraph 6(a) of the complaint.

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The Board has enumerated factors to consider in determining the severity of threats during the critical period: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated" at or near the time of the election. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *see also PPG Industries*, 350 NLRB 225 (2007). Under this standard, the threat to decrease mason wages if they voted in favor of the Union is quite severe. The threat strikes to the heart of a mason's livelihood and would affect the entire bargaining unit, and it is bolstered by campaign literature directly linking an increase in mason paychecks with the Company no longer honoring the 8(f) agreement with the Union. With a tie vote, and one of the challenged votes in attendance at this meeting where up to eight other employees were present, wide dissemination of the threat is not necessary for it to have an effect on the election.

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The same type of threat was made by Statutory Supervisor McNett during a mandatory safety meeting at the Westshore jobsite on May 16. During that meeting, McNett, who talked regularly about how the Union was tricking employees into signing up and was stealing their money, told employees that a union will probably not be good for wages.

40

McNett's comment during the critical preelection period was coercive. It sent a clear message to employees that the Company would reduce wages if the employees selected the Union, and the statement therefore violated Section 8(a)(1) of the Act.

*C. Restrictions on Solicitation*

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Objection 9 by the Union alleged that the Company discriminatorily applied a solicitation policy to preclude Botempo and other union officials from communicating at the jobsites with masons. The Company denies the allegation, insisting that union representatives were permitted

to solicit employees at its jobsites prior to and after work time, and during lunch and other break periods.

5 Prior to the filing of the representation petition on April 29, 2016, company supervisors and Bontempo agreed that the latter would be permitted to solicit employees at jobsites prior to and after work, and during lunch and other breaks. As the campaign heated up, Bontempo strayed from his agreement by soliciting employees during worktime. On several occasions, company supervisors caught Bontempo soliciting employees during worktime. Each time he was told to stop and to resume solicitation during break and nonwork time. While there was testimony that the Company permitted employees to access food trucks in the parking lot, there is no indication that they permitted food vendors to access the jobsite during worktime. Moreover, the parking lot is the same location where Bontempo was permitted to wait for employees until they went to break time or got off from work.

15 Accordingly, the Company's enforcement of its longstanding solicitation policy during work time was proper under the circumstances and Objection 9 is overruled.

## II. THE SECTION 8(A)(3) ALLEGATIONS

20 Paragraph 7 of the complaint and Objections 1 and 2 of the petition allege that the Company enforced its fall protection safety rules against Acevedo and Stevenson more strictly than normal by suspending them on March 16, 2016 and discharging them the following day because of Alvarez's strong support for the Union. The Company contends that enforcement of these rules was consistent with its enforcement of the rule and discipline of other employees.

25 Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. To determine whether adverse employment action was effected for prohibited reasons, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. 30 *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014).<sup>7</sup> Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. If the General Counsel makes his initial showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Id.*

40 The evidence established that Company foreman became lax in their enforcement of the Company's fall protection policies, which were also required by OSHA regulations, while work was being performed outside of the UT structures. However, once the elevated masonry work went inside, McNett reiterated the Company's written "zero" tolerance policy with respect to fall protection.

5 The Company's stricter enforcement of its fall protection policy cannot be considered adverse action since it was mandated by law. Moreover, I am not convinced that the Company resumed enforcement of the policy solely because of the impending representation election or for the purpose of trapping Alvarez and Stevenson in a violation. Accordingly, that allegation and Objection 2 are dismissed.

10 The Company's enforcement of the fall protection policy against Alvarez and Stevenson, however, produces a different result. They initially experienced adverse action by being suspended. Given the timing just before the election, the action became even more suspicious when Feliz took the unusual step of discussing the incident with the Karps. As a result, Alvarez and Stevenson were discharged 23 days prior to the election for violating the fall protection policy. The Company knew that Acevedo was an active Union supporter and that he stood up to Feliz when the latter threatened lower wages. Stevenson was not an active Union supporter. However, I agree with the General Counsel's assertion that Stevenson, Acevedo's partner on 15 May 16, was collateral damage, i.e., working alongside the wrong person at the wrong time.

