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**Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems *and* Bricklayers and Allied Craftsworkers, Local 8 Southeast.** Cases 12–CA–176715 and 12–RC–175179

April 13, 2018

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On May 10, 2017, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision, Order, and Direction; to amend the conclusions of law and remedy; and to adopt the recommended Order as modified and set forth in full below.[4]

This is a consolidated unfair labor practice and representation case. For the reasons set forth below, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act and engaged in objectionable conduct by suspending and discharging employees Luis Acevedo and Walter Stevenson. However, we reverse the judge and find that the Respondent also violated Section 8(a)(3) and (1) and engaged in objectiona-

[1] No exceptions were filed to the judge's dismissal of the Union's objection regarding the Respondent's solicitation policy or to the judge's sustaining of the Respondent's challenges to the ballots of Robert Harvey, Robert Baker, Mark France, and Robert Pietsch.

[2] The Respondent has excepted to some of the judge's credibility findings. 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. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We affirm the judge's conclusion that the Respondent did not violate Sec. 8(a)(1) of the Act or engage in objectionable conduct by interrogating employee Luis Acevedo. Under the circumstances of this case, a reasonable employee would not have interpreted Foreman Mario Morales's question regarding insurance papers as inquiring about Acevedo's union allegiance. Member Pearce does not rely on the judge's statements that "from Acevedo's perspective" Foreman Mario Morales was asking about insurance papers and that "Acevedo was not intimidated" because the Board applies an objective standard. See *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 fn. 9 (2014).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) and engaged in objectionable conduct when Safety Director Aleksei Feliz threatened that wages would decrease if the Union won the election, we do not rely on *Westwood Horizons Hotel*, 270 NLRB 802 (1984), and *PPG Industries*, 350 NLRB 225 (2007), cited by the judge, because those cases involve third-party threats. Instead, we rely on *President Riverboat Casinos of Missouri*, 329 NLRB 77, 77 fn. 5 (1999). We find it unnecessary to pass on the judge's additional finding that the Respondent violated Sec. 8(a)(1) and engaged in objectionable conduct when Foreman Brent McNett stated that it probably would not be good for wages if the Union won the election. Such a finding would be cumulative and would not materially affect the remedy.

We agree with the judge that the Respondent's Sec. 8(a)(1) and (3) violations and objectionable conduct warrant setting aside the election if the Union does not receive a majority of the votes cast after the overruled challenged ballots are opened and counted. *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786–1787 (1962). However, we note that the *Dal-Tex* principle that elections will not be set aside where the 8(a)(1) violations are so minimal or isolated that "'it is virtually impossible to conclude that the misconduct could have affected the election results'" has never been applied to 8(a)(3) violations. See *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (quoting *Clark Equipment Co.*, 278 NLRB 498, 505 (1986)). Because we endorse the judge's conditionally setting aside the election for these reasons, we find it unnecessary to pass on the judge's finding that the Respondent failed to substantially comply with the Board's voter list requirements. Finally, we do not rely on *Kingspan Benchmark*, 359 NLRB 248 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Chairman Kaplan joins his colleagues in conditionally setting aside the election based on the Respondent's unfair labor practices, and he agrees that the "virtually impossible" exception of *Clark Equipment*, supra, does not apply here. However, regarding their observation that this exception "has never been applied to 8(a)(3) violations," Chairman Kaplan echoes the counter-observation of former Member Johnson: the Board has never held that this exception *should* never apply to 8(a)(3) violations—not even, in the context of a lopsided vote, to an 8(a)(3) violation that affects one or few employees and involves no loss of employment. See *Lucky Cab Co.*, 360 NLRB at 277 fn. 22.

As agreed to by the Respondent and the General Counsel, we have corrected several inadvertent errors made by the judge in his decision. We deny the Respondent's and the General Counsel's respective exceptions regarding additional alleged errors. Finally, we reject the Respondent's assertion that the judge's errors warrant dismissal of the complaint. See, e.g., *Long Island Nursing Home*, 297 NLRB 47, 47 fn. 2 (1989) (correcting several errors in judge's decision and noting that they did not affect the disposition of the case).

[4] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

ble conduct by more strictly enforcing its fall-protection policy. As to the representation issues, we affirm the judge's overruling of the Respondent's challenges to nine ballots, but we reverse the judge and sustain the Respondent's challenge to one ballot.

## Facts

The Respondent is a masonry contractor in Florida. From at least May 1, 2004, to April 30, 2016, the Respondent and the Union maintained a 8(f) relationship. The Union filed a petition to represent the Respondent's bricklayers and masons pursuant to Section 9(a) on April 29, 2016,[5] after the Respondent expressed its intention not to renew the parties' 8(f) agreement. Luis Acevedo and Walter Stevenson worked as bricklayers for the Respondent from January 25 to May 16.

