

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

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

Employer,

and,

**Case 12-CA-176715
12-RC-175179**

**BRICKLAYERS AND ALLIED
CRAFTWORKERS,
LOCAL 8-SOUTHEAST**

Petitioner.

UNION'S BRIEF IN OBJECTION TO EMPLOYER'S EXCEPTIONS

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UNION'S BRIEF IN OBJECTION TO EMPLOYER'S EXCEPTIONS

Bricklayers and Allied Craftworkers, Local 8 Southeast (hereinafter "Petitioner" or Union"), the Charging Party, respectfully submits this brief opposing the exceptions filed by Advanced Masonry Systems (hereinafter "AMS" or "Employer"). As the Judge concluded, the Employer engaged in certain unfair labor practices and the remedies recommended should be followed. Specifically, the challenged votes of Luis Acevedo and Walter Stevenson should be counted as the Judge concluded that their terminations violated established labor law. Moreover, the challenged votes of John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed, and Raymond Pearson should also be counted as the Judge determined that AMS did not satisfy its burden of proof regarding their ineligibility to vote. Finally, if after the counting of the ballots, the Union is not certified as representative of the employees at AMS, the Judge concluded that the results of this election should be set aside based on the Employer's conduct. The Employer's exceptions are based primarily on mere disagreement with the Judge's credibility determinations and on legal arguments that are contrary to settled law.

I. INTRODUCTION AND STATEMENT OF THE CASE

For ease of cross-reference, the Union will generally respond to the Employer's arguments in the order in which they are presented in AMS's Brief. But while doing so, the Union requests the reader bear in mind at the outset that AMS's counsel have done what good lawyers often do: they have tried to bury the discussion of some of the most egregious misconduct. With that being said, much of the Union's response is broadly applicable to the Employer's brief in its entirety. The exceptions filed by the Employer require that the Board make findings contrary to those made by the Administrative Law Judge (hereinafter "Judge" or

“ALJ”) as to the credibility and the weight of the evidence. The Employer’s exceptions in this regard are clearly without merit.

The Union and the Employer maintained an 8(f) collective bargaining agreement relationship for over a decade. [GC Ex. 14; Tr. 170-174]. The Employer employs union masons through its relationship with the Union. [Tr. 58, 260, 851]. The Union is a labor organization that represents masons. [J. Stip. 2].¹ This case arises out of the Union’s representation of the masons employed by the Employer. On April 29, 2016, the Union filed a petition for representation and commenced an organizing campaign. [RD Ex. 1(a); Tr. 174, 175]. The campaign included distribution of literature to AMS employees;² distribution of Union t-shirts and stickers for hard hats; and meetings with employees of AMS by Union officials. [GC Ex. 12; CP Ex. 25(b); Tr. 175-177, 401-404]. The objectionable and unlawful conduct at issue in this case took place in this context.

Pursuant to *Taylor Wharton Division*, the Judge considered several factors in determining that the objectionable conduct of the Employer interfered with the employees’ freedom of choice in the election. *See Taylor Wharton Division*, 336 NLRB 157 (2001). The Judge explained in great detail how the evidence, when taken as whole, supports that there was Employer interference in the election.

¹ While this issue was not necessarily submitted to the ALJ for resolution, the history of the relationship between the parties was relevant to the issues that were submitted and ample evidence was introduced into the record to permit the ALJ to determine that the 8(f) relationship existed. Consequently, Employer Exception No. 3 should be overruled.

² The record is replete with evidence that both parties distributed literature during the organizing campaign. [GC Ex. 7(a)-(m)]. However, it is the evidence that relates to the Employer’s literature that is relevant to, and determinative of, the Judge’s finding of necessary animus on the part of the Employer in regards to the unfair labor practices and Petitioner’s objections to the election. While the Employer attempted to show animus on the part of the Union toward the Employer throughout the hearing, this is simply irrelevant to the questions presented as these were not issues related to Union unfair labor practices or timely Employer objections to the election.

As part of his decision, the Judge explained how statutory supervisors employed by AMS used coercive language in which they told employees the Union was stealing their money and that a union would not be good for wages, clear 8(a)(1) violations. [ALJD 17:7-41]. The Judge explained how AMS committed 8(a)(3) and (1) violations when it suspended and discharged Luis Acevedo³ and Walter Stevenson. [ALJD 20:30-32]. The Judge, again in great detail, points out that AMS was aware of Acevedo's union activity and that AMS harbored great animus towards that activity. [ALJD 19:17-23]. AMS's decision to suspend and discharge the two of them for violations of its fall protection policies was pretext for AMS's real, retaliatory motivations. [ALJD 20:5-10].

Additionally, the Judge took great effort to explain the parties' agreement in the Stipulated Election Agreement regarding employee eligibility to vote. [ALJD 8:28-34]. He specifically recognized the definition of the voting unit, and identified the formula required for determining voter eligibility in the construction industry pursuant to the *Steiny-Daniel* formula. [ALJD 8:36-42]. The Judge also detailed the improprieties with the voter list provided by the Employer. [ALJD 9:6-18]. After complete and careful review of the record evidence and application of the relevant statutory, regulatory and case law, the Judge correctly concluded that Petitioner's Objection 8 should be sustained.

The Judge also addressed the challenges to the ballots in great factual detail in his recommendation to the Board. He analyzed the facts specific to each individual voter's eligibility and analyzed those varying findings of fact against the legal standards relevant to determining

³ The ALJ in his decision uses the name "Alvarez" interchangeably with the name "Acevedo". It is clear from both the Exceptions filed by the Employer (Exception No. 2) and the Counsel for the General Counsel (Exception Nos. 2 and 3) that the ALJ's use of a wrong name was incidental and merely a typographical error. In order to correct this oversight, Petitioner submits that Counsel for the General Counsel's Objections 2 and 3 should be sustained. Moreover, the Employer's position that this typographical error is evidence that the ALJ did not carefully review the record before him stretches credulity and emphasizes the overall weaknesses of the Employer's arguments in support of its claimed exceptions.

voter eligibility. While the Employer's exceptions and evidence submitted in general attempts to lump groups of voters together, the Judge performed a more careful review of the facts and separately considered each voter's circumstance to conclude that there was insufficient credible evidence for the Employer to carry its burden of proving that eight of the fourteen ballots challenged as voluntarily quit or discharged for cause were ineligible to vote. Two of the fourteen were determined to be eligible to vote because they were the subject of the unfair labor practice charges which the Judge concluded had merit. The fact that the Judge did find credible evidence to support the ineligibility of four voters refutes the Employer's assertion that the Judge did not carefully consider the evidence.

The Judge was best positioned to evaluate and question the evidence put before him and make determinations based on that evidence. Now, AMS asks that those determinations be set aside because the Judge's decision contains "serious errors of fact and law." [Emp. Brief p. 2]. As will be clear in latter sections of this brief, AMS is wrong. The Judge made well-reasoned and heavily-supported factual and legal conclusions ripe for Board adoption.

