

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

RIVER BEND CRANE AND RIGGING, INC.

and

Case 28-CA-182666

INTERNATIONAL ASSOCIATION OF BRIDGE,  
STRUCTURAL, ORNAMENTAL, AND  
REINFORCING IRONWORKERS, LOCAL 263

*Sara Demirok, Esq.*

for the General Counsel.

*Chris Borunda, Esq.*

for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in El Paso, Texas, on March 7 and 8, 2017. International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 263 (Charging Party or Union) filed the charge on August 23, 2016, and an amended charge on November 2, 2016<sup>1</sup> and the General Counsel issued the complaint on November 14. (GC Exhs. 1(a), 1(c), and 1(e).) The General Counsel further filed a Notice of Intent to Amend Complaint and Notice of Hearing on March 1, 2017, and amended the Complaint at the hearing on March 7, 2017. (GC Exh. 1(k).) The amendments included changing Respondent's corporate status from LLC to corporation, changing the date of the alleged violations of the Act throughout the complaint to August 12, changing the allegations contained in paragraphs 5(f) and (g), and adding two additional violations of the Act. The complaint, as amended, alleges that Respondent violated Section 8(a)(1) of the Act by: threatening employees and Union officials; denying Union officials access to its employees; denying employees access to certain areas of a jobsite; denying off-duty employees access to parking lots, gates, and other non-working areas; and discharging two employees. (GC Exhs. 1(e) and 1(k); Tr. 7-8.) Respondent filed an answer to the complaint, denying the alleged violations of the Act, and asserting two affirmative defenses.<sup>2</sup> (GC Exh. 1(g); Tr. 7-8.)

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<sup>1</sup> All dates are in 2016 unless otherwise indicated.

<sup>2</sup> Respondent denied the amendments to the complaint at the hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,<sup>3</sup> I make the following

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## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation, provides construction services from its facility in El Paso, Texas, where it annually performs services valued in excess of \$50,000 for enterprises within the State of Texas, including El Paso Community College, which are engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(g); Tr. 9.) Furthermore, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (Tr. 6.)

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### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

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Respondent is a construction company, which hangs steel and provides crane services in and around El Paso, Texas. (Tr. 16.) Billy Black is Respondent's president. (Tr. 16.) Respondent admits, and I find, that Black is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(g).) Candace Ontiveros, Black's daughter, serves as Respondent's executive secretary. (Tr. 24, 261.) Ontiveros manages contracts, human resources, correspondence, and bidding for Respondent. (Tr. 261.)

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T&T Staff Management, Inc.<sup>4</sup> (T&T), is a contractor providing personnel, payroll, and training services to Respondent. (Tr. 39, 74, 263.) Ontiveros maintains training records for Respondent. (R. Exh. 5; Tr. 264.)

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Black's maintains an email address for work purposes (riverbendcrane@aol.com). (Tr. 54.) At trial, Black testified that he does not check the inbox for this email address. (Id.) Instead, Ontiveros monitors this email account and sometimes replies to emails on Black's behalf. (Tr. 262.) Ontiveros also maintains a separate email address at work. (Tr. 262.)

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Ontiveros handles payroll duties by inputting hours for Respondent's employees. (Tr. 267.) She then forwards this information to T&T. (Tr. 267.) Paychecks are delivered by T&T to Respondent's office on Thursdays. (Tr. 267.) Paychecks are distributed to Respondent's

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<sup>3</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

<sup>4</sup> Throughout the transcript T&T is referred to as "TNT." However, in Respondent's records, the name of the company is listed as T&T Staff Management, Inc. (R. Exh. 5.) Therefore, I correct the transcript to indicate that the name of the company is T&T Staff Management, Inc., or T&T.

employees by Respondent's foreman or can be picked up at Respondent's office.<sup>5</sup> (Tr. 121, 139, 148.)

Carlos Gonzales and Brady Bratcher are organizers for the Union.<sup>6</sup> (Tr. 207.) Both met with Respondent's employees to discuss their concerns regarding Respondent. These concerns included a lack of safety training, lack of water on jobsites, and low pay.<sup>7</sup> (Tr. 208-209.) Respondent's workforce is not represented by a union.

#### B. *El Paso Community College Project*

In July, Respondent began performing work pursuant to a contract with El Paso Community College (EPCC) at its Valley Verde campus. (Tr. 17.) Banes General Contractors, Inc. (Banes), was the general contractor for this project. (Tr. 17.) Eddy Acosta served as the project manager and Martin Arrieta served as site superintendent for Banes. (Tr. 84, 237.) Chris Garcia was Respondent's lead welder on this project. (Tr. 18.) Cesar Portillo served as Respondent's foreman for the EPCC project.<sup>8</sup> (Tr. 18.)

The EPCC jobsite is surrounded by a fence and retaining wall. (GC Exhs. 8(a)-(c); Tr. 70-71.) Access to the site is through a single, 10-foot wide gate, located on a corner of the jobsite. (GC Exh. 8(b); Tr. 71.) Signs on the fence indicate, "Authorized personnel only. Hard hats required. PPE [Personal Protective Equipment] required at all times." (Tr. 72, 242.) According to Arrieta, visitors to the site must wear, at a minimum, hard hats and safety vests. (Tr. 245.) Visitors also need to sign in and out at the general contractor's office trailer at the site. (Tr. 242-243.) This trailer is positioned near the entrance gate. (Tr. 242-243.)

#### C. *Morales' and Ramirez' Employment with Respondent*

Morales and Ramirez first worked together at the EPCC project. (Tr. 100.) Morales was employed by Respondent as an iron worker and welder for about nine years, on-and-off, until

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<sup>5</sup> I reject the testimony of Ontiveros that employees usually pick up their checks at Respondent's office and, if they fail to do so, employees pick up their checks at T&T. (Tr. 268.) This testimony conflicts with the more credible testimony of Morales and Ramirez. It is also implausible, given that Morales and Ramirez came to the EPCC jobsite seeking their paychecks.

<sup>6</sup> Bratcher did not testify at the trial of this matter.

<sup>7</sup> Respondent maintains that its employees are trained by T&T and presented certificates and wallet cards issued to its employees as evidence. (R. Exh. 5.) None of the training certificates or wallet cards were signed by the employees at issue. Respondent's employees Morales and Ramirez testified they did not receive any of the training alleged. (Tr. 136, 188-191.) Morales further testified that he was forced to sign training attendance sheets. (Tr. 188.) Whether Respondent's employees received this training or not is immaterial. The reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. *Odyssey Capital Group*, 337 NLRB 1110, 1111 (2002), *citing NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). Whether the protested working condition was actually as objectionable as the employees believed it to be is irrelevant to whether their concerted activity is protected by the Act. *Tamara Foods*, 258 NLRB 1307, 1380 (1981), *enfd.* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983). Section 7 of the Act protects the rights of employees to engage in protests over what the employees believe to be unsafe working conditions. *Tamara Foods*, 258 NLRB at 1380.