In February, Safety Coordinator Fernando Ramirez trained Acevedo and Stevenson regarding the Respondent's fall-protection policy, which requires employees working at or above a height of 6 feet with exposure to a fall to wear designated safety equipment. Ramirez instructed the employees not to hook their retractors directly to scaffolding. However, he did not explain or demonstrate how to safely tie off to scaffolding.

In early May, Safety Director Aleksei Feliz held a meeting with eight employees at the University of Tampa (UT) jobsite in which he urged the employees to vote against the Union and stated that wages would decrease if the Union won the election. Acevedo, who was an open union supporter, challenged Feliz's assertion, eliciting a silent glare from Feliz.

On May 16, Foreman Brent McNett held a prework safety meeting at the UT jobsite. He reminded employees about the fall-protection policy because some employees, including Acevedo and Stevenson, were being moved from outside to inside work and they had not previously been required to wear safety harnesses. McNett warned that violations of the policy would result in discharge, but he did not demonstrate or explain how to properly wear or tie off the safety harnesses.[6]

Shortly after the meeting, Foreman Mario Morales discovered partners Acevedo and Stevenson not wearing safety harnesses. Morales directed them to retrieve their harnesses and informed McNett. Soon thereafter, McNett observed Acevedo and Stevenson improperly tied off to the scaffolding. McNett warned them about the fall risk, corrected their equipment, and asked if they had been trained on tying off. They denied receiving training. McNett reported the incident to Feliz and asked whether the employees had been trained. Feliz then called Ramirez and directed him to investigate. Ramirez found records from the February safety training he conducted that reflected the attendance of Acevedo and Stevenson. He showed the records to McNett and the two employees, who admitted that they had been trained. Ramirez called Feliz, who directed him to suspend Acevedo and Stevenson for the day. Neither employee had received any prior discipline.

That evening, Feliz took the unprecedented step of telephoning the Respondent's owners, Ron and Richard Karp, to discuss the incident. Although Feliz was fully authorized to decide Acevedo and Stevenson's discipline, he contacted the Karps because he knew Acevedo was a union supporter and the election was a week away. The decision was made to terminate both employees. The next day, McNett informed Acevedo and Stevenson that they were discharged. Other employees who tied off incorrectly on May 16 were not discharged or disciplined for their violations.

Prior to May 16, the Respondent did not follow a consistent "zero tolerance" fall-protection policy that mandated discharge for a violation of the policy. Rather, the Respondent merely warned and suspended several employees for their first and second violations. Indeed, in a February 2016 report to the Florida unemployment compensation agency, the Respondent described the consequence of violating its policy as "[f]irst and second warnings, third discharge."

From May 25 to June 9, the Region conducted a mail-ballot election pursuant to a stipulated election agreement. The revised tally of ballots shows 16 votes for and 16 votes against the Union, with 14 determinative challenged ballots. Ten of the challenged ballots are before the Board: those of Acevedo, Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed, and Raymond Pearson.

## Discussion

### 1. Acevedo's and Stevenson's suspensions and discharges

For the reasons that follow, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by suspending and discharging Acevedo and Stevenson because of Acevedo's union activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert.

[5] All dates are in 2016 unless otherwise noted.

[6] We do not rely on the judge's statement that the Respondent's "foremen became lax in their enforcement" of the policy "while work was being performed outside of the UT structures." It is undisputed that fall-protection equipment was not required while employees worked outside at the UT site in April and early May. There was no risk of falling because employees working on the wall were protected by metal guardrails on the remaining three sides.

denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As an initial matter, the Respondent concedes knowledge of Acevedo's union activity and support. Further, the judge's finding that Acevedo's partner Stevenson was "collateral damage" is well supported by Board precedent. See, e.g., *Adam Wholesalers*, 322 NLRB 313, 314 fn. 7, 329–330 (1996) (finding 8(a)(3) violation where respondent pretextually disciplined coworker accompanying principal union organizer; coworker's warning stemmed from being "with the wrong person at the wrong time").

We also agree with the judge that the Respondent's animus is well established by the close timing of the discharges to the election and the Respondent's other unfair labor practices. The Respondent's decision to discharge Acevedo, an open union supporter, and Stevenson just 8 days before the ballots were mailed is suspect. See *Redwing Carriers, Inc.*, 224 NLRB 530, 531 (1976) (discharge 1 week before election supports animus). Indeed, as recognized by the Board and reviewing courts, "'[t]iming alone may suggest antiunion animus as a motivating factor in an employer's action.'" *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015) (quoting *Masland Industries*, 311 NLRB 184, 197 (1993)). Further, as noted above, the Respondent violated Section 8(a)(1) by threatening employees that their wages would be reduced if the union won the election. See *Continental Radiator Corp.*, 283 NLRB 234, 237 (1987) (threat to reduce wages supports animus). This threat is particularly probative of the Respondent's animus because it was made by Safety Director Feliz and challenged by Acevedo, eliciting a silent glare from Feliz. Just days later, Feliz was involved in the decision to suspend and discharge Acevedo and Stevenson.[7]