The Employer has pointed out that the Board reviews decisions of an administrative law judge *de novo*. [AMS Brief pg. 17, relying on *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enf'd*. 188 F.2d 362 (3d Cir. 1951)]. However, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *See Standard Dry Wall Products, Inc.* at 545. It is the Board's policy to attach great weight to a Trial Examiner's [the Judge's] credibility findings insofar as they are based on demeanor. *Id.* "To the extent that the Judge's decision rests explicitly on his evaluation of demeanor, we are required to weigh those particular findings more heavily." *Kopack v. NLRB*, 668 F.2d 946, 954 (7th Cir. 1982).

Without repeating, the Judge, in great detail and with thorough understanding, summarized the facts of the case, the testimony of the witnesses, and the evidence presented in his decision. His decision aptly paints a picture of a company that committed unfair labor practices in violation of the National Labor Relations Act in order to prevent a union from organizing its employees. The Judge made clear and precise findings as to the testimony and other evidence put before him. A review of all relevant evidence supports the Judge's decision. Accordingly, his credibility findings should be adopted and his decision left undisturbed by the Board, and the Employer's exceptions thereto should be overruled.

II. ARGUMENT

A. The Record Supports Finding that Feliz and McNett Made Statements In Violation of Section 8(a)(1) (Response to Employer Brief 18-20) (Answer to Employer Exceptions 9-11).

The Judge found that Aleksei Feliz and Brent McNett committed unfair labor practices as to the threats to decrease wages of employees if they voted in favor of the Union in the election. Moreover, the Judge found that these threats occurred during the critical period and sustained Petitioner's Objection 8. AMS's exceptions have no merit.

(a) First (as set forth in paragraph 6(a) of the Complaint and Objection 8), in early May 2016, Aleksei Feliz threatened employees with reduced wages if they voted for the Union. The Judge discussed this charge, and found merit in it, at page 17, lines 7-18. AMS's argument on exceptions is a simple disagreement with the Judge's credibility determination. (*See* Emp. Brief p. 18 (AMS arguing that Feliz should be credited over Acevedo)).

The Judge's credibility determination easily survives the deferential *Standard Drywall* review. The Judge was able to see, firsthand, the testimony of Acevedo, and he specifically "credits Acevedo's detailed testimony over that of Feliz." [ALJD 11:fn. 36], Moreover, in

contrast to AMS's portrayal of Luna corroborating the testimony of Feliz, the Judge found that Luna contradicted the testimony of Feliz in this regard, with this finding relying upon substantially cited record evidence. [ALJD 11:fn. 36; Tr. 846-50].

The Judge's findings were supported by the credited testimony. Acevedo testified that Feliz made this threat in Spanish during a University of Tampa job site meeting with only Spanish-speaking employees, including Acevedo. [Tr. 409-412]. When Feliz threatened that the mason rate would decrease if the Union was successful in the election, Acevedo was the only employee at the meeting to challenge him in the presence of the other eight eligible voters at the meeting. [Tr. 411-412]. Feliz testified that the substance of the meeting was to simply inform employees about the election process and that they should vote yes or no; however, as the Judge found, this testimony strains credibility considering the magnitude of the anti-union campaign. [ALJD 11:fn. 36; Tr. 107; GC Ex. 7(a)-(m) (clearly requesting that employees "VOTE NO!)]

The behavior as found by the Judge is unlawful under settled precedent. *See e.g. 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 AMS no longer honoring the 8(f) agreement with the Union. [GC Ex. 7(h)]. 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. The Judge correctly concluded that this conduct interfered with the results of the election.

(b) Second (as set forth in paragraph 6(b) of the Complaint and Objection 8), in early May 2016, Brent McNett threatened employees with reduced wages if they voted for the Union. The Judge addressed this charge, and found merit in it. [ALJD 17:34-41]. AMS's argument on exceptions is simply not supported by the record evidence. The Judge correctly found that Walter Stevenson testified that, during the critical period, McNett told employees at a safety meeting that a union will probably not be good for wages. [ALJD 11:fn. 37; Tr. 129-130]. Additionally, Acevedo testified that McNett talked disparagingly about the Union on multiple occasions and once stated that the Union steals employees' money that they deserve. [Tr. 411]. McNett corroborated both that he talks unfavorably about the Union in his own testimony, in which he repeated that he heard the Union tricks people into signing up, and that, as the Judge correctly found, there was something to lose in regards to the wage package if the Union won the election. [Tr. 608; ALJD 11:fn. 37; Tr. 684].

All of this record evidence supports the Judge's ultimate finding that McNett's comment was coercive and violated 8(a)(1). [ALJD 17:41]. *See Dish Network Corp.* 358 NLRB No. 29, slip op. at 1 (2012) (finding that a threat to decrease wages if the union was successful can be distinguished from more innocuous statements about the employer's intent to negotiate with the union during collective bargaining or to adhere to the terms of a collective bargaining agreement or empty threats.)

B. The Discharges of Acevedo and Stevenson were Clearly Illegal (Response to Employer Brief 20-34) (Answer to Employer Exceptions 4-5, 15-38)

The Judge made no errors in regard to the discriminatory terminations of union supporters Luis Acevedo and Walter Stevenson, which were the subjects of Paragraphs 7(c) and (d) of the Complaint and Petitioner's Objection 1. The Judge addressed this issue at page 11,

line 10 to page 15, line 17, and at page 18 line 18 to page 20 line 36. The Judge aptly summarized his conclusion:

Accordingly, the suspension and discharges of Alvarez [sic] 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 [sic], and by association, Stevenson, in retaliation for Alvarez's [sic] support for the union was retaliatory and calculated to prevent him from voting in the representation election and restrain others from voting for the Union.

[ALJD 20:5-10].

On May 16, 2016, the Employer suspended employees Acevedo and Stevenson. They were terminated the next day. This was eight days before ballots were to be mailed to employees in the election. Acevedo was an active union supporter. [Tr. 402, 404-406, 443]. He met with Union representative Mike Bontempo when he would make job site visits during the critical period. [Tr. 401-402]. He openly and prominently wore, and displayed, Union shirts and stickers. [Tr. 402-403, 405, 443-444; CP Ex. 25(b)]. He spoke with his fellow employees about the benefits of the Union, including insurance and retirement. He spoke with his supervisor about union dues not being deducted from his paycheck even though he had submitted a dues authorization card. [Tr. 397-400; GC Ex. 13]. He spoke out at a meeting with his supervisor and other employees in favor of the Union when the supervisor spoke against the Union. [Tr. 410-412].

AMS claims that it had just cause for its terminations of Acevedo and Stevenson. It argues that Acevedo and Stevenson violated safety policies. But, as the Judge recognized, the evidence shows a different motivation: AMS terminated Acevedo because he was a Union supporter and it terminated Stevenson to hide the actual unlawful reason for terminating Acevedo. This conclusion is supported most strongly by two findings by the Judge from the

substantial record evidence: (1) a comparison to other employees who received much lesser degrees of discipline for safety violations [ALJD 14:19; ALJD 15:1-17]; and (2) the Judge crediting the testimony of Acevedo and Stevenson [ALJD 13:fn. 44; ALJD 14:fn. 48 and 49] and discrediting AMS safety personnel Feliz [ALJD 13:fn. 46] and supervisors McNett and Dutton [ALJD 14:fn. 48] regarding the investigation of the alleged safety violations of Acevedo and Stevenson, and the disparate treatment received by them.