<sup>8</sup> Portillo did not testify at the trial of this matter.

August 12, when he was discharged. (Tr. 18, 152-153.) Personnel records show that Morales either abandoned his job or resigned without notice in July 2008, November 2008, June 2009, September 2011, March 2013, August 2013, August 2014, and February 2015. (R. Exh. 3.) Despite these issues, Respondent reemployed Morales after each departure and gave him several raises.<sup>9</sup> (R. Exh. 3.)

Ramirez was employed by Respondent on-and-off from January 2 to August 12, when he was also discharged.<sup>10</sup> (Tr. 19, 98-99.) Ramirez testified that he worked as a welder for Respondent, although he did not perform welding every day, and earned \$9.00 per hour. (Tr. 101.) During his short tenure, Ramirez was released once by Respondent, in May 2016 due to a lack of work. (R. Exh. 2.) Ramirez was recalled to work by Respondent on August 1 and started working at the EPCC jobsite around August 6.<sup>11</sup> (Tr. 130-131.)

While working together, Morales and Ramirez shared concerns about safety. (Tr. 101, 153.) According to Morales and Ramirez, Respondent did not provide them with water or safety training. (Tr. 101-103, 136, 154, 190-191.) When working as a foreman, Morales would buy water for Respondent's workers with his own money, but he never sought reimbursement. (Tr. 182-183.) Ramirez testified that Respondent did not purchase safety equipment for employees, but Morales testified that he purchased his own safety equipment, but did not seek reimbursement. (Tr. 103, 136, 184-185.) Morales and Ramirez also discussed concerns with the safety of Respondent's cranes. (Tr. 106-107, 154.) They shared these concerns with other workers at the EPCC jobsite.<sup>12</sup> (Tr. 102, 154.)

#### *D. Morales and Ramirez Plan and Picket*

Morales and Ramirez shared their concerns with both coworkers and two Union organizers, Carlos Gonzalez and Brady Bratcher. (Tr. 102, 154.) Morales and Ramirez decided to go on strike to protest Ramirez' wages, the lack of safety equipment and instruction, and the safety of Respondent's cranes. (Tr. 103, 136, 155.) The men also hoped to, "get [Black's] attention." (Tr. 155.)

On August 12, at about 5:30 a.m., Morales and Ramirez met with Bratcher, Gonzalez, and Union Business Agent Gerrad Strange in the front parking lot of EPCC. (Tr. 103-104, 208-209.) At that time, Morales and Ramirez signed documents indicating they were going on strike. (GC

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<sup>9</sup> Respondent gave Morales merit raises in August 2015 and May 2016. He received a raise for "other" reasons in June 2014. (R. Exh. 3.)

<sup>10</sup> On brief and in its answer, Respondent denied that it discharged either employee. (R. Brf. p. 13.) I find that Respondent did, in fact, discharge Morales and Ramirez, for reasons explained in the Discussion and Analysis section of this decision.

<sup>11</sup> Although Respondent asserts that Ramirez was hired as a skilled laborer, he applied to work for Respondent as a welder. (GC Exh. 2; Tr. 19-20.) Ramirez was not certified as a welder and had no relevant experience as a welder. (Tr. 76, 125, 127.) Ramirez was paid \$9.00 per hour; welders are paid about \$15.00 per hour. (Tr. 125.) Nevertheless, I credit Ramirez' testimony that he was a welder.

<sup>12</sup> Christopher Garcia, a current employee of Respondent, testified that Black does not threaten employees and that employees are supplied with safety equipment by Respondent. (Tr. 286-287.) I did not credit Garcia's testimony for reasons stated in the credibility section of this decision.

Exh. 6; Tr. 104.) They took the documents to their foreman, Portillo, at the jobsite.<sup>13</sup> (Tr. 104, 210.) Portillo accepted the documents and said he would give them to Black. (Id.) Morales, Ramirez, and the Union representatives then left the EPCC campus. (Tr. 106, 210.) Portillo gave this paperwork to Black later that day.<sup>14</sup> (Tr. 81.)

5 Later that same morning, Morales and Ramirez went to the Union hall to prepare for their strike. (Tr. 106, 210.) The men received signs that said “RIVER BEND CRANE & RIGGING UNFAIR.”<sup>15</sup> (GC Exh. 11; Tr. 106; 157-158, 211.) Morales and Ramirez believed that Respondent’s safety practices and unsafe equipment were unfair. (Tr. 106, 158.) Neither 10 Morales nor Ramirez ever told Black about their issues with Respondent’s safety practices or equipment. (Tr. 133-134, 180.) The Union officials also never attempted to raise the safety and other issues brought to them by Morales and Ramirez with Black. (Tr. 220.)

15 Morales and Ramirez began picketing on a sidewalk near the entrance to EPCC between 8:00 and 10:00 a.m. (GC Exh. 8(a); Tr. 110, 159.) The men were joined by Bratcher, Gonzalez, and Strange. (R. Exh. 1; Tr. 111, 210.) Their protest lasted about 1 to 2 hours. (Tr. 111; 158, 211.) Campus police came during the picketing. (Tr. 197, 211.) An officer advised the group that they had the right to picket, but that they should remain peaceful, stay off the sidewalk, and stay out of trouble. (Tr. 197, 211.)

20 At about 8:30 a.m. on August 12, Black received a call from Portillo in which Portillo stated that Morales and Ramirez had gone out on strike.<sup>16</sup> (GC Exh. 3; Tr. 20-21.) Eddy Acosta, the project manager for Banes, called Black that morning and told him that people were walking up and down the street near the jobsite with signs bearing Respondent’s name. (Tr. 25, 27, 89.) He told Black that the protesters were carrying signs that said “River Bend.” (Tr. 91.) Acosta asked 25 Black if he knew about this activity and asked him to look into it. (Tr. 27-28, 91-92.)

Martin Arrieta, the site superintendent for Banes, noticed that Respondent had fewer employees than usual on the EPCC jobsite on August 12. (Tr. 239-240.) Someone from the

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<sup>13</sup> I reject Black’s and Garcia’s versions of events regarding Morales and Ramirez submitting their strike notices. Black was not present at employee meeting at which he claimed Morales and Ramirez submitted their strike notices. I found Garcia’s testimony about these events less than credible. I also found Morales and Ramirez to be more credible witnesses than Garcia and Black.