20 In addition to the Company's knowledge of Acevedo's union activity, it harbored animus toward that activity. The Company's vigorous anti-union campaign demonstrates that it harbored animus toward the Union. Animus is further established by the Company's threats to reduce employee wage rates if they selected the Union as their collective bargaining representative. The Company's animus is most notably demonstrated by its disparate treatment of Acevedo and Stevenson following the filing of the Union's representation petition, by strictly enforcing its "zero tolerance" policy against them, while ignoring others who were not in compliance.

25 Even in the absence of union activity, the evidence revealed that prior to or after May 16 no other employees were discharged for failing to tie off "properly" as a first offense. A glaring example of such disparate treatment was when Bryant, also safety trained a month earlier, was observed working without a harness, but only sent home for the day.

30 Prior to May 16, the Company's safety policy was not zero tolerance, but rather, a tolerance of up to one or two fall protection violations. Carollo was charged with two fall protection violations, but was not discharged until his third offense. The decision to discharge Carollo following a third safety violation is consistent with the Company's safety policy as reported to the Florida unemployment compensation agency. In that regard, the Company stated 35 that its policy was to issue warnings to employees for their first two safety violations and only discharge after the third safety violation. Similarly, after a second fall protection violation, Haser was merely sent home until he attended safety orientation again.

40 The discharges of Golphin and Leonardo were not comparable to those of Alvarez and Stevenson. Also discharged based on one incident, Golphin and Leonardo were each guilty of severe compound violations—failing to anchor their harnesses while simultaneously engaging in another safety violation.

45 The evidence of disparate treatment, combined with the timing of the suspensions and discharges shortly after Acevedo challenged Feliz about the merits of union representation during the peak of the pre-election period, provides a causal connection between the Company's anti-Union animus and the decision to selectively enforce its fall protection policy and discharge

Acevedo and Stevenson. Under the circumstances, it is evident that Acevedo and his partner at the time, Stevenson, would not have been suspended and then discharged in the absence of Alvarez's protected conduct.

5           Accordingly, the suspension and discharges of Alvarez and Stevenson, occurring during  
the critical pre-election period as the result of the Company's discriminatory enforcement of its  
fall protection policy, were a pretext. The Company's motivation in terminating Alvarez and, by  
association, Stevenson, in retaliation for Alvarez's support for the union was retaliatory and  
10           calculated to prevent him from voting in the representation election and restrain others from  
voting for the Union.

15           In determining whether to set aside election results the Board considers a number of  
factors, such as (1) the number of incidents of misconduct; (2) the severity of incidents and  
whether they were likely to cause fear among unit employees; (3) the number of employees in  
the unit subject to the misconduct; (4) the proximity of the misconduct to the election; (5) the  
degree of persistence of the misconduct in the minds of unit employees; (6) the extent of  
dissemination of the misconduct; (7) the closeness of the vote; and 8) the degree to which the  
misconduct can be attributed to the party. See *Cedar-Sinai Medical Center*, 342 NLRB 596, 597  
20           (2004).

25           When considered in conjunction with the Company's coercive statements threatening  
lower wages if employees voted for the Union, the discharge of Alvarez, an open supporter of  
the Union, clearly had an effect on the outcome of the election. It is well settled that conduct in  
violation of Section 8(a)(1) that occurs during the critical period prior to an election is "a fortiori,  
conduct which interferes with the exercise of a free and untrammelled choice in an election." The  
Board will thus set aside an election unless the 8(a)(1) violation is so minimal or isolated that it  
is virtually impossible to conclude that the misconduct could have affected the election results.  
E.g., *Iris U.S.A., Inc.*, 336 NLRB 1013 (2001).