We find, in agreement with the judge, that the Respondent's animus is further demonstrated by its disparate treatment of Acevedo and Stevenson. See *Pollock Electric, Inc.*, 349 NLRB 708, 709–710 (2007). The Respondent suspended and discharged Acevedo and Stevenson for their first violations of the fall-protection policy. However, the Respondent merely warned and suspended several other employees for their first and second violations of the policy. For example, Brandon Carollo received a suspension for his first violation (working without fall-protection equipment), a suspension for his second violation (failing to be tied by a harness), and was only discharged following his third violation (working without a harness and insubordination). The Respondent suspended Timothy Bryant and Richard Haser for their first violations of the policy: Bryant was sent home for 2 days for not wearing a harness or being connected to an anchor point and Haser was sent home and required to complete a safety orientation for failing to tie off. Additionally, we agree with the judge that Timothy Golphin's and Jaswin Leonardo's discharges for their first violations of the policy were not comparable because both engaged in "severe compound [safety] violations." In addition to this disparate treatment, the Respondent's animus is further evidenced by its decision to change the level of Acevedo and Stevenson's discipline, after consultation with the Respondent's owners, from a one-day suspension straight to discharge.

Contrary to the Respondent's assertion, its labeling of the fall-protection policy as "zero tolerance" provides no defense. As an initial matter, the disparate treatment evidence discussed above shows that the Respondent has not in fact followed a zero tolerance fall-protection policy. Similarly, when reporting to the Florida unemployment compensation agency, the Respondent stated that violations of the policy would result in "[f]irst and second warnings, third discharge," not that it was a zero tolerance policy.

Nor do we find merit to the Respondent's argument that it did not discharge other employees for their first violations of the policy because general contractors, and not the Respondent, discovered the violations. The evidence does not support the Respondent's contention that its purported "zero tolerance" policy applies only to violations observed by the Respondent's personnel. Significantly, the Respondent did not discharge Bryant for his first violation of the fall-protection policy even though its safety coordinator, Ramirez, observed the violation. While the Respondent argues that Bryant's continued employment was due to numerous administrative errors and oversight, its convoluted defense is simply not credible.

Finally, we agree with the judge that the Respondent's proffered reasons for the suspensions and discharges were pretextual. In addition to the reasons cited by the judge, we find that Feliz' unprecedented and suspicious decision to contact Owners Ron and Richard Karp, after which the suspensions of Acevedo and Stevenson were escalated to discharges, demonstrates pretext. We also rely on the judge's crediting of Acevedo's and Stevenson's testimony that other employees were not tied off properly on the same day as Acevedo and Stevenson, yet none were disciplined for their violations of the policy.[8]

[7] As we discuss below, the Respondent also violated Sec. 8(a)(3) and (1) by more strictly enforcing its fall-protection policy.

[8] We find it unnecessary to rely on the Respondent's anti-union campaign as background evidence of animus. We find that the record amply demonstrates the Respondent's animus for the other reasons

Having found that the Respondent's stated reasons for the suspensions and discharges were pretextual, the Respondent has failed by definition to meet its rebuttal burden of proving that it would have suspended and discharged Acevedo and Stevenson in the absence of Acevedo's union activity. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by suspending and discharging Acevedo and Stevenson.

2. Stricter enforcement of fall-protection policy

Stricter enforcement of a rule because of employees' union activity violates Section 8(a)(3) and (1). See *Neises Construction Corp.*, 365 NLRB No. 129, slip op. at 3 (2017). The judge dismissed the stricter enforcement allegation in this case because he "was not convinced that the [Respondent] resumed enforcement of the [fall-protection] policy solely because of the impending . . . election or for the purpose of trapping [Acevedo] and Stevenson in a violation" and because the policy "was mandated by law." We find that the judge erred in both respects.

As a preliminary matter, the judge mischaracterized the nature of the complaint. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by more strictly enforcing its fall-protection policy against Acevedo and Stevenson because of employees' union activity, not because of the election or in order to trap the discriminatees in a violation.