<sup>14</sup> Black testified that he placed the papers in his truck, but did not look at them until 3:00 or 3:30 p.m. that day. (Tr. 81-82.) Employee Christopher Garcia testified that Morales and Ramirez turned in their parking passes that morning and told him, “F Billy, F this, F that, F River Bend, they’re stupid...” (Tr. 290, 293.) I do not credit Garcia’s version of events as it conflicts with that given by Morales and Ramirez and it is not corroborated by any other evidence or testimony.

<sup>15</sup> The words “LABOR PRACTICE” were added to the sign later. (GC Exh. 6.) The sign, as it appeared on August 12, did not have these words upon it. (Tr. 108; 157-158; 218.)

<sup>16</sup> Although Black attempted to disavow a statement he made on August 25 indicating that he received this call from Portillo on August 12, I do not credit his testimony. (GC Exh. 3.) Black testified that he prepared his statement for T&T, in order to seek their advice on this unfamiliar situation. (Tr. 78.) The statement of August 25 was made less than two weeks after the events at issue, when Black’s memory would have been fresher. In addition, if Black was seeking advice, it would have befitted him to give truthful information to T&T. I do not credit his self-serving testimony that the information in this statement was inaccurate. (Tr. 79.) Also, his trial testimony on the subject was dubious. Therefore, I credit Black’s statement over his testimony. (GC Exh. 3; Tr. 20-23.)

college approached Arrieta that morning and asked if he had anything to do with “whatever was going [on] up the street.” (Tr. 240.) Arrieta then went to the site of the picketing. Arrieta also called Black on August 12 before going to observe the picketing; he asked why Black had fewer employees than usual on the jobsite. (Tr. 241.) Arrieta also stated that the police had asked him about what was going on and he, in turn, asked Black if he knew anything about it. (Tr. 241.)

Acosta later sent Black a photo of the picketing in an email.<sup>17</sup> (GC Exh. 5; Tr. 28, 92.) This photograph shows 5 people walking along a sidewalk carrying picket signs. (GC Exh. 5.) After receiving the calls from Portillo and Acosta, Black called Ontiveros and asked her to go to the jobsite to inspect the area. (Tr. 24-25.)

Black told Ontiveros that there was some kind of disturbance happening at EPCC and that she needed to check it out and let him know what was happening. (Tr. 272.) Ontiveros was aware that Morales and Ramirez were involved picketing when she went to the EPCC campus. (Tr. 274.) Ontiveros circled the campus several times, but was unable to locate the picketing. (Tr. 272.) She then called Black and told him there was nothing happening. (Id.)

Ontiveros then called the jobsite and either spoke to the supervisor [Portillo] or an employee named Chris. (Tr. 276.) In a statement she made shortly after this incident, Ontiveros stated that she went to the campus at 9:00 a.m. and claimed that the campus police had dispersed the strikers.<sup>18</sup> (GC Exh. 4; Tr. 277.) Black himself went to the EPCC jobsite before noon on August 12 because his crew was shorthanded without Morales and Ramirez.<sup>19</sup> (Tr. 30.)

#### *E. Morales and Ramirez Return to the EPCC Jobsite with Union Organizers*

After picketing, Morales, Ramirez, and the Union officials returned to the Union hall. (Tr. 112, 212.) August 12 was Respondent’s payday. (Tr. 35.) At the Union hall, Morales called Portillo in an effort to get his and Ramirez’ paychecks. (Tr. 112, 160.) Portillo told Morales that the checks were already at the jobsite and were retained by Black. (Tr. 112; 160.) The men decided to go and talk to Black about this.<sup>20</sup> (Tr. 112-113; 161.)

<sup>17</sup> Black denied that he saw the email on the morning of August 12. (Tr. 27.) The email indicates it was sent at 10:48 a.m. (GC Exh. 5.) I have not credited much of Black’s testimony for reasons stated elsewhere in this decision. Moreover, even if Black did not see Acosta’s email until later that day, I still find that he was aware of his employees’ picketing on the morning of August 12, based upon the calls he received that morning from Portillo, Acosta, and Arrieta.

<sup>18</sup> Like Black, Ontiveros tried to disavow most of her prehearing statement given to T&T. This statement was given closer in time to the events at issue and was made in an effort to obtain advice from T&T. As such, I credit Ontiveros’ prehearing statement over her testimony. I do not credit the portion of her statement in which she claims campus police dispersed the strikers, as it is contradicted by the testimony of Morales, Ramirez, and Gonzales.

<sup>19</sup> Black denied ever being told that Morales and Ramirez went on strike, instead stating that Portillo told him they “left the job.” (Tr. 30; 32.) This testimony is contradicted by Black’s pretrial statement to T&T and I do not credit Black’s testimony.

<sup>20</sup> Black testified that he did not remove Morales’ and Ramirez’ paychecks from the stack of other employee paychecks and further denied that Portillo told him that the two employees would be coming to pick up their paychecks. (Tr. 35-36.) Ontiveros testified that only 2 checks were left over at 2:00 p.m. Friday August 12: George Morales’ and Victor Ramirez’. (Tr. 269.) She claimed that T&T came and picked up the checks before she left for the day. (Id.) Black and Ontiveros testified that Black did not

Morales and Ramirez, accompanied by Bratcher and Gonzalez, returned to the EPCC jobsite in search of their paychecks. (Tr. 113; 161, 212.) They found Black eating lunch in his truck at the jobsite. (Tr. 32.) Morales and Ramirez approached Black's truck and Bratcher and Gonzales remained a few feet behind them. (GC Exh. 8(c); Tr. 115-116, 212.) Black did not know the Union officials and they did not identify themselves. (Tr. 23, 64, 141-142, 198, 219.) Ramirez and Morales admitted that they were not wearing a safety vest or a hard hat, which are required on the EPCC jobsite, when they went to speak to Black. (Tr. 140, 203.) Gonzales also was not wearing hard hat or vest.<sup>21</sup> (Tr. 231-232.)

Morales and Ramirez waited for Black to finish a phone call inside his truck. (Tr. 116.) When he did, Black exited the truck and said, "What are you losers doing here?" (Tr. 116; 163, 212.) Morales said, "we're not . . . losers. We just want our paychecks." (Tr. 116.) Black responded, "You guys don't work for me." (Tr. 116; 163, 212.) Morales responded that he worked for Black yesterday. (Tr. 163.) Black said he did not have their paychecks and told the men to go to T&T to get them. (Tr. 163, 212.)