The Judge correctly applied the long-standing bell-weather case applicable to these cases. *See Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982). Where there are a number of motivating factors present in the contested personnel actions, one must question the Employer's motives. The analytical test to be applied is the Board's so-called "dual motive" standard enunciated in and subsequently approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). The Judge, correctly noting further, that establishing the requisite proof of animus and discriminatory motive under this standard may be based on direct evidence or inferred from circumstantial evidence. *See Anglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014).

(1) Other Employees Received Less Discipline

The discipline of Acevedo and Stevenson following their first violations of AMS's fall protection policies is inconsistent with AMS's discipline for other employees who have violated its fall protection policies. Acevedo and Stevenson were both terminated following their first offense for allegedly violating AMS's fall protection policies. [Tr. 142, 429-430; GC Ex. 5 and 6]. Other employees were not. The Judge acknowledged that AMS was aware of Acevedo's union activity and that the Employer harbored animus toward that activity. [ALJD 19:17-18].

He also noted that this animus was demonstrated in the disparate treatment of Acevedo and Stevenson following the filing of the Union's representation petition. [ALJD 19:20-22].

The Judge found that other employees were not treated as harshly, comparing Acevedo and Stevenson directly to Bryant, who had also been safety trained a month earlier, but was only sent home for the day when observed working without a harness. [ALJD 19:26-28]. Further, the Judge found that Carollo, another comparator, also was not terminated following his first, or second, fall protection violation, and that Haser was merely sent home and ordered to attend safety orientation again following his second fall protection violation. [ALJD 19:31-37]. There is ample evidence in the record to support these findings.

In regards to Haser, the evidence showed that he was allowed to remain with AMS following his first offense for working on scaffolding over six feet high without being tied off. [GC Ex. 3]. The second time that he was found doing so, he was still not terminated by AMS. [GC Ex. 3]. Instead, he was sent home for the day, as Acevedo and Stevenson initially were, and required to complete an orientation before returning to work. [GC Ex. 3]. This evidence is specifically cited by the Judge. [ALJD 15: fn. 53].

Similarly, Timothy Bryant was not terminated following a fall protection violation. He was observed, ironically, by Luis Acevedo violating the fall protection policies. [GC Ex. 4(a) and (c)]. AMS sent him home for the remainder of the day and did not terminate him. [GC Ex. 4(a), (b), and (c)]. This evidence was also relied upon by the Judge in reaching his ultimate conclusion of disparate treatment. [ALJD 15:10-13, fn. 54].

Brandon Carollo also was not terminated following his first, or second, fall protection violation. Carollo was written up for a fall protection violation that occurred on June 24, 2015, and was not terminated. [GC Ex. 8(d)]. He was written up a second time for a fall protection

violation on August 20, 2015. [Tr. 898-899; GC Ex. 8(d)]. The second write-up even indicates that he had been previously warned. [GC Ex. 8(e)]. Still, he was not terminated. [Tr. 900; GC Ex. 8(e)]. He was not terminated until much later. [GC Ex. 8(a)]. Following his eventual termination, Carollo filed for unemployment. [GC Ex. 8(b) and (c)]. AMS's response to the unemployment questionnaire from the State indicated that Carollo had been given several verbal and written warnings about fall protection. [GC Ex. 8(c)]. The Judge discussed, with clear understanding, Carollo's employment situation in his decision. [ALJD 14: 28-34]

While Acevedo and Stevenson were terminated following their first fall protection violations, the Employer unpersuasively argues that their cases were somehow distinct from those of Haser, Bryant, and Carollo, and others. Feliz testified that Acevedo and Stevenson were terminated following their first offense because they were observed directly by AMS supervisors, and not a third party. [Tr. 93-94, 99-100]. Feliz and Ramirez each testified that this is distinct from Haser and the others who were observed violating the fall protection policy because they were observed by a general contractor, and not AMS supervisors. [Tr. 99-100, 532-533].

It may be true that Haser, Bryant, and Carollo were not observed violating the fall protection policy by AMS supervisors. However, even if they were not observed directly by AMS supervisors and it is the general contractor's policy not to terminate an employee following a first offense, there is nothing stopping AMS from following its own more stringent zero tolerance policy. [Tr. 703]. AMS has done just that and gone over the general contractor policies in the past. [Tr. 703]. Moreover, as the Judge appropriately noted, this claimed exception is not found in the Employer's "zero tolerance" policy. [ALJD 3:fn.6].

The Judge's findings and the evidence support that Acevedo and Stevenson would not have been suspended and discharged had Acevedo not been engaged in protected activity. The disparate treatment evidence combined with the timing of their discipline so soon after Acevedo challenged Feliz supports the Judge's finding that there is a connection between the Employer's animus towards the Union and its decision to discriminatorily enforce its fall protection policies against Acevedo and, his work partner, Stevenson.

In addition to the evidence of disparate treatment of Acevedo and Stevenson in regards to the application of the fall protection policy, the Judge also relied upon the conduct of the investigation and manner of implementation of the discipline to establish the discriminatory nature of the terminations. [ALJD 19:7-15]. AMS made the decision to terminate Acevedo and Stevenson following their first fall protection offense. McNett called Ramirez to tell him that two employees had violated the fall protection policy; Ramirez then reported it to Feliz. [Tr. 89]. Feliz, not knowing who the employees were, initially had the employees suspended for the day. [Tr. 90]. After reviewing the employee signed paperwork indicating the employees' names, Feliz "realized that at least one of them was a union mason by the name." [Tr. 91]. It was then that Feliz contacted senior management. [Tr. 91].

Though Feliz testified that he has the authority to dismiss employees and doesn't typically call senior management, he did just that before terminating Acevedo and Stevenson. [Tr. 91-92]. He testified that he contacted senior management because "there was a situation going on with the Union." [Tr. 91]. AMS clearly could have followed the discipline process applied to other employees. It did not. Ron Karp testified that he is not tremendously involved in the day to day on projects once they are going. [Tr. 882]. Nonetheless, Feliz went to Ron

Karp and relied on him and his brother, Richard, both principals in the company, to make the decision to terminate Acevedo and Stevenson. [Tr. 880-881].

The Employer did not follow its past discipline process because Acevedo was a known union member. [Tr. 91; GC Ex. 13; Tr. 402-403; GC Ex. 12]. It chose to terminate him, and Stevenson as pretextual cover, to prevent him from voting for the Union in the coming election and encouraging others to do the same. This was the finding by the Judge and it is amply supported by the record evidence.

(2) The Testimony of Acevedo and Stevenson was More Credible than that of Feliz, McNett, Morales, and Dutton

The Judge's findings show that he was more inclined to rely on the testimony of Acevedo and Stevenson than that of Feliz, McNett, Morales, and Dutton. In thoroughly reviewing the circumstances surrounding their suspensions and terminations, the Judge made numerous credibility findings in favor of Acevedo and Stevenson.