Additionally, the judge erred by stating that there can be no violation because the policy is mandated by law. Contrary to the judge, the Board has previously found stricter enforcement violations in these circumstances. For example, in *Story Oldsmobile, Inc.*, 244 NLRB 835, 837–838 (1979), the Board found that the respondent violated Section 8(a)(3) and (1) by more strictly enforcing an Occupational Safety and Health Administration (OSHA) rule regarding safety glasses and hardhats because of employees' union activity. Therefore, the fact that OSHA requires employees to utilize appropriate safety equipment when working at or above a height of 10 feet does not preclude the Board's finding of a violation.[9]

We find that the record, particularly the evidence of disparate treatment, strongly demonstrates that the Respondent more strictly enforced its fall-protection policy because of employees' union activity. Indeed, the judge stated that in view of the disparate treatment of Acevedo and Stevenson, they would not have been discharged in the absence of union activity. In *Neises*, 365 NLRB No. 129, slip op. at 3, the Board found that the respondent unlawfully enforced its attendance policy more strictly when discharging one employee and reprimanding two other employees in retaliation for employees' union activity. Similarly, in *St. John's Community Services-New Jersey*, 355 NLRB 414, 414–415 (2010), the Board found unlawful the respondent's stricter enforcement of its medication administration policy, including by discharging one employee, in retaliation for employees' support of the union. As detailed above, the Respondent previously warned and suspended several employees for their first and second violations of the policy, and the Respondent only enforced its policy in a strict, "zero tolerance" manner against Acevedo and Stevenson, an open union supporter and his partner, just days before the election. The Respondent's sole defense—that it has always enforced its policy in a "zero tolerance" manner—is plainly contradicted by the record. As in *Neises* and *St. John's*, the Respondent more strictly enforced its fall-protection policy against Acevedo and Stevenson because of employees' union activity.

Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) and engaged

stated above. See *CSC Holdings, LLC* and *Cablevision Systems New York City Corp.*, 365 NLRB No. 68, slip op. at 5 fn. 16 (2017).

Contrary to the suggestion of the judge, we note that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel . . . to demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015). Chairman Kaplan agrees that there is no separate and distinct "nexus" element that the General Counsel must satisfy under *Wright Line*, supra. He emphasizes, however, that *Wright Line* is inherently a causation test. Thus, identification of a causal nexus as a separate element the General Counsel must establish to sustain his burden of proof is superfluous because "[t]he ultimate inquiry" is whether there is a nexus between the employee's protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012). Chairman Kaplan reads the judge's decision to state no more than that. To the extent his colleagues suggest that the General Counsel *invariably* sustains his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of animus, Chairman Kaplan disagrees. See, e.g., *Roadway Express, Inc.*, 347 NLRB 1419, 1419 fn. 2 (2006) (finding that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004) (finding insufficient facts to show that the respondent's animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005).

[9] The Respondent's fall-protection policy, which requires employees to use safety equipment when working at heights of 6 feet or above, is stricter than OSHA's rule. Moreover, nothing in OSHA's rule requires employers to discharge employees for violating the rule, let alone for a first infraction.

in objectionable conduct by more strictly enforcing its fall-protection policy.[10]

3. Challenged ballots

Ten determinative challenged ballots are before the Board. The Respondent challenged the ballots of Acevedo, Stevenson, Smith, and Pearson on the ground that those four individuals were terminated for cause and the ballots of Wrench, Barlow, Hickey, Greenlee, Clark, and Reed on the ground that these six voluntarily quit. The judge overruled the Respondent's challenges, finding that Acevedo and Stevenson were unlawfully discharged and that the other eight employees had been laid off with a reasonable expectation of recall and therefore were eligible to vote.[11] As the party challenging the employees' eligibility to vote, the Respondent bears the burden of proof. See *Sweetner Supply Corp.*, 349 NLRB 1122, 1122 (2007). For the reasons set forth below, we sustain the Respondent's challenge to Pearson's ballot, but affirm the judge's overruling of the Respondent's challenges to the remaining nine ballots.[12]

The record contains ample evidence indicating that Smith, Wrench, Barlow, Hickey, Greenlee, Clark, and Reed were laid off and thus were eligible to vote. Significantly, all of these employees left the Respondent's Bethune-Cookman University (BCU) project in January or April when work on the project was in successive phases of winding down. Indeed, most block work was completed in January, and Foreman McNett admitted that the last brick was laid on April 8. Further, the judge fully credited Smith's and Wrench's testimony that they had been laid off, and their testimony is supported by the Respondent's re-employment of Smith (who the Respondent alleged was terminated for cause) and the Respondent's failure to contest Wrench's filing for unemployment benefits.[13] The judge also credited Union Representative Mike Bontempo's testimony that Foreman Robert Dutton told him that Reed was laid off. Bontempo's testimony is supported by the fact that the Respondent did in fact reemploy Reed. Additionally, Smith, Wrench, Barlow, Hickey, Greenlee, and Clark left with a group, which is more likely indicative of a lay off than a group of employees coincidentally quitting on the same day. The Respondent also included Smith, Barlow, Hickey, Greenlee, and Clark on its initial voter list and identified them as laid off based on its payroll records. Finally, in addition to Smith and Reed, the Respondent has since re-employed Greenlee.