At this point, Bratcher joined the conversation and asked, "Who do they work for?"<sup>22</sup> (Tr. 117; 163.) Black said they worked for T&T. (Tr. 117.) Black then stood face-to-face with Bratcher and said, "And who the fuck are you?" (Tr. 117; 163, 213.) Black added, "You motherfucker[s] better leave my jobsite." (Tr. 118.) Bratcher replied they were leaving. (Tr. 118, 213.)

The men turned to leave the jobsite and Black continued yelling after them that they were on private property and trespassing. (Tr. 118, 213.) Black further threatened to call the police. (Tr. 213.) Black said the men were being unsafe because they were not wearing hard hats or safety vests. (Tr. 41, 118, 165, 214.) Gonzales turned and said, "Do you want to talk about safety?" (Tr. 118; 165, 214.) Black became upset and walked toward Gonzales. (Tr. 118, 165, 214.) Black then asked if he, "want[ed] some shit motherfucker? Your ass is mine" and charged at Gonzales. (Tr. 165, 214.) The site superintendent then approached the men. (Tr. 118; 163, 214.)

Martin Arrieta, Banes' site superintendent, was eating lunch in Banes' trailer on the jobsite when he observed Morales, Ramirez, Bratcher, and Gonzales enter the jobsite and noticed they were not wearing PPE. (Tr. 237, 242, 246.) Arrieta went to investigate why the men were not wearing PPE. (Tr. 245.) He noticed that the men were "having an exchange of words" with Black. (Tr. 247.) Arrieta remembered few details about what he observed, but remembered Black saying, "I'm not the one that pays you guys, it's T&T; why are you collecting money from me?" (Tr. 247.) Arrieta described the exchange between Black and the four men as "picking" at each other. (Tr. 248.) Arrieta asked the men to leave the jobsite, which they did. (Tr. 247.)

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have Morales' and Ramirez' paychecks on August 12. (Tr. 36; 284.)

<sup>21</sup> Black attempted to deny that he observed Morales and Ramirez approach his truck while he was eating lunch. (Tr. 33-35.) This testimony was contradicted by his sworn pretrial affidavit given to the General Counsel. I credit Black's pretrial affidavit, as it was given closer in time to the events at issue.

<sup>22</sup> Morales testified that Bratcher asked, "What do you mean, he doesn't work for you?" (Tr. 163.) I do not find this minor discrepancy material, as both Morales and Ramirez testified that Bratcher inquired about whether the men were still employed by Respondent.

Morales and Ramirez next engaged in what can best be described as a wild goose chase in an effort to obtain their paychecks. Morales and Ramirez called T&T several times. (Tr. 120; 167, 217.) They also called Respondent's offices, but were told the checks were not there. (Tr. 167.) They went to T&T's offices after 4:00 p.m. and finally received their checks. (Tr. 120-121, 168, 217.) Someone at T&T told the men that their checks had only been dropped off there a short time ago. (Tr. 217.) Previously, the men had not picked up a check from T&T. (Tr. 121, 189.) Typically, they received their checks from their foreman or Respondent's offices. (Tr. 121.)

#### F. *Morales and Ramirez Continue their Picketing*

On Monday, August 15, Morales and Ramirez returned to the Union hall. (Tr. 121.) At that time, they signed a notice to Respondent stating they were going on an unfair labor practice strike. (GC Exh. 10; Tr. 121-122; 224.) The men delivered the notice to Respondent's office. (Tr. 169-170.) They changed their signs on August 15 to state, "RIVER BEND CRANE & RIGGING UNFAIR LABOR PRACTICE." (GC Exh. 11; Tr. 123, 171.) This picketing continued until shortly before the hearing. (Tr. 123-124.) The men changed the sign and began an unfair labor practice strike because they felt their discharges were an unfair labor practice. (Tr. 123, 166, 219.)

### DISCUSSION AND ANALYSIS

#### A. *Witness Credibility*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

I did not find Black to be a credible witness. His demeanor on the witness stand varied between unsure and argumentative. He gave contradictory testimony and his testimony was frequently implausible. I have already cited numerous examples of Black contradicting his pretrial affidavit testimony and a statement given to T&T in August 2016. I have credited Black's pretrial statements, as they were given closer in time to the events giving rise to this case. I did not credit Black's efforts to disavow either of his statements. Black described his statement to T&T as "very vague." (Tr. 38.) I did not accept Black's explanation that he did not feel the need to be accurate in his statement to T&T when he was seeking advice from T&T in an unfamiliar situation. This testimony simply defies logic.

Black further refused to concede even the most basic information, such as the address of EPCC, that overhead photographs presented by the General Counsel depicted EPCC, or that he sometimes uses email. (Tr. 49-50, 59.) In this regard, he in the following exchange with the General Counsel

Q Now, Mr. Black, I'm handing you what's been marked as General Counsel Exhibit 8(a) --

A Okay.

5 Q -- and 8(b). And if you could take a look at that. This is an overhead view of the EPCC, community college, campus, right?

A It appears to be.

Q The one where the -- the job site was located; is that right?

A It appears to be.

10 Q Okay. And then if you look and -- at the second page, 8(b), this appears to be a zoomed-in version, right? And this is of the job site; is that correct?

A It appears it might be.

Q It appears it might be?

A Uh-huh. I've never seen it like this before.

15 Q You've never seen it like this before. Do you have any reason to believe that this is -- is not an overhead view of the job site?

A It very possibly might be, but I'm not --

Q You worked on the job site, right?

A I'm not 100 percent positive.

20 Q You worked on that job site, right?

A Yes.

Q Okay. And you spent quite a few days on that job site, right?

A Yes.

25 Q Okay. Does this appear to be an accurate representation of what that job site was like?

A Like I said, I'm not positive.

Q Okay. Well, what differences are there?

A I don't see any steel up.

Q No steel up. Okay.

30 A No steel up.

Q That's what you guys were doing, right?

A Yeah. That's what I look at.

Q Okay. But, as far as the location, is this where you erected the steel?

A Very possible.

35 Q Okay. And the address of the El Paso Community College is 919 Hunter Drive, correct?

A I don't know.

40 (Tr. 49-50.) Later, after this exchange, Black used a marker to denote various locations on the EPCC jobsite on the aerial photographs. (Tr. 51-52.)

He further sparred with the General Counsel. For example, he engaged in the following exchange:

45 Q Okay. Now, around February, you were contacting several different companies in the area; is that right?

A About what?

...

Q You learned that -- that several of your former employees were going to companies in town and -- and raising concerns about working conditions working for you; is that right?

A Could you explain that a little bit better?

Q Sure. Yeah, that was a -- it might have been a little confusing. So you heard that certain individuals, maybe your former employees, were going around to other businesses in town; is that right?

A Which employees?