The Judge found that the testimony of McNett was too generalized to credibly refute Acevedo's contention that other masons were also tied off in other ways. [ALJD 12:fn. 40]. Acevedo testified that everyone was tied up that day in different way "because everyone thinks different, different way, you know, tie it up to the scaffolds or the cross-bracer--...--to his back." [Tr. 425]. Additionally, the Judge found that the testimony of Acevedo and Stevenson that other masons were also working at elevated heights over six feet without being tied off was more credible than the conclusory and overgeneralized testimony of McNett and Morales. [ALJD 13:fn. 44, relying on GC Ex. 5-6; Tr. 89, 139-142, 424-429, 539-540, 632-633].

The Judge's credibility determinations in favor of Acevedo and Stevenson over the AMS management correctly continued. The Judge found that Feliz's testimony that he did not mention the names of the employees involved in the fall protection incident, that is Acevedo and

Stevenson, to the owners of AMS was not credible. [ALJD 13:fn. 46]. The Judge noted in making this determination that this communication with the owners about discipline was unprecedented and that it was precipitated because Acevedo was a member of the Union and Feliz knew that the election was looming. [ALJD 13:fn. 46, relying on Tr. 89-94, 119, 541, 633-635, 874, 879-881]. Feliz testified that he has the authority to dismiss employees and doesn't typically call senior management, as he did before terminating Acevedo and Stevenson, because "there was a situation with the Union." [Tr. 91-92].

The Judge also found credible Acevedo's assertion that McNett responded "this is America, fight for your rights" when Acevedo asked McNett if he was firing him because he is a union supporter. [ALJD 14:fn. 48]. The Judge did this while also discrediting testimony of McNett to the contrary, based on McNett's expressions of antiunion sentiment as a supervisor on numerous occasions. [ALJD 14:fn. 48].

The Judge did not wholly discount the testimony of McNett, Feliz, and other AMS employees; he just found the testimony of Acevedo and Stevenson to be more credible based on the substance and their demeanors. It is with these credibility determinations in mind that the Judge made his conclusion that the terminations of Acevedo and Stevenson were discriminatory and in violation of federal labor law. Consequently, the Employer's exceptions on these points should be overruled and the Judge's decision and report should be adopted.

C. The Employer's Ballot Challenges Were Properly Denied (Response to Employer Brief (34-43) (Answer to Employer Exceptions 43-60))

AMS 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. Of these, the Union filed unfair labor practice charges on behalf of Acevedo and Stevenson on the basis that the two were terminated for activity protected by Section 7. The Regional Director then

issued a complaint on behalf of Acevedo and Stevenson. See ¶ 7 and 8 of Complaint. The Union has responded to the Employer's exceptions with regard to Acevedo and Stevenson above. A favorable outcome on the unfair labor practice charges in the Complaint will necessarily result in a finding of eligibility to vote in the election. The Judge determined that Robert Harvey's vote should not be counted. The Union did not file an exception to this finding. The Employer filed an exception to the Judge's determination with regard to Raymond Pearson and John Smith, both of whom testified at the hearing.

AMS also challenged the ballots cast by Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pietsch, George Reed, and David Wrench on the basis that they quit their jobs. The Judge agreed as to Baker, France, and Pietsch, and the Union did not file exceptions to these determinations. The Employer, however, filed exceptions as to the Judge's determinations that the remaining employees were eligible to vote. Of these individuals, David Wrench testified in person at the hearing.

The Judge made no error in his determinations as to the eligibility of the challenged voters and the ballots that should be counted. While the Employer casts its argument on exceptions regarding ballot challenges as determinations made on inconsistent findings of fact, the truth of the matter is that AMS's argument on these exceptions boils down to a disagreement with the Judge's credibility determinations. To that point, the Judge's credibility determination easily survives the *Standard Drywall* review. To wit: "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."

As the Judge correctly acknowledged in his decision, it is well established that the burden of proving that an employee is ineligible to vote rests with the party asserting the challenge. [ALJD 21:1-2, relying on *Sweetener Supply Corp.*, 349 NLRB 1122 (2007)]. The Employer has not submitted credible sufficient evidence to satisfy this burden. The Employer's Challenges are due to be overruled and each of the challenged ballots should be counted.

(1) David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, and George Reed Were Laid Off and Their Votes Should be Counted

The Judge determined that David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, and George Reed were all laid off by the Employer with a reasonable expectation of rehire and, accordingly, that their votes should be counted. The Employer filed exceptions to these determinations

The Employer's exceptions are based on an erroneous assumption. The Employer states that "it is irrelevant whether the masons who quit the in-progress Bethune job, or the terminated mason, expected to be rehired in the future. Nor would it be relevant that any mason at Bethune quit because he perceived the job to be winding down." [Emp. Brief p. 35]. However, this assumes that there is credible evidence that the challenged voters voluntarily quit. The Judge correctly concluded that these individuals were laid off on the basis of credibility determinations. Specifically, the Judge discredited the testimony of McNett regarding layoffs at Bethune Cookman. [ALJD 4:fn. 8; ALJD 5, fn. 14, 16], and correctly relied upon the Employer's admissions in the *Excelsior* list that Barlow, Hickey, Greenlee and Clark were laid off. [ALJD 5: fn. 14,15,16].

Board law is clear that laid off employees are eligible to vote if they have a reasonable expectation of recall in the future. See *Osram Sylvania, Inc.*, 325 NLRB 758, 759 (1998); *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). The Board has relied on a number of factors in

determining if a reasonable expectation exists “including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.” *See Apex Paper* at 68.

With the nature of the construction industry being that employees are temporarily laid off and then rehired on a regular basis, it is to be expected that the Judge should determine that these employees had a reasonable expectation of recall, if a finding is made that they were laid off, which it was. The Judge significantly displayed his awareness and understanding of these circumstance within his decision. [ALJD 4:8-6:3]. The Board’s reliance on a number of factors, as in *Apex Paper*, makes consideration of the circumstances related to the layoffs appropriate.

The Employer’s contention that the eligibility of these individuals is unsupported by competent, substantial evidence and/or inconsistent with cited and omitted “undisputed” record evidence is simply wrong. The Employer conveniently ignores its own admission as to the laid off status of four of these employees in the *Excelsior* list. [CP. Ex. 2 and 3]. The Judge correctly relied upon this documentary admission by the Employer and credited it over any conflicting testimony by AMS foremen, management or supervisors as it was developed and voluntarily included with the voter list submitted by the Employer. The designation of these employees as “laid off” was not information required to be included in those documents. *See* Rules and Regulations of the National Labor Relations Board §102.62(d). Instead, this information was included by Yolanda Phelps at the request of AMS Principal, Ron Karp. [Tr. 963-964].

Consequently, the Judge correctly determined that this evidence was an admission by AMS.⁴

⁴ The Employer, in an attempt to discredit its own voter eligibility list, argues the Judge merely concluded that individuals were eligible to vote because they were included on the voter list. [Emp. Brief p. 39-40]. However, the Judge is clear regarding the credibility he gives to the list as a party admission; and the identification of those employees as laid off by the Employer. This is further supported by the fact that the Judge relied upon evidence other than the voter list to conclude that employees who were intentionally omitted from the voter list by the Employer, Reed and Pearson, were eligible to vote. The Employer’s argument fails in this regard.