We find that the Respondent failed to present sufficient reliable evidence to sustain its burden of proof regarding these seven challenged voters. The Respondent relies on Reason For Leaving (RFL) forms and personnel records to support its claim that the employees were terminated for cause or voluntarily quit. However, these documents are inconsistent with the initial voter list, which the Respondent prepared based on its payroll records. As noted above, five of the challenged voters were identified as laid off on the voter list. We find that this inconsistency demonstrates that the Respondent's personnel records are not sufficiently reliable. Moreover, the RFL forms and personnel records are contradicted by credited testimony that the challenged voters were laid off, the Respondent's reemployment of Smith, Reed, and Greenlee, and the Respondent's failure to contest Wrench's filing for unemployment benefits. As discussed above, the Respondent's actions indicate that the challenged voters did not voluntarily quit and were not terminated for cause.[14] In support of its challenges, the Respondent also relies on testimony from foremen and Human Resources (HR) personnel. However, the judge discredited the testimony of Foreman McNett regarding Barlow, Hickey, and Clark as vague. Furthermore, in crediting Smith, Wrench, and Bontempo, the judge implicitly discredited the contrary testimony of the Respondent's witnesses. Therefore, we affirm the judge's overruling of the Respondent's challenges to the ballots of Smith, Wrench, Barlow, Hickey, Greenlee, Clark, and Reed.

By contrast, we find that the Respondent met its burden of proving that Pearson was terminated for cause and therefore was ineligible to vote in the election. In support of its challenge, the Respondent presented testimony from two foremen regarding the poor quality of Pearson's work and his discharge for failing to correct faulty blocks laid by another mason, testimony from HR personnel, and Pearson's RFL Form and personnel record. Additionally, we note that Pearson left the Respondent's

[10] Nothing in the Board's Decision, Order, and Direction prevents the Respondent from enforcing its safety rules, or from more strictly enforcing its safety rules, for non-discriminatory reasons. The Respondent is only prohibited from doing so in a discriminatory manner in response to protected activity.

[11] The Respondent contends only that ten individuals were ineligible to vote because they were either discharged for cause or quit. It does not contend in the alternative that if any of the ten are found to have been laid off, they are still ineligible to vote because they worked too few days to qualify for eligibility under the *Steiny/Daniel* formula. See *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

[12] We affirm the judge's overruling of the Respondent's challenges to Acevedo's and Stevenson's ballots based on our finding that the Respondent discriminatorily discharged them.

[13] Employees who voluntarily quit their employment generally are not eligible to receive unemployment benefits.

[14] We do not rely on the judge's finding that the RFL forms are unreliable because they were not provided to employees and employees did not have an opportunity to dispute their accuracy.

Westshore Yacht Club project in February, which was not a time when work on the project was in a winding-down phase. Further, unlike many of the other challenged voters, Pearson did not leave with a group, was not included on the initial voter list, and has not since been re-employed by the Respondent. In overruling the Respondent's challenge to Pearson's ballot, the judge relied solely on Pearson's testimony that Foreman Coy Hale later told him that the Respondent would call him for future work. This conversation took place after Pearson's employment with the Respondent had ended and shortly before he moved to another state, months after the eligibility period ended. Having considered all of the evidence, we reverse the judge and sustain the Respondent's challenge to Pearson's ballot.

Accordingly, we will direct the Regional Director to open and count the ballots of Acevedo, Stevenson, Smith, Wrench, Barlow, Hickey, Greenlee, Clark, and Reed and, as appropriate, either issue a certification of representative or conduct a second election.

## AMENDED CONCLUSIONS OF LAW

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

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

3. By threatening that employees' wages will decrease if they select the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By suspending Luis Acevedo and Walter Stevenson on May 16, 2016, and discharging them on May 17, 2016, because Luis Acevedo supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By more strictly enforcing its fall-protection policy against Luis Acevedo and Walter Stevenson because of employees' union activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

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

7. The challenged votes of Luis Acevedo and Walter Stevenson, unlawfully discharged, should be counted. In addition, the challenged votes of the following laid-off employees should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, and George Reed. The challenged votes of the following employees should not be counted: Raymond Pearson, who was terminated for cause, and Robert Harvey, Robert Baker, Mark France, and Robert Pietsch, who voluntarily resigned from the Respondent during the *Steiny/Daniel* period.

8. The Respondent's conduct during the critical pre-election period, as alleged in Objections 1, 2, and 8, was objectionable and tended to interfere with the election. Objections 3 and 9 are overruled, and Objections 4 and 5 are not passed upon.

9. The Respondent's unfair labor practices and objectionable conduct warrant setting aside the election if the Union does not receive a majority of votes cast after the overruled challenged ballots are opened and counted.