...

Q So you learned that certain employees were going to companies around town and they were handing out pamphlets about your company; is that right?

A Do you mean [ex-]employees?

Q Former employees, yes.

A As individually, no. I didn't know.

Q I didn't ask you if they went individually. But you did know that some former employees went --

A I know there was a group of people doing something like that.

Q Okay.

(Tr. 56-58.)

Black further attempted to add to his testimony during examination by his own counsel. While under examination by the General Counsel, pursuant to Federal Rule of Evidence 611(c), Black described, at great length, his interaction on the EPCC jobsite on August 12 with Morales, Ramirez, Bratcher, and Gonzales. (Tr. 32-54.) Then, when examined by Respondent's counsel, Black testified that as the men were leaving the jobsite, one of them said, "Watch your ass. You're going to pay for this." (Tr. 69.) This testimony was given for the first time to his own counsel and he did not explain why he suddenly remembered this detail after his exhaustive testimony under questioning by the General Counsel.

Black's testimony regarding his encounter with Morales, Ramirez, Bratcher, and Gonzales on August 12 when they were seeking Morales' and Ramirez' paychecks, was not believable. Black first stated did not give one of the Union organizers the paychecks because "it's not company policy," but he also claimed that he did not have the checks with him. (Tr. 37) Black also told the Union organizers that he did not have permission to give them the paychecks. (GC Exh. 3; Tr. 38-39.) This statement is incredible because Morales and Ramirez were present during this exchange and he could have given the checks directly to them. Black, a former police officer, further testified that he was scared and felt that his life was threatened by the Union organizers. (Tr. 40; 69.) He also noted that the men were sloppily dressed and might have been robbers. (Tr. 46.) I found this testimony exaggerated and unworthy of belief.

Therefore, I did not credit the testimony of Black, except where was corroborated by another, more credible, witness, was inherently plausible, or ran contrary to Respondent's interests.

I further did not find Candace Ontiveros to be a credible witness. She evinced a spotty memory regarding key events and added to her testimony on cross-examination. For example, Ontiveros added testimony that she called Portillo to check on the safety of Respondent's crew before going to EPCC for the first time on cross-examination. (Tr. 272.)

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Her testimony was not corroborated by Black. For example, she testified that when Black called her on the morning of August 12, he said, "There's something happening at the campus . . . there's gatherings of people at the campus happening, we don't know if it's a protest, we don't know what's going on, can you please go over there and check it out." (Tr. 278.) Black did not testify that he said these things to Ontiveros.

10

Ontiveros further quibbled with the General Counsel:

Q Okay. Now, you said when you spoke with Mr. Black on the morning of August 12th that he said he didn't know what employees were involved in the incident; is that right?

15

A Correct.

Q Okay. But you knew when you went over there to the job site that Victor Ramirez and George Morales were involved, didn't you?

20

A I cannot recall if I knew those two individuals or if it was my entire crew, at that point.

...

Q Because Mr. Black told you that there was a strike happening at the job site; is that right?

25

A He did say that there was a disturbance, a possible protestor strike going on but we did not know at that time of what it incurred, what it entailed.

Q But you did know that Victor Ramirez and George Morales may be involved in that, right?

30

A I knew that they were part of my crew at the job site. I know who was on payroll that day so I didn't know -- I knew they were part of my crew that was working on that job site that day. I didn't know if my supervisor was in with them in said protest strike going on. I did not know what, my crane operators. I didn't know who else was involved with them.

35

(Tr. 274-276.)

Like Black, Ontiveros attempted to disavow her pretrial statement given to T&T:

Q And after this -- after this -- after August 12th, you wrote a statement about what had happened that day; is that right?

40

...

Q I'd like to show you what's been marked as General Counsel Exhibit Number 4. And this is the statement that you drafted about the incident, right?

45

A Yes.

Q Okay. And from what you wrote in that statement, it says that "you arrived at the job site at 9 a.m. and learned that the campus police had dispersed the supposed strikers off campus property." Do you remember writing that?

5 A I do remember writing that, yes, but I do not know where I got the information of supposed police dispersing. I cannot recall why I wrote that.

Q And you also wrote that "I didn't see any activity going on and the two employees, George Morales and Victor Ramirez, had not returned to work"; is that right?

A Yes.

10 Q And you also stated that Mr. Black told you that he "informed you of a strike happening at El Paso Community College"; is that right?

A He informed me of a disturbance going on at the community college that morning.

Q Okay.

15 A I know I wrote strike in there. That is after the fact we already knew that a strike was happening based off of the letters that were provided to us.

Q So he didn't actually inform you that a strike was happening that day?

20 A He said there was a disturbance happening that day, that I can recall him telling me. There's something happening at the campus is what he said; there's gatherings of people at the campus happening, we don't know if it's a protest, we don't know what's going on, can you please go over there and check it out.

(Tr. 276-277.) Ontiveros' statement was given closer in time to the events giving rise to this case. In addition, the statement was given in an effort to receive advice from T&T. As such, I credit Ontiveros' statement over her hearing testimony.

30 In less than 25 pages on transcribed testimony, Ontiveros added to her direct testimony on cross-examination and contradicted both Black and her own pretrial statement. Therefore, I did not credit the testimony of Ontiveros, except where was corroborated by another, more credible, witness, was inherently plausible, or ran contrary to Respondent's interests.

35 I further did not find Christopher Garcia to be a credible witness. He testified in a rambling and fashion and generally seemed uncertain. His testimony contradicted the more credible testimony of Morales and Ramirez regarding the events of August 12 and was not corroborated by any other witnesses.

40 When asked about Respondent's safety policies, Garcia gave the following response, "There is Dan Wolfe (phonetic) that's he in charge of all the safety equipment, in charge of anything. And he pretty much regulates on everybody plus everyone else. Everyone else that's around there is on top of each other making sure everyone has fire extinguishers, taped off areas, you know. Yeah, so." (Tr. 287.) No effort was made to clarify this testimony. In addition, No other witness mentioned Dan Wolfe or who he might be in Respondent's organization.

45 Garcia gave equivocal testimony, hedging with words like "pretty much" or "pretty sure." (Tr. 287, 288, 290, 291.) Although the testimony current employees of a respondent are sometimes given extra credibility, I do not find that to be the case with Garcia. Under Board law, current employees are likely to be particularly reliable because these witnesses are testifying

adversely to their pecuniary interests. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products, Inc.*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). However, Garcia was not subpoenaed and he did not give testimony contrary to his employer's interests. As Garcia's testimony was not corroborated by any other witness, was contradicted by more credible witnesses, and was generally imprecise, I did not credit it.