Additionally, and as the Judge found, the Reason for Leaving (“RFL”) forms produced by the Employer at the hearing are highly suspect. [R Ex. 27(p.4); 27(p.5); 27(p.6); 27(p. 7); 32)]. None of the forms were completed and signed by the same individual. [Tr. 705-707]. Moreover, the forms are not seen by the employees so they do not have an opportunity to contest the designations by the Employer, a fact the Judge noted in giving little weight to them in his decision. [Tr. 841-842; ALJD 21: 15-17]. All of this combined with the testimony from Ron Karp that documents collected for the purpose of responding to the subpoena in this litigation were altered simply for completeness places a cloud of doubt as to the veracity of any RFL form introduced at the hearing. [Tr. 887-888, 891]. This evidence supported the Judge’s accurate application of *NLRB v. Cal-Maine Farm, Inc* standard to the RFL forms in this case. *Cal-Maine Farm, Inc.*, 998 F.2d 1336, 1343 (5th Cir. 1993) (self-serving business records in evidence but trier-of-fact gave disputed contents little weight).

AMS also relied on the testimony of McNett to help establish that these were voluntary quits and not layoffs. The Judge considered McNett’s testimony, noting that he considered it “vague”, but gave little weight to it in determining that these employees were laid off. [ALJD 5:fn. 14, 16). The evidence supports the Judge’s determination. Chief of Operations Marc Carney testified that the work on that project was complete in April or May 2016. [Tr. 815-816]. And while McNett testified that there was still some clean-up work going on after April 8, he concedes that there was no need for a full crew of masons, and that there wasn’t a full crew on the project. [Tr. 721].

The Judge properly determined, and the evidence supports, that David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, and George Reed were laid off with a

reasonable expectation of recall. As such, the challenges to their votes should be denied and their votes should be counted.

David Wrench

David Wrench's name was intentionally omitted from the official voter eligibility list provided to the Union on May 10, 2016, and again in the purported amended *Excelsior* list on May 17, 2016. [CP Ex. 2 and 3]. Consequently, there is no admission from AMS as to his status. Instead, David Wrench, a known Union supporter, provided testimony at the hearing which the Judge credited over testimony from McNett or the RFL introduced as evidence that he was laid off and had an expectation of recall. [ALJD 4: footnote 11; Tr.986- 988]. In further support of Wrench's credibility, the Judge correctly found that his testimony that he was laid off was corroborated through undisputed evidence that he filed for unemployment benefits with the State of Florida and AMS did not contest his eligibility. [ALJD: 4: footnote 11; Tr. 988-989].

Despite the challenge by AMS, the Judge did not find credible evidence to support the challenge. The Judge considered Wrench's testimony and found it to be credible. [ALJD 4:fn. 11]. AMS could not show that Wrench is ineligible to vote. Accordingly, the challenge to his vote should be denied and his vote should count.

Jacob Barlow and Dustin Hickey

As with the challenge to Wrench, the exceptions related to Barlow and Hickey also turn on credibility determinations. The Judge relied upon the credibility of the *Excelsior* list submitted by the Employer identifying Barlow and Hickey as laid off over the testimony of McNett. [ALJD: 5: footnote 14, CP. Ex. 2 and 3]. This designation is supported by the fact that Barlow and Hickey worked off and on for AMS over a long period of time. [Tr. 708; CP Ex. 26(a) and (c)]. This finding also supports the conclusion by the Judge that both Barlow and

Hickey would have an expectation of recall. [ALJD: 21:11-12; Tr. 1019]. In further support of a finding of an expectation of recall is that fact that McNett testified that that Barlow “is still working at the same job, as of a few weeks—a month ago, when he left us. Because I call him and try to get him to come back.” [Tr. 708].

An exception cannot be sustained based on a disagreement with the credibility determinations made by the Judge when there is substantial evidence to support it. The Union submits that the Employer’s designation of Barlow and Hickey as laid off is the best evidence of their status with AMS. At the time AMS compiled the *Excelsior* list, it was in the best position to determine Barlow’s and Hickey’s status. At that time, McNett could have been consulted and the RFL forms could have been reviewed. Further, the Judge considered McNett’s testimony but did not find it credible that Barlow or Hickey had quit. [ALJD 5:fn. 14]. AMS could not show that Barlow or Hickey are ineligible to vote. Accordingly, the challenge to Barlow’s and Hickey’s votes should be denied and their votes should count.

Jeremy Clark

The Judge also credited the Employer’s designation of Clark as laid off in the *Excelsior* List over the testimony of McNett. [ALJD: 5: fn. 16, CP Ex. 2 and 3]. This designation is supported by the fact that Clark worked off and on for AMS over a long period of time. [CP Ex. 26(b)].

Once the Judge correctly determined that Clark was laid off, he also correctly found that Clark would have had a reasonable expectation of recall. [ALJD: 21: 11-12, Tr. 1019]. The Judge’s findings are further supported by the fact that McNett testified that Clark was a good employee, and known Union member. [Tr. 710, CP Ex. 24(f)].

As with Barlow and Hickey, an exception cannot be sustained based on a disagreement with the credibility determinations made by the Judge when there is substantial evidence to support it. AMS could not show that Clark is ineligible to vote. Accordingly, the challenge to his vote should be denied and his vote should count.

Forest Greenlee

The Judge credited the Employer's designation of Forest Greenlee as laid off in the official voter eligibility list over testimony provided by McNett. [ALJD 5: fn. 15; CP Ex. 2 and 3]. This designation is supported by the fact that Greenlee worked off and on for AMS over a long period of time. [CP Ex. 26(d)]. In fact, he has since been rehired by AMS [CP 26(d)]; therefore, undisputedly showing he had an expectation of recall. [Tr. 1019]. In an effort to have its exceptions related to the challenged ballots sustained, the Employer continues to challenge the Judge's credibility determinations. Notwithstanding these efforts, the record is replete with evidence to support the Judge's credibility determinations. AMS could not show that Greenlee is ineligible to vote. Accordingly, the challenge to his vote should be denied and his vote should count.

George Reed

While relying on evidence other than the Employer's admission in the *Excelsior* list, the Judge also concluded that George Reed, a known Union member, was laid off with an expectation of recall based on a credibility determination on the evidence. [ALJD: 6: fn. 17]. Although Reed did not testify regarding his layoff and subsequent recall, the Judge credited testimony by Mike Bontempo that he was told that Reed was "laid off, put on the couch temporarily." [ALJD: 6: fn. 17]. This credibility finding in Bontempo's testimony is

supported by the fact that Reed has worked for AMS off and on since the late 1990s, and had been referred for work to AMS by Bontempo. [Tr. 713, 907, 1017].

The Judge found the RFL form involving Reed not to be credible. [ALJD 6: fn. 17]. There is ample support in the record for this finding. Unlike most of the other RFL forms submitted by AMS which are signed by McNett, this one is signed by Ron Karp. [R 27 and 28]. Karp testified that in compiling documents for this case, he signed some of them for completeness. [Tr. 887-888, 891]. The form also indicated Dutton as his supervisor. [R 28]. Yet, Dutton testified for the Employer and was never asked about Reed. [*See generally* Tr. 894-910, 1039-1045].