## AMENDED REMEDY

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

The Respondent, having discriminatorily suspended and discharged Luis Acevedo and Walter Stevenson, 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 6 (2010).

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Acevedo and Stevenson for their 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.

Additionally, the Respondent shall be required to compensate Acevedo and Stevenson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Finally, we shall order the Respondent to remove from its files any reference to Acevedo's and Stevenson's unlawful suspensions and discharges and to notify them in writing that this has been done and that the unlawful suspensions and discharges will not be used against them in any way.

## ORDER

The National Labor Relations Board orders that the Respondent, Advanced Masonry Associates, LLC, d/b/a

Advanced Masonry Systems, Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening that employees' wages will decrease if they select the Union as their collective-bargaining representative.

(b) Discharging, suspending, or otherwise discriminating against its employees because they engage in union or other protected concerted activity or to discourage them from voting in a representation election.

(c) More strictly enforcing its fall-protection policy because of employees' union activities or support.

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

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

(a) Within 14 days from the date of this Order, offer Luis Acevedo and Walter Stevenson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

(b) Make Acevedo and Stevenson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Acevedo and Stevenson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

(e) Within 14 days after service by the Region, post at all of its active jobsites copies of the attached notice marked "Appendix" in both English and Spanish.[15] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the 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 May 1, 2016.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix" in both English and Spanish, at its own expense, to all employees who were employed by the Respondent at its Florida jobsites at the University of Tampa in Tampa, Florida Bethume-Cookman University in Daytona Beach, Westshore Yacht Club in Tampa, the Hermitage in St. Petersburg, and the Holiday Inn Express in St. Petersburg at any time since May 1, 2016, until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(g) Within 21 day after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 12 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Luis Acevedo, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, and George Reed and issue a revised tally. If the revised tally of ballots shows that the Union received a majority of the eligible votes cast, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally shows that the Union has not prevailed in the election, the election shall be set aside and a second election shall be conducted at such time as the Regional Director deems appropriate.

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

Dated, Washington, D.C. April 13, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## 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 that wages will decrease if you select Bricklayers and Allied Craftsworkers, Local 8 Southeast (the Union) as your collective-bargaining representative.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you because you engage in union or other protected concerted activity or to discourage you from voting in a representation election.

WE WILL NOT more strictly enforce our fall-protection policy because of your union activities or support.

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

WE WILL, within 14 days from the date of the Board's Order, offer Luis Acevedo and Walter Stevenson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

WE WILL make Acevedo and Stevenson whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Acevedo and Stevenson for the adverse tax consequences, if any, of receiving lump sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

ADVANCED MASONRY ASSOCIATES, LLC D/B/A ADVANCED MASONRY SYSTEMS

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

*Caroline Leonard, Esq.,* for the General Counsel.

*Gregory A. Hearing* and *Charles J. Thomas, Esqs. (Thompson, Sizemore, Gonzalez & Hearing, P.A.),* of Tampa, Florida, for the Respondent.

*Kimberly C. Walker, Esq.,* of Fairhope, Alabama, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

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

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

### FINDINGS OF FACT

#### I. JURISDICTION

The Company is engaged in business as a masonry contractor in the construction industry performing commercial construction at jobsites throughout the State of Florida where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida and from enterprises located within the State of Florida, each of which received the goods directly from points located outside the State of Florida. The Company 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 and that the Union and its predecessor entity, Bricklayers and Allied Craftworkers, Local 1, Florida, have been labor organizations within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

##### *A. The Company's Operations*

The Company's masonry projects are procured by competitive bids and are located across the State of Florida, primarily in the central and southwestern parts of the state. Richard and Ron Karp, the principles and owners, are based out of the Company's Sarasota, Florida headquarters. Ron Karp is primarily responsible for negotiating and finalizing the Company's bids and contracts for work, and has very little involvement with the Company's day-to-day operations.[2]

Marc Carney, the chief of operations, oversees the foremen on each jobsite and travels between jobsites, ensuring that all work is completed in accordance with contractual deadlines. The foremen are responsible for ensuring the quality of the work by masons and laborers, and are eligible for bonuses if they finish a project ahead of schedule.

The standard Company workday for masons is 7 a.m. to 3:30 p.m. Employees are permitted two 15-minute breaks and a 30-minute lunchbreak. During breaks, employees are permitted to access food trucks stationed in adjacent parking lots.

The size of the Company's skilled work force fluctuates depending upon the scope of the project and the Company hires and lays off masons as needed. The Company customarily offers masons work at other locations upon completion of a job, when available. Historically, the Company has requested the referral of masons from the Union.

The Company's personnel files for all employees are stored at its Sarasota headquarters. The front of each file folder is preprinted with a personnel information form, including contact information and an employment history section, which indicates date of hire, name of the supervising foreman, and dates and reasons for separation as they occur.