30           Under the circumstances, the Company's actions violated Section 8(a)(3) and (1) of the  
Act as alleged in paragraph 7 of the amended complaint and constituted objectionable conduct as  
alleged at Objection 2. Objection 1 is overruled.

35           In the event that the Union does not prevail after the additional 10 challenged votes are  
counted, the Section 8(a)(3) and (1) violation, which was also alleged as election Objection 2,  
warrants setting aside the election.

### III. THE CHALLENGED BALLOTS

40           The Company challenged the ballots cast by Luis Acevedo, Robert Harvey, Raymond  
Pearson, John Smith, and Walter Stevenson, on the basis that they were discharged for cause.  
The Company also challenged the ballots cast by Robert Baker, Jacob Barlow, Jeremy Clark,  
Mark France, Forest Greenlee, Dustin Hickey, Robert Pretsch, George Reed, and David Wrench  
45           on the basis that they quit their jobs.

It is well established that the burden of proving that an employee is ineligible to vote rests with the party asserting the challenge. *Sweetener Supply Corp.*, 349 NLRB 1 122 (2007). The Company's ability to meet such a challenge with respect to Alvarez and Stevenson is precluded by the law of the case, i.e., they were unlawfully terminated after the Company discriminatorily enforced its fall protection policy against them because Alvarez engaged in protected conduct during the pre-election period. Accordingly, Alvarez and Stevenson were eligible to vote and their votes should be counted.

With respect to the following employees, there was insufficient credible evidence to satisfy the Company's burden with respect to their challenged ballots, thus, they were laid off by the Company with a reasonable expectation of rehire and their votes should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson. The RFL forms produced by the Company purporting to show that each voluntarily quit were simply not reliable. In addition to other factors previously mentioned, these documents were not provided to the employees and they did not have an opportunity to dispute the accuracy of the representations therein. Under the circumstances, I gave these documents little weight in determining whether an employee quit or was laid off. See *N.L.R.B. v. Cal-Maine Farm, Inc.*, 998 F. 2d 1336, 1343(5th Cir. 1993) (self-serving business records received in evidence but trier-of-fact gave disputed contents little weight).

The little weight that I gave such documents did enable the Company, however, to meet its burden in establishing that the remaining employees voluntarily quit or were discharged for cause prior to the election and their votes should not be counted: Robert Harvey, Robert Baker, Mark France and Robert Pietsch.

#### IV. THE EXCELSIOR LIST

The Union contends at Objections 4 and 5 that the Company submitted an inaccurate or incomplete Excelsior List and improperly included additional lists to the list after it was produced to the Union. Both objections concern the

Employers are required to provide complete and accurate information as required by *Excelsior Underwear, Inc.* 156 NLR B 1236 (1966). Pursuant to Section 102.62(d) the Board Rules and Regulations, an employer must provide a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters. Moreover, an employer's failure to provide the list in proper format shall be grounds for setting aside the election upon timely objection.

Although the Company provided a voter list within the required two business days of the Stipulated Election Agreement, the list undisputedly did not include seven employees—Raymond Pearson, Robert Baker, Mark France, Robert Harvey, Robert Pietsch, George Reed and David Wrench—who worked a sufficient number of hours for the Company in order to satisfy the *Steiny/Daniel* eligibility formula agreed to by the parties. However, France, Baker, Harvey and Pietsch voluntarily resigned from Company projects prior to the election and, thus, were rendered ineligible to vote. The remaining three employees—Pearson, Reed and Wrench were laid off and clearly satisfy the *Steiny/Daniel* eligibility formula. There was undisputed

testimony that employees typically work an eight hour work day, and Company payroll records corroborate this testimony as they clearly identify hours as regular or overtime for each employee in question.

5 By intentionally omitting three employees required to be included on the voter eligibility list in some capacity in direct violation of Rules and Regulations of the National Labor Relations Board §102.62(d), the Company committed objectionable conduct affecting the results of the election. *See Shore Health Care Ctr.*, 323 NLRB 990 (1997) (election directed where voter eligibility list omitted only 5% of the names and there was evidence of intentional conduct on the part of the Employer). In this case, where there was tied vote, even the omission of one eligible voter ultimately affected the results of the election.