The Judge found that Reed was laid off as his project was winding down. [ALJD 6: fn. 17; Tr. 815-816; CP 26(b)]. Bontempo testified that McNett told him that “[Reed] was laid off, put on the couch temporarily.” [Tr. 1018]. Further, Bontempo testified that Dutton told him that “when he went to recall [Reed] for work, Reed was already employed somewhere else.” [Tr. 1018]. Reed would not have been employed somewhere else until after he was laid off. Bontempo testified that “Mr. Reed would have not known about the OUC power plant/Pullman job until he heard it from me. So after he got laid off, he contacted me and when I told him there was another job available.” [Tr. 1034].

Reed would have had a reasonable expectation of recall, and in fact, has been recalled to work for AMS since being laid off in April of 2016. [Tr. 1019; CP 26(e); R 7(14)]. AMS could not show that Reed is ineligible to vote. Although based on different credited evidence, the Judge still based his finding on this issue on credibility determinations between the evidence presented. As such, his finding should not be disturbed, and the challenge to his vote should be denied and his vote should count.

(2) Luis Acevedo, Walter Stevenson, John Smith, and Raymond Pearson Were Not Terminated for Cause and Their Votes Should be Counted

As discussed at length above, the evidence is clear and sufficient to establish that Acevedo and Stevenson were unlawfully terminated and their votes should be counted. “The Company discriminatorily enforced its fall protection policy against them because [Acevedo] engaged in protected conduct during the pre-election period.” [ALJD 21:4-6].

The Employer also challenged the ballots cast by Robert Harvey, Raymond Pearson, and John Smith on the basis that they were discharged for cause. The Judge found that there was insufficient credible evidence to satisfy the Employer’s burden with respect to the challenged ballots of John Smith and Raymond Pearson and that their votes should be counted. However, the Judge found that the Employer has satisfied its burden as to Robert Harvey and his vote should not be counted. The Union did not file an exception to this finding.

In finding that Employer had not satisfied its burden as to Pearson and Smith, the Judge stated that “they were laid off by the Company with a reasonable expectation of rehire and their votes should be counted.” [ALJD 21:10-11].

John Smith

The Judge correctly determined that John Smith was laid off with an expectation of recall. [ALJD 21:10-11. In doing so, the Judge discredited the testimony of McNett and Feliz, as well as the RFL form that Smith was terminated for poor performance and attendance. [ALJD 4:fn. 10]. This finding is supported by the fact that Smith has been intermittently employed with AMS, and he is currently working for AMS as a mason laying block. [Tr. 714, 997-998, 1005]. In its exceptions, the Employer attempts to split hairs in the re-hire of Smith by presenting testimony from Feliz that he is now working on a different size of block, this testimony was refuted by Smith and discredited by the Judge. [ALJD 4:fn. 10; Tr. 1004, 1057-1058].

McNett's position that Smith was terminated for poor work performance is not supported by the evidence. Smith testified that his employment at the Bethune-Cookman project ended when McNett laid him off and told him to go draw unemployment. [Tr. 999]. AMS was nearly finished with the block portion of the work that Smith worked on, and was beginning the brick portion of the work, which Smith doesn't perform. [Tr. 1004]. Smith was never told that he was discharged for cause from the Bethune-Cookman project, and he was among a group of employees laid off on the same day. [Tr. 999-1000]. When he was laid off, there were "probably like at 12 or 13 masons or maybe more" still working on the project laying bricks, which was down from the "30 or 40 people" laying block. [Tr. 1004-1005]. Smith was able to find another job soon thereafter and did not apply for unemployment. [Tr. 1005].

AMS's position that Smith had poor work performance seems quite implausible considering the fact that he has been intermittently employed with AMS, and he is currently working for AMS as a mason laying block. [Tr. 714, 997-998, 1005].

Moreover, Smith testified in person and the Judge was in the best position to determine his credibility based on his demeanor over that of the testimony provided by McNett and Feliz. The Judge correctly credited the testimony of Smith considering he is currently working for AMS and provided testimony against the interest of his current employer, as compared to the testimony of McNett and Feliz who are both long term supervisory employees of AMS whose interest are clearly aligned with the Employer.

Additionally, the Employer designated Smith as laid off on the official voter eligibility list provided to the Union on May 10, 2016, and again in the purported amended *Excelsior* list on May 17, 2016. [CP Ex. 2 and 3]. The Judge notes that "Employers are required to provide complete and *accurate* information as required by *Excelsior Underwear, Inc.* 156 NLRB 1236

(1966).” [ALJD 21:32-33] (emphasis added). The Employer contends that it did just this. [See Emp. Brief p. 43 (“The Company Submitted an Acceptable Excelsior List, and Properly Sought to Update It”)]. An acceptable list would most certainly be accurate. The Employer noted on its lists that Smith was Laid Off. [CP Ex. 2 and 3].

If this is an accurate description of Smith’s employment with AMS, it is reasonable and expected for the Judge to determine that he was indeed laid off, with a reasonable expectation of rehire, and that his vote should be counted.

Raymond Pearson

The Judge determined that Pearson was not discharged for cause, but rather laid off with a reasonable expectation of rehire, and his ballot should be counted. The Judge determined that there was insufficient credible evidence that Pearson’s supervisor, Coy Hale, terminated him for cause, like the co-worker whose work Pearson was trying to fix. [ALJD 7: fn. 23]. This finding is clearly supported by the record. Pearson is a member of the Union and has been for at least the past couple of years. [Tr. 505]. He was a known member who wore shirts with the Union logo on them, and he had a union sticker on his hard hat. [Tr. 507-508; GC-Ex. 12; CP-25(a) and (b)].

Pearson worked for AMS at the Bethune-Cookman site, as well as the Yacht Club jobsite in Tampa. [Tr. 1008]. Coy Hale testified that he terminated Pearson because he was not setting blocks correctly, specifically, that they weren’t plumb. [Tr. 781-782, 790]. However, he also agreed with Pearson that there was someone else assigned to work on the wall. [Tr. 798, 1012]. Hale could not be certain as to who that person was, noting that “the guys shuffle so much, I don’t—I can’t tell you exactly which other guy was on the wall with him.” [Tr. 798]. Pearson testified that “someone else had laid it up, and they wanted me to fix it” when asked about the

faulty wall. [Tr. 1012]. Further, Pearson testified that the person who did the faulty work was fired. [Tr. 1013].

Upon receiving his last check and learning that he was no longer needed at the Yacht Club site, Pearson was never told that he was not eligible for rehire or recall. [Tr. 1009]. In fact, Hale later told Pearson that they would call him when AMS started the job in Celebration. [Tr. 1009-1010]. Like Smith, Pearson testified in person and the ALJ was in the best position to judge his demeanor and credit his testimony.

AMS's attempt to challenge Pearson as a discharge for cause, as opposed to a layoff, should be viewed as pretextual. Pearson is one of the eligible employees that AMS completely omitted from the voter eligibility list despite the fact that he clearly had sufficient hours to be included on that list. The RFL form for Pearson introduced as R Ex. 31, like the other forms, is highly suspicious considering the different writings. Further, it is not even signed by Hale, but rather by Marc Carney, who testified that he did not have direct knowledge of Pearson's performance. [Tr. 837]. Although AMS challenges Pearson's work performance, Pearson had worked on two separate job sites and been in the industry for over 20 years. [Tr. 506]. Bontempo, who himself is a veteran of the industry and whose abilities were praised by Morales, testified that you would know within a day if a mason could do his job. [Tr. 506, 759, 1029]. Again, the Judge noted that the RFL forms were not reliable. [ALJD 21: 13-19].