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

##### *B. Safety Training*

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

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

The Company's safety rules are further implemented through its policies and procedures. In essence, an employee working at 6 feet or higher on a scaffold in a setting where a fall risk exists must use appropriate protective equipment.[5] Employees are required to "wear a full body harness with a lanyard or retractor in all elevated areas not protected by guardrails," and instructs that employees must never connect two lanyards, or a retractor and a lanyard to each other. The policy also warns

[1] 29 U.S.C. §§ 151–169.

[2] Richard Karp was present throughout the hearing, but did not testify and his role is unknown.

[3] Jt. Stip. 4–6.

[4] R. Exh. 2.

[5] The Company's safety rule is stricter than the 10-foot requirement promulgated by OSHA.

that the Company has "zero tolerance" toward, and will discipline an employee who, violates the Company's fall protection rules after receiving the applicable safety training. [6]

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

### *C. Bethune-Cookman University*

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

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

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

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

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

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

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

[7] R. Exh. 5–6.

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

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

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

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

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

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

who is currently on another job, to return.[14]

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

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

George Reed, a known union member, has worked for the Company as a mason on an off over a period of years. He was referred to work on the Bethune job by Bontempo and worked 82 days between December 2015 and April 15, 2016, when he was laid off. Dutton subsequently sought to recall Reed but, by then, he had been referred to another job by Bontempo. Reed did, however, return to the Company's employ on August 22, 2016.[17]

### *D. Westshore Yacht Club*

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

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

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

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

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

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

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

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

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

[18] GC Exh. 20.

[19] GC Exh. 24.

[20] Stevenson and Acevedo provided similar estimates as to the duration of the fall protection orientation. (R. Exh.7; GC Exh. 2(a)-(b); (Tr. 414–17, 580, 583.)

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

[22] GC Exh. 2(c).

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

*E. University of Tampa*

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

Masons, working in pairs, initially worked on the outside of each building for about 2 weeks, laying a brick veneer over the new 40 to 50 foot high wall. Employees were not required to wear harnesses or otherwise utilize personal fall protection. They utilized scaffolding as they worked their way up the wall, and had metal railings on the other three faces. The work was followed by work on the building's interior columns, which were 12 to 14 feet tall. No safety orientation was conducted for the employees at the UT jobsite.

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

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

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

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

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

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

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

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

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

On May 17, 2016, the Company filed and served an amend-

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

[24] JS at 7–9.

[25] Acevedo's testimony regarding protected concerted activity was not disputed. (Tr. 392–412.)

[26] GC Exh. 14.

[27] RD Exh.1(c) at 1–2.

[28] It is undisputed that employees typically work an 8-hour workday.

ed *Excelsior* list. On at least three other occasions by electronic communication with Region 12, the Company attempted to amend the *Excelsior* list, including on May 20, 2016, to add an eligible voter; [29] on May 23 to exclude six eligible voters;[30] and finally on May 24, 2016 to exclude six eligible voters.[31]

### *G. The Preelection Period*

#### 1. The union campaign

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

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

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

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

#### 2. Antiunion flyers distributed

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

#### 3. Threats of reduced wages

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

At lunchtime that day, Feliz followed up Richard Karp's remarks with his own meeting with eight Spanish-speaking masons, including Acevedo. Feliz explained why the Company opposed unionization and urged the employees to "vote for no, no union, because the Union is taking our money." He added that a union victory would result in hourly wages dropping from $22 to about $18 per hour. Acevedo challenged that assertion, resulting in a silent glare from Feliz. Another mason asked whether the Company would provide employees with health insurance. Feliz responded that he did not have that information, but that, under the Affordable Care Act, he believed that employers had to offer insurance to all employees. Feliz concluded by imploring the employees not to vote for the Union.[36]

During the May 16 pre-work safety meeting with masons on the UT job, McNett, who regularly disparaged the Union, mentioned the Union campaign that was underway. He shared his opinion that it probably "won't be good for wages" if the Union won.[37]

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[29] CP Exh. 4.

[30] CP Exh. 5.

[31] CP Exh. 6.

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

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

[34] GC Exhs.7(a)-(m).

[35] This finding is based on Feliz' credible and undisputed testimony. (Tr. 103–106, 111–112.)

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

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

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

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

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

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

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

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

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

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

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

[39] Except for Acevedo's selective memory in failing to recall whether fall protection was discussed in that meeting, there is no dispute that McNett and Morales issued that safety directive on May 16. (Tr. 137–141, 153, 158–160, 396–397, 418–422, 620–623, 670–671, 700, 762–765; R. Exh. 14.)