I found Eddie Acosta and Martin Arrieta to be generally credible witnesses. Both witnesses gave only brief testimony. Arrieta did not seem to remember many details about his observations on August 12. However, the testimony he gave was largely corroborated by other witnesses. Arrieta gave rambling testimony regarding his interaction with Gonzales after escorting Morales, Ramirez, Bratcher and Gonzales from the jobsite on August 12. As such, I credited the testimony of Gonzales over that of Arrieta. Acosta's testimony was uncontradicted and he did not waver on cross-examination. As such, I credited Acosta's testimony and Arrieta's testimony, except where it was contradicted by Gonzales.

I found Gonzales to be a credible witness. He appeared candid while testifying. He readily admitted that he is larger and younger than Black regarding their confrontation on the jobsite on August 12. (Tr. 229.) He further admitted that he never saw any sort of notice of separation or termination notice from Respondent to Morales or Ramirez. (Tr. 233.) His testimony was largely corroborated by that of Morales and Ramirez. As such, I credited Gonzalez' testimony.

I found George Morales to be a credible witness. He testified in a soft spoken, but sure, manner. He candidly admitted that he entered the EPCC jobsite without PPE on August 12. His testimony did not waver on cross-examination. Furthermore, his testimony was corroborated in large part by Ramirez and Gonzalez. Therefore, I credited it.

I further found Victor Ramirez to be a credible witness. English is not Ramirez' first language and he testified with the aid of an interpreter. Although he appeared nervous, Ramirez testified in a steady and forthright manner. Ramirez seemed a bit unsure of what Gonzales was wearing on August 12, but I do not find this minor misstep detracts from his overall credibility. Like Morales, he candidly admitted that he entered the EPCC jobsite without PPE on August 12. Ramirez' testimony was largely corroborated by Morales, who I found credible. Also, his testimony was corroborated on many points by Black's pretrial statement to T&T. As such, I credited Ramirez' testimony.

*B. Respondent Unlawfully Threatened Morales, Ramirez, and Union Representatives  
(Complaint paras. 5(b)(1-3))*

Based on the facts found above, Respondent, through Black, threatened employees with discharge, threatened to cause the arrest of employees and Union organizers, and threatened Union officials with physical violence.

The Board has long held that an employer violates Section 8(a)(1) of the Act when it engages in conduct that might reasonably tend to interfere with the free exercise of employee rights under

Section 7. *Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 35 (2016), citing *American Freightways Co.*, 124 NLRB 146 (1959). The test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer’s motive or on whether the coercion succeeded or failed. *Greenbrier Rail Services*, at 35, citing *American Tissue Corp.*, 336 NLRB 435, 441 (2001). In making the requisite determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees. 336 NLRB at 442 citing *NLRB v. E. I. du Pont & Co.*, 750 F.2d 525, 528 (6th Cir. 1984).

Threatening physical violence against a union official in the presence of employees violates Section 8(a)(1) of the Act. *Dayton Hudson Corp.*, 316 NLRB 477, 482-483 (1995); see also *Jay Dee Transportation*, 243 NLRB 638, 640 (1979) (Threatening union officials in the presence of employees by stating, “stay the hell away from here before you get hit by a bus” violated Section 8(a)(1) of the Act.)

A threat of discharge which results in an actual discharge is still a threat under Section 8(a)(1). See *Bates Paving & Sealing, Inc.*, 337 NLRB slip op. at n. 7 (2016). In that case, the Board noted that to disregard such a violation would effectively privilege unlawful statements--which are independently coercive--when the respondent contemporaneously gives effects to its unlawful words. *Bates Paving & Sealing, Inc.*, 337 NLRB slip op. at n. 7 (2016), citing *TPA, Inc.*, 337 NLRB 282, 284 (2001).

Applying these principles to the facts of this case, I find that Black violated the Act by threatening his employees and their union representatives. Initially, I find that Black violated the Act by charging at Gonzales and stating “want some shit motherfucker? Your ass is mine.” He made this statement in the presence of two employees. Furthermore, I find that he violated the Act by threatening to call the police on Morales, Ramirez, Bratcher, and Gonzales. Finally, I find that by calling his employees losers and then advising them that they did not work for him, Black threatened Morales and Ramirez with discharge. Therefore, I find that Black violated Section 8(a)(1) of the Act by threatening his employees with discharge, threatening employees and union officials with arrest, and threatening union officials with physical violence in the presence of employees.

C. *Respondent Unlawfully Denied Employees and Union Organizers Access to Non-Working Areas of the EPCC Jobsite (Complaint paras. 5(b)(4-6))*

An employer who denies non-employee union representatives access to private property for purposes related to the exercise of employees' Section 7 rights bears a threshold burden of establishing that, at the time it denied access, it had a property interest that entitled it to exclude individuals from the property. *Swardson Painting Co.*, 340 NLRB 179, 179 (2003), citing *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997), *enfd.* 187 F.3d 1080 (9th Cir. 1999), *cert. denied* 529 U.S. 1098 (2000). If the employer fails to meet this threshold burden, there is no actual conflict between private property rights and Section 7 rights, and its actions therefore will be found to violate Section 8(a)(1) of the Act.<sup>23</sup> *Id.* *A & E Food Co. 1, Inc.*, 339 NLRB 860

<sup>23</sup>If a respondent fails to meet this burden, there is no need to undertake a balancing or rights analysis pursuant to *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S.

(2003), citing *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997); *Food for Less*, 318 NLRB 646, 649 (1995); *Bristol Farms, Inc.*, 311 NLRB at 438-439.

5 In this instance, Respondent presented no evidence regarding its property interest in the EPCC jobsite. The evidence has established that Bratcher and Gonzales came to the EPCC jobsite to support Morales and Ramirez in retrieving their paychecks. The act of demanding paychecks has been found to constitute protected, concerted activity. *Random Acquisitions, LLC*, 357 NLRB 303, 311 (2011). As such, Bratcher and Gonzales came onto EPCC's property to support Respondent's employees in the exercise of their Section 7 rights. As Respondent failed to make any showing that it had the right to exclude either the Union organizers or its employees from the jobsite, I find that Respondent violated Section 8(a)(1) of the Act by telling the Union organizers to leave the premises on August 12.

15 In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board stated that, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid. *United States Postal Service*, 318 NLRB 466, 467 (1995). An employer's restrictions on employees' statutory right to engage in protected activity must be clearly limited so as not to interfere with employees' rights to engage in protected activities on their own time in non-work areas. *First Transit, Inc.*, 360 NLRB 619, 619 (2014), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-804 (1945).