Based on the credibility determinations, as well as the substantial weight of the evidence, Pearson's vote should be counted as recommended by the Judge.

D. The Employer Submitted an Inaccurate and Incomplete *Excelsior* List, and Improperly and Repeatedly Added Additional Lists (Response to Employer Brief (43-47) (Answer to Employer Exceptions 39-42, 62-64))

The Employer argues in its Brief that it submitted an “acceptable” *Excelsior* List and properly sought to update it. The Judge accurately points out that “Employers are required to provide complete and accurate information as required by *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966).” [ALJD 21:32-33]. As the Judge noted and explained with clarity, Section 102.62(d) of 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. [ALJD 21:33-36]. The Employer did not provide a complete list or substantially comply with the requirements of *Excelsior*. See also *Shore Health Care Ctr.*, 323 NLRB 172 (1997).

The Employer repeatedly attempted to amend and add additional lists while simultaneously continuing to leave off a number of qualified voters. Although AMS provided a voter list within the required two business days of the Stipulated Election Agreement, the list undisputedly did not include employees (Raymond Pearson, George Reed and David Wrench) who clearly satisfied the *Steiny/Daniel* eligibility formula as agreed to by the parties. [CP Ex. 2; RD Ex. 1(c)]. Based on the Employer’s own payroll records, and undisputed records from the Union, which are based on hours of employees reported by AMS to the affiliated fringe benefit plans, these employees clearly satisfy the *Steiny/Daniel* eligibility formula. The Judge recognized the undisputed testimony that employees typically work an eight hour work day, and AMS payroll records corroborate this testimony as they clearly identify hours as regular or overtime for each employee in question. [ALJD 9: fn. 28; Tr. 714-715; Ex. GC 14; Article 18].

Specifically, Union records indicate that Raymond Pearson worked 615 hours for AMS from October 2015 through February 2016, which would be the equivalent of 76 days during the eligibility period. Robert Harvey worked 396.75 hours between June and October 2014, which provides 49 work days during the eligibility period. [CP Ex. 16]. Employer records indicate that David Wrench worked 161.25 hours part of the last week of December 2015 and January 2016; however, Union records establish that he also worked 814.25 hours from August 2015 through December 2015 [CP Ex. 18], which means he worked 121 days during the eligibility period. Finally, Employer records indicate George Reed worked 663 hours from December 2015 through April 2016 [CP Ex. 28(e)], which means he worked 82 days during the eligibility period.

AMS argues that these individuals were not on the voter eligibility list because they had either voluntarily quit or were discharged for cause; however, this argument fails. [Tr. 228]. The Employer did not exclude other employees whose hours would not have been different from the seven omitted employees who were ultimately challenged on the basis of voluntarily quit or terminated for cause. For instance, John Smith had hours similar to these employees from August 2015 through January 2016. [CP Ex. 19]. However, he was included on the *Excelsior* list and identified as laid off, but ultimately, the Employer challenged as terminated for cause. [CP Ex. 2 (AMS 030)].

Given the fact that the Employer's own payroll system should have included these individuals within the parameters of the eligibility list; the fact that they were purportedly excluded because AMS determined it had a basis on which to challenge each of them; and other individuals who were similarly situated and included on the list only to be challenged later, the omission of these individuals appears to be, and was found by the Judge to be, intentional and contrary to the intent of the law. [ALJD 22:5-10]. The only difference between these

individuals and those included on the list, and not ultimately challenged, is that they had submitted dues authorization cards to the Employer. [CP Ex. 24(b), 24(c), 24(e), 24(g), 24(h), 27].

In other words, AMS all but provides an admission that it intentionally omitted seven 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). Contrary to the Employer's assertion in its Brief in Support of Exceptions (Emp. Brief p. 46), all of this evidence provides clear support to the Judge's finding that Pearson, Reed and Wrench were intentionally omitted from the *Excelsior* list. In doing so, AMS has clearly committed objectionable conduct affecting the results of the election. *See Shore Health Care Ctr.*, 323 NLRB 172, 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, the omission represents 7.5% of the voters and the Employer had all relevant evidence to include the voters based on the time they worked during the eligibility period. This percentage of omitted voters ultimately affected the results of the election.

To further frustrate the intent of the law requiring an employer to provide a voter eligibility list with contact information, AMS proceeded, on multiple occasions, to take steps to unilaterally remove individuals from the list of eligible voters, and add at least one new voter to the list. On May 17, 2016, AMS filed and served a purported amended *Excelsior* list. [CP Ex. 3; Tr. 195]. On at least three other occasions by electronic communication with Region 12, AMS attempted to amend the *Excelsior* list, including on May 20, 2016 to add an eligible voter [CP Ex. 4; Tr. 196]; on May 23 to purportedly exclude six eligible voters [CP Ex. 5; Tr. 197]; and, and finally on May 24, 2016 to purportedly exclude six eligible voters [CP Ex. 6; Tr. 198]. All

of these attempts to modify the May 10, 2016 *Excelsior* list are untimely under the Board's Rules and Regulations. If any of the purported changes are relied upon to determine voter eligibility for receiving ballots, it would be based on an untimely *Excelsior* list. The Employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election if proper and timely objections are filed. *See* NLRB Rules and Regulations §106.62(d).

While Region 12 made an attempt to minimize the affect these actions by AMS would have on the laboratory conditions of the election, by seemingly conducting the election based on the only timely *Excelsior* list, the fact remains that AMS took every opportunity to frustrate and confuse the conduct of the election by intentionally omitting known Union supporters from the list based on their dues authorization cards and by attempting to alter the status of known Union supporters based on their dues authorization cards in an effort to dilute the number of Union supporters on the eligibility list. These intentions are clear in AMS's request of May 23, 2016 to change the status of Jeremy Clark and Dustin Hickey from "LAID OFF", as identified in both the official *Excelsior* list and the purported Amended *Excelsior* list, to "QUIT", and John Smith from "LAID OFF" to "TERMINATED FOR CAUSE". [CP Ex. 2, 3, and 5]. Of course, AMS would do this with full knowledge that these employees were Union supporters. [CP Ex. 24(a); CP 24(d); CP 24(f)].

Even under established law preceding the more stringent requirement to the amended regulations, the Board gave 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. *Woodman's Food Markets, Inc.*, 332 NLRB 503 (2000). In situations where the results of the vote are a tie and there are fourteen challenges, seven of whom were omitted from the voter eligibility list, the

conduct by AMS certainly has an effect on the results of the election. Moreover, while a finding of bad faith is not necessary for a finding that an employer did not comply with the requirements for providing the voter eligibility list in order for the election to be overturned on this basis, the evidence in this case demonstrates an intent on the part of AMS to omit seven known Union supporters and attempt to alter the already identified status of three other Union supporters in such a way as to make them ineligible to vote. *Special Citizens Futures Unlimited, Inc.*, 331 NLRB 160 (2000); *Shore Health Care Ctr.*, 323 NLRB 172 (1997); *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989); *Gamble Robinson Co.*, 180 NLRB 532 (1970). The Judge appropriately considered and weighed the evidence in determining that the Employer failed to comply with the requirements of *Excelsior*.