15 The Union refers to the Company's untimely attempts to frustrate the intent of the law by seeking to add and remove employees from the list after the initial list was field. The Regional Office, however, conducted the election based on the only timely *Excelsior* list and the Company's efforts to alter the list were unsuccessful.

20 In situations where the results of the vote are a tie and there are fourteen challenges, three of whom were omitted from the voter eligibility list, the Company's conduct certainly has an effect on the results of the election. *See Woodman's Food Markets, Inc.*, 332 NLRB 503 (2000) (Board gives substantial weight to the number of eligible voters omitted from the eligibility list when they are sufficient in number to affect the results of the election). *Special Citizens Futures Unlimited, Inc.*, 331 NLRB 160 (2000); *Thrifty Auto Parts, Inc.*, 295 NLRB 11 18 (1989); *Gamble Robinson Co.*, 180 NLRB 532 (1970). By its actions, the Company failed to substantially comply with the Board's *Excelsior* requirements, the election should be overturned and a new one scheduled. *Shore Health Care Ctr.*, 323 NLRB 172, 323 NLRB 990 (1997).

#### CONCLUSIONS OF LAW

30 1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

35 3. By threatening or implying that employees' wages will go down if they select the Union, the Company violated Section 8(a)(1) of the Act.

40 4. By suspending Luis Alvarez and Walter Stevenson on May 16, 2016 and discharging them on May 17, 2016 because Luis Alvarez supported the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

45 6. The challenged votes of Luis Alvarez and Walter Stevenson, unlawfully discharged, should be counted. In addition, the challenged votes of the following laid-off employees should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy



(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5

(a) The Respondent, having discriminatorily suspended and discharged Luis Acevedo and Walter Stevenson, must offer them full reinstatement as masons on the next available project and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

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(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

15

(c) The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

20

(d) Within 14 days after service by the Region, post copies of the attached notice marked Appendix<sup>57</sup> in both English and Spanish at its all of its active job sites and mail said notices, at its own expense, to all employees of the attached notice, at its own expense, to all bricklayers and masons employed who were employed by the Respondent at its Florida jobsites at the University of Tampa in Tampa, Florida Bethune-Cookman University in Daytona Beach, Westshore Yacht Club in Tampa, the Hermitage in St. Petersburg, and the Holiday Inn Express in St. Petersburg at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

35

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.

40

IT IS RECOMMENDED that (1) the challenged votes during the June 9, 2016 labor representation election of Luis Alvarez, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson be

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<sup>57</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

counted; (2) the challenges to votes cast by Robert Harvey, Robert Baker, Mark France and Robert Pietsch be sustained; (3) Objections 1, 4, 5 and 8 be sustained; and (4) Objections 2, 3 and 9 be overruled.<sup>58</sup>

5 Dated, Washington, D.C. May 10, 2017



Michael A. Rosas  
Administrative Law Judge

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<sup>58</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington DC by May 24, 2017.

**APPENDIX**

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 discharge or otherwise discriminate against any of you s because you engage in union or other protected concerted activity in order to discourage you from voting in a representation election.

WE WILL NOT threaten or imply that your wages will go down if you select the Union as your collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Luis Acevedo and Walter Stevenson reinstatement as masons on our next available project.

WE WILL make Luis Acevedo and Walter Stevenson whole for any loss of earnings and other benefits resulting from their unlawful discharges on May 17, 2016, less any net interim earnings, plus interest compounded daily.

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

WE WILL compensate Luis Acevedo and Walter Stevenson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Luis Acevedo and Walter Stevenson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ADVANCED MASONRY ASSOCIATES, LLC  
d/b/a ADVANCED MASONRY SYSTEMS

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(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824  
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/12-CA-176715](http://www.nlr.gov/case/12-CA-176715) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2345.