25 Again, Respondent has failed to espouse any business justification for excluding Morales and Ramirez from a non-work area of the EPCC jobsite. Even if Respondent were to argue that Morales' and Ramirez' lack of personal protective equipment on August 12 justified their expulsion, such an argument would be unavailing. Black told the employees that they were trespassing, would be arrested, and had to leave the jobsite. Respondent has failed to show that the employees were trespassing or that Respondent had the right to exclude them from the jobsite. Respondent has a legitimate interest in workplace safety, and it is entitled to insist that third parties follow safety protocols. *Ambrose Electric*, 330 NLRB 78, 79 (1999). Despite this interest in workplace safety, Respondent has not shown that its denial of access was so tailored to that interest as to allow it to exclude employees from the jobsite. See *Ambrose Electric*, 330 NLRB at 79. Therefore, I find that Respondent's denying its off-duty employees access to outside, non-working areas of the EPCC jobsite violated Section 8(a)(1) of the Act.

35 *D. Respondent Unlawfully Terminated Morales and Ramirez (Complaint paras. 5 (c) and (d))*

40 Respondent further violated Section 8(a)(1) of the Act by terminating the employment of Morales and Ramirez. Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]. 29 U.S.C. §158(a)(1). Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. §157. An employee's discharge independently violates Section 8(a)(1) of the Act where it is motivated by employee activity protected by Section 7. Unrepresented employees who engage in a peaceful work stoppage are engaged in protected concerted activity and an employer who

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105 (1956). *Wild Oats Markets, Inc.*, 336 NLRB 179, 180 (2001); *Bristol Farms, Inc.*, 311 NLRB at 438.

discharges employees for engaging in such activity violates Section 8(a)(1) of the Act. *Robbins Engineering*, 311 NLRB 1079, 1083-1084 (1993).

In this case, I find that Morales' and Ramirez' actions were both protected and concerted. When unrepresented employees concertedly cease work to protest unsatisfactory working conditions, their actions are protected by the Act. *Poppin Fresh Pies, Inc.*, 256 NLRB 233, 234 (1981), citing *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). Furthermore, the act of going on strike is protected, concerted activity, regardless of whether the employer had been given notice of the strike, or presented with a prior demand for a change in working conditions. *Accel, Inc.*, 339 NLRB 1052, 1057 (2003), citing *Americorp*, 337 NLRB 657, 659 (2002); see also *Benesight, Inc.*, 337 NLRB 282 (2001) (It is well settled that the Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice.). Morales and Ramirez initially went on strike due to their concerns over Respondent's safety and pay practices. That they did not make a prior demand to Respondent to change these practices is of no moment. Thus, I find that Morales and Ramirez engaged in protected, concerted activity by striking starting on August 12.

Additionally, I find that Respondent was aware of Morales' and Ramirez' protected, concerted activity. I have found that Portillo, Acosta, and Arrieta all told Black about the picketing activity on the morning of August 12. Black was clearly concerned about the strike, as he sent Ontiveros to find out what was happening. Furthermore, in their prehearing statements, which I have credited, both Black and Ontiveros admitted that they knew that employees were picketing on the morning of August 12. (GC Exhs. 3, 4.) Therefore, I find that Respondent knew of the protected, concerted activities of Morales and Ramirez on the morning of August 12.

Furthermore, I find that Morales and Ramirez were discharged by Respondent. The Board has long held that the fact of discharge does not depend upon the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), enfd 570 F.2d 705 (6th Cir. 1978). It is sufficient if the words or actions of the employer would lead a prudent person to believe that his or her tenure had been terminated. *Ridgeway Trucking Co.*, 243 NLRB at 1048-1049 (1979) enfd in relevant part 622 F.2d 1222, 1224 (5th Cir. 1980). The determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer's statements or conduct "would reasonably lead the employees to believe that they had been discharged." *Industrial Hard Chrome, Ltd.*, 325 NLRB 298, 312 (2008), quoting *Kolkka Tables*, 335 NLRB 844, 846 (2001).

Morales and Ramirez were never told they were "terminated" or "fired." However, the credited evidence establishes that Black told Morales and Ramirez that "you don't work for me," threatened them with arrest for trespassing, and told them to leave the premises. Telling employees "you don't work for me" clearly implies that they have been discharged from employment. Under these circumstances, I find that a prudent person would believe that he or she had been discharged. See *Apex Cleaning Service*, 304 NLRB 983, 986 (1991) (engaging in an angry exchange with employees, threatening them with arrest, and demanding they leave the premises would lead prudent employees to believe they had been discharged). Therefore, contrary to Respondent's assertions, I find that Morales and Ramirez were discharged on August 12.

Employees may not be discharged or otherwise discriminated against for engaging in protected concerted work stoppages to protest working conditions. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Dismissing employees for going on strike, which constitutes protected, concerted activity, violates Section 8(a)(1) of the Act. *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007). Therefore, I find that Respondent violated Section 8(a)(1) of the Act by discharging Morales and Ramirez for engaging in a strike.

In its brief, Respondent argues that the discharges should be analyzed using the burden shifting approach set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). A *Wright Line* analysis is unnecessary, as I have found that Morales and Ramirez were discharged for engaging in protected concerted activity. However, even using the burden-shifting framework of *Wright Line*, I find that Respondent's discharges of Morales and Ramirez violates the Act.

In *Wright Line*, the Board determined that the General Counsel carries the initial burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. The elements required for the General Counsel to meet his initial burden are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel meets that burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Once the General Counsel has met the initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

The General Counsel has met the initial burden under the *Wright Line* test. Initially, I have found that the activities of Morales and Ramirez were both protected and concerted and that Respondent knew of these activities. The General Counsel has further established that Respondent bore animus toward these activities. The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). Improper motivation may be inferred from several factors, including the timing between an employee's protected activity and the discharge. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005).

Several factors establish that Morales' and Ramirez' discharges were motivated by their protected, concerted activity. Black knew that the employees were on strike on the morning of August 12 and sent Ontiveros to investigate. Black was clearly angry the next time he encountered Morales and Ramirez, outside of his truck on August 12. He screamed at and threatened both men and their union representatives at that time. He also referred to the employees as losers. The timing of the discharges just hours after Black learned of Morales' and Ramirez' protected, concerted activity, coupled with contemporaneous unfair labor practices, lead me to infer that the discharges were improperly motivated.

The burden now shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. Respondent argues that it did not discharge Morales and Ramirez, an argument I have rejected. Respondent has not offered any reason for its discharge of Morales and Ramirez. As such, Respondent has not met its burden of proving that it would have discharged Morales and Ramirez in the absence of their protected, concerted activities. Thus, even under the burden shifting framework of *Wright Line* I would have found that Respondent's discharge of Morales and Ramirez violated Section 8(a)(1) of the Act.