In support of its exceptions, the Employer argues that the Judge was somehow remiss in failing to find fault in the Union's communications with the Region and AMS in an effort to get ballots to all eligible voters. This reasoning fails on multiple grounds. First, there are no timely objections filed by the Employer as to alleged Union misconduct during the critical period. Consequently, there is no authority for the Judge to even consider this issue, much less make any findings regarding this issue. Second, the Union has no control over the voter eligibility list. It does not have access to all of the detailed payroll and employment information necessary to compile the *Excelsior* list. Moreover, it is not the Union's responsibility to double check the Employer for compliance with its legal obligations. Third, actions by the Union to correct the Employer's non-compliance does not absolve the Employer of its responsibilities under federal labor law or of a finding that its conduct interfered with the election.

E. The Judge made no Factual or Legal Errors to Warrant Dismissal of the Complaint (Response to Employer Brief 47-79) (Answer to Employer Exceptions 1-3, 6-8, 12-14, 61)

AMS suggests that the Judge failed to explicitly review and meaningfully consider all of the relevant evidence in this case and that the Complaint should be dismissed. This is incorrect for a number of reasons. First, as has been discussed at length in the Judge's decision, the exceptions and brief filed by the Employer, and above, the Judge thoroughly reviewed and evaluated all of the evidence presented to him. Second, in reviewing the evidence, the Judge made numerous credibility decisions that were adverse to the Employer, or at the least not favorable. Credibility determinations that do not go the Employer's way are not grounds for dismissal of the Complaint or sustaining exceptions. Third, many of the examples on which the Employer relies are irrelevant to the Judge's decision and report.

The Employer argues that the Judge's determination that "Bontempo's interaction with Alvarez [sic] did not go unnoticed by Morales" [ALJD 10:1] is contrary to undisputed record evidence. This is not true. This is pointedly an example of an unfavorable credibility determination: "The Judge also credited Acevedo's account of events over Morales' account." [Emp. Brief p. 47; Emp. Exception 7, in reference to footnote 32 of the Judge's decision: "I credit Acevedo's version of his encounter with Morales."]. Acevedo testified that the next day Morales spoke to him about it. [Tr. 406]. That morning, Morales asked Acevedo what he signed. [Tr. 407]. Acevedo testified that he refused to answer because he was already a union member. [Tr. 407].

Further, when asked if he had seen any evidence that Bontempo had been there the previous day, Morales testified: "Yes. I see all the union pension shirts, the green shirts." [Tr. 761]. The evidence supports the Judge's conclusion that Morales noticed that Bontempo had

interacted with Acevedo the previous day. The Employer fails to appreciate this, while the Judge clearly does. The Judge makes numerous citations to the record that, though claimed by the Employer to have nothing to do with Morales, provide background on Bontempo's visit to the worksite. Finally, and this is most important to the Employer's point, the Judge did not find that Morales' conversation was an unfair labor practice. [ALJD 16-17].

Another of the credibility determinations that the Employer wants to dispute is that the Judge generally found Bontempo more credible than the Employer's witnesses. [Emp. Brief p. 48]. The Employer's argument is that Bontempo should not be believed because he is a convicted felon who failed to note that in a previous employment application. Bontempo testified that when asked on a 2012 employment application if he had been convicted of a felony he gave the answer no. [Tr. 237]. He also testified that this was not accurate and that he had been convicted of a crime in 1995. [Tr. 237]. While the Employer does not specifically invoke Federal Rule of Evidence 609 to impeach Bontempo's testimony (presumably because the underlying crime does not come close to satisfying that standard), the Employer nevertheless incorrectly argues that because he had been convicted of a felony over 20 years ago, and that he did not include that information on an employment application 17 years later, the Judge somehow erred in crediting Bontempo. Although the Employer clearly hoped that this argument would be successful and convince the Judge to discredit all of Bontempo's testimony, the Judge, instead, observed Bontempo's demeanor during his testimony and found it to be credible, and many times found it to be corroborated by other testimony.

Bontempo had been convicted in 1995 on a charge of possession with intent to deliver marijuana. [Tr. 374]. He testified that he did not disclose the felony almost two decades later on an employment application because of the time that had elapsed since the conviction and because

he felt it was optional to disclose it. [Tr. 374]. Whether or not he should have disclosed it on the employment application does not matter. The Judge did not give much weight to the conviction or the failure to disclose it on the employment application, and instead found Bontempo's testimony to be credible. [ALJD 6:fn. 17]. The Rules of Evidence support this. *See* FRE Rules 608 and 609. The felony conviction was over 10 years ago, and knowledge of it had little probative value. FRE Rule 609(b).

The Employer next argues that the Judge failed to make legal determinations with regard to OSHA regulations. [Emp. Brief 48]. This is another of the Employer's irrelevant rabbit trail arguments. It was not necessary for the Judge to make a determination on whether Acevedo and Stevenson violated OSHA regulations or fall protection rules. The Judge's decision, while basically accepting that Acevedo and Stevenson might have violated the rules, found that their treatment by the Employer after being found in violation of the rules was the discriminatory event. [ALJD 12:fn. 40; 19:25-26]. Employer Exception 14 has no relevance to the issues in the Complaint or the Judge's Decision and Report.

The final minimal "errors" on which the Employer relies provide little support to their argument that the Judge failed to meaningfully review the record. Employer Exception 1 notes that as a matter of law and Board precedent, AMS prevailed in the election. The Judge does not dispute this or state otherwise. The Judge states that it was "a representation election that ended in a 16-16 tie vote." [ALJD 1:"Statement of the Case"]. As explained in footnote 1, Employer Exception 3 notes that the Judge made three findings related to a collective bargaining agreement, while the parties instead used short-term memoranda of understanding to set wages and benefit contributions. Any references to a collective bargaining agreement clearly shows that the Judge understands that the parties have a preexisting relationship, and the exact

contractual nature of the relationship is, again, irrelevant to the issues in the Complaint or the Judge's Decision and Report.

CONCLUSION

For the reasons state herein, the reasonable conclusion as a matter of fact and law is that AMS committed to a pattern of unlawful and objectionable conduct that the Board has repeatedly condemned as being unlawful. The Board should reject AMS's exceptions and adopt the Judge's decision and order. The challenged votes of Luis Acevedo, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed, and Raymond Pearson should be counted, and, if after the counting of the ballots, the Union is not certified as representative of the employees at AMS, the results of this election should be set aside due to the Employer's misconduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above foregoing Petitioner's Post-Hearing Brief has been filed electronically with the NLRB Executive Secretary on the date specified below.

I further certify that pursuant to 29 C.F.R. §102.114(i), the expedited service rules have been complied with by service of the above and forgoing pleading to those below, via electronic mail:

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This 21st day of June, 2017.

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