*E. Respondent Prolonged Its Employees' Strike (Complaint para. 5(g))*

An economic strike may be converted into an unfair labor practice strike if the employer commits unfair labor practices that have the effect of prolonging the strike. *Titan Tire Corp.*, 333 NLRB 1156, 1157 (2001). A strike will be considered converted if the unfair labor practice was a factor that caused a prolongation of the work stoppage. *Id.* The Board considers both objective and subjective factors in evaluating causation. *Id.* citing *C-Line Express*, 292 NLRB 638 (1989), *enf. denied* on other grounds 873 F.2d 1150 (8th Cir. 1989). In applying objective criteria, the Board considers whether certain types of unfair labor practices have a reasonable tendency to prolong a strike and are a "sufficient and independent basis for finding conversion." *Titan Tire Corp.*, 333 NLRB at 1157 quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980). In applying subjective criteria, the Board gives substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. *Id.*

Telling strikers that they are fired has been held to be they type of unfair labor practice that has a reasonable tendency to prolong a strike and therefore afford a sufficient and independent basis for finding a conversion. *F.L. Thorpe & Co.*, 315 NLRB 147 (1994). Therefore, I find that Black's actions in threatening and discharging Morales and Ramirez afforded a sufficient basis to find that the strike was converted from an economic strike to an unfair labor practice strike on August 12. Furthermore, both men testified that they began an unfair labor practice strike on August 12 because they felt their discharges were unfair labor practices. (Tr. 123, 166, 219.) As such, I find that Black's actions in threatening and discharging Morales and Ramirez on August 12 converted their strike to an unfair labor practice strike.

*F. Respondent's Defenses are Without Merit*

Respondent raised affirmative defenses in its answer and on brief. Respondent, in its answer, asserted that it would have taken the same actions in the absence of any alleged protected, concerted activity. (GC Exh. 1(g).) However, in its brief, Respondent continues to maintain that it did not discharge Morales and Ramirez. Respondent asserts no evidence in support of its defense that it would have taken the same action in the absence of protected, concerted activity by Black. As such, I find no merit to this defense.

In its brief, Respondent asserts that any misconduct of Black was *de minimis* and did not rise to the level of a violation of the Act. (R. Brf. p. 12.) Respondent cited no case law in support of this defense. The discharge of an employee, even if subsequently remedied, is not a *de minimis* violation of the Act. *Georgia Hoisery Mills*, 207 NLRB 781, 781 (1973). The other meritorious allegations found herein include threats, denial of access, and causing a strike to be prolonged.

Therefore, I find that Respondent's violative conduct was clearly more than *de minimis* and warrants a remedy.

#### CONCLUSIONS OF LAW

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1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. The Union and International Union have been labor organizations within the meaning of Section 2(5) of the Act.

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3. By threatening employees with discharge because they engaged in protected, concerted activities Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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4. By threatening to cause the arrest of its employees and Union representatives in response to its employees' protected, concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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5. By threatening Union representatives with physical violence in the presence of its employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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6. By Union representatives access to a jobsite, at which Respondent lacked the right to control access, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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7. By denying off-duty employees access to parking lots, gates, and other outside non-working areas, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

8. By discharging George Morales and Victor Ramirez because they engaged in protected, concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

#### REMEDY

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Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employees, must offer them reinstatement 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).

Respondent shall also expunge from its files any reference to the employees' unlawful discharges and to notify the affected employees in writing that this has been done and that the discharges will not be used against them in any way.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate the unlawfully discharged employees for search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 28. Respondents will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 12, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 28 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>24</sup>

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<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, River Bend Crane and Rigging, Inc., its officers, agents, successors, and assigns, shall

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1. Cease and desist from

- (a) Discharging or otherwise discriminating against any employee for supporting International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 263 (Union), or any other union.
- (b) Threatening employees with discharge because they engaged in protected, concerted activities.
- (c) Threatening to cause the arrest of its employees and Union representatives in response to its employees' protected, concerted activities.
- (d) Threatening Union representatives with physical violence in the presence of its employees.
- (e) Denying Union representatives access to jobsites at which Respondent lacked the right to control access.
- (f) Denying off-duty employees access to parking lots, gates, and other outside non-working areas.
- (g) 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.

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

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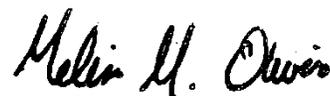
- (a) Within 14 days of the date of this Order, offer George Morales and Victor Ramirez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (b) Make George Morales and Victor Ramirez whole for any loss of earnings and other benefits suffered as a result of the unlawful discharges, less any net interim earnings, plus interest.
- (c) Compensate George Morales and Victor Ramirez for any adverse tax consequences of receiving a lump-sum backpay award.
- (d) Reimburse George Morales and Victor Ramirez for reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, plus interest.

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- 5 (e) Within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 28. Respondent will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.
- 10 (f) Within 14 days, remove from its files any reference to the discharges of George Morales and Victor Ramirez and, within 3 days thereafter, notify them in writing that this has been done and that the layoff will not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.
- 15 (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 20 (h) Within 14 days after service by the Region, post at its El Paso, Texas facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2016.
- 30 (i) 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 Respondent has taken to comply.
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40 Dated, Washington, D.C. September 29, 2017



Melissa M. Olivero  
Administrative Law Judge

**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 threaten you with discharge if you engage in protected, concerted activities.

WE WILL NOT threaten you or union representatives with arrest if you engage in protected, concerted activities.

WE WILL NOT make threats of physical harm to union representatives.

WE WILL NOT deny union representatives access to jobsites at which we lack the right to control access.

WE WILL NOT deny off-duty employees access to parking lots, gates, and other outside non-working areas.

WE WILL NOT fire you for engaging in protected, concerted activities.

WE WILL NOT, in any like or related manner, interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL offer George Morales and Victor Ramirez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of this Order, remove from our files any reference to our unlawful discharges of George Morales and Victor Ramirez and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against

them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

WE WILL make George Morales and Victor Ramirez whole for any loss of earnings and other benefits resulting from our unlawful firing of them, less any net interim earnings, plus interest.

WE WILL reimburse George Morales and Victor Ramirez for reasonable search-for-work, interim employment expenses regardless of whether those expenses exceed interim earnings, and consequential economic harm they may have incurred, plus interest.

WE WILL compensate George Morales and Victor Ramirez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

**RIVER BEND CRANE & RIGGING, INC.**

(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).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/28-CA-182666](http://www.nlr.gov/case/28-CA-182666) 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, (602) 416-4755.