[40] I credit testimony by McNett and Morales that Acevedo and Stevenson were tied off incorrectly. However, McNett's generalized testimony failed to credibly refute Acevedo's contention that other masons were tied up in different ways, with some tied to the scaffold and others to the cross-bracers. (Tr. 139–140, 158–160, 396–397, 422–425, 475–478, 624–630, 670–671, 764–768, 675–676.)

[41] It is undisputed that Feliz and Ramirez quickly established that Acevedo and Stevenson received fall protection training on the Westshore job. (Tr. 89–90, 111, 534–535, 567,630–631, 700–701.)

[42] Neither Acevedo nor Stevenson disputed this encounter with Ramirez. (Tr. 41–42, 76, 90–91, 111, 535–540, 567–570, 631–632, 701; GC Exh. 5–6.)

[43] GC Exh. 5–6.

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

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

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

Acevedo arrived at work the following day, May 17 and was informed by McNett that he was being let go. In response to Acevedo's request for an explanation, McNett said he was being fired for violating safety regulations. Once again, Acevedo responded that it is an OSHA violation to tie off to scaffolding. McNett responded by calling him a liar and telling him that he was fired. Acevedo asked McNett if he was firing him because he is a union guy. McNett responded "this is America; fight for your rights."[47]

Acevedo then returned to the parking lot, called Stevenson and told him that both of them were fired. Acevedo then called Feliz, who replied "that's the way it is, there's nothing that we can do. I'm sorry, that's what it is." Stevenson still proceeded to go to the jobsite and spoke with McNett, who told him that the decision "came from above, it's not me."[48]

Both employees called Feliz the next day. Acevedo asked that his termination be changed to a layoff, so that he might receive unemployment. Feliz declined, but Acevedo filed for unemployment compensation benefits anyway. The Company opposed Acevedo's claim with the Connecticut Department of Labor, but it was granted. Stevenson also called Feliz. Contrite, he told Feliz that "we were wrong," adding that he hoped for another chance on a future job.[49]

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

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

Carollo, a laborer on the Bethune job, was discharged after being observed working without a safety harness and hurling an expletive at McNett when the latter spoke to him about the violation. The incident was Carollo's third fall protection violation. Previously, he received a warning and 2-day suspension on June 24, 2015, after being observed working at an elevated level on a scaffold without fall protection equipment in place. On August 10, 2015, Carollo was again warned and suspended for 3 days after he was observed by the general contractor's representative walking on scaffolding without being tied by a harness.[50]

Golphin, a scaffold builder/laborer on the Bethune job, was discharged on February 10, 2016, because he was talking on his cellular phone while working and was not tied off at an elevation of 38 or 40 feet.[51]

Haser was observed by the general contractor's representative to be working above 6 feet on the Bethune jobsite while not tied off. It was his second offense. He was sent home and was required to complete the general contractor's safety orientation before being permitted to return to the job.[52]

Bryant, a mason who attended Westshore training along with Acevedo and Stevenson was observed by Ramirez not wearing

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

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

[46] GC Exh. 9–10.

[47] I base this finding on the credible testimony of Acevedo. McNett may have been a former union member, but as a supervisor he expressed antiunion sentiment here and on several other occasions. (Tr. 428–431, 477–479, 634–635).

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

[49] R. Exh. 20–21; Tr. 94, 478.

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

[51] R. Exh. 33.

[52] GC Exh. 3.

a harness or otherwise connected to his anchor point as he lay block 18 feet off the ground. Ramirez sent Bryant home, but he returned to work 2 days later. Bryant was subsequently terminated for insubordination a little over a month later.[53]

Leonardo was discharged from the Midrise project after failing to use fall protection at an elevation of about 10 feet and improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder.[54]

### *K. The Representation Election*

The election was conducted by mail, with approximately 110 eligible voters. The Board mailed the ballots on May 25, 2016, and tallied them on June 9, 2016. The ballot tally showed 16 votes cast for the Union, 16 votes cast against the Union, 2 votes voided, and 22 challenged ballots. The challenged ballots were sufficient in number to affect the election results.

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

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

## Legal Analysis

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

### *A. Interrogation*

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

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

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

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

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

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

### *B. Threats*

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

Feliz, an admitted statutory supervisor, told a group of seven or eight Spanish-speaking masons that they should vote against the Union, because the Union was taking their money. Feliz

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

[54] R. Exh. 34.

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

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

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

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

### *C. Restrictions on Solicitation*

Objection 9 by the Union alleged that the Company discriminatorily applied a solicitation policy to preclude Bontempo and other union officials from communicating at the jobsites with masons. The Company denies the allegation, insisting that union representatives were permitted to solicit employees at its jobsites prior to and after work time, and during lunch and other break periods.

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

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

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

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

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. To determine whether adverse employment action was effected for prohibited reasons, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, *Inc.*, 360 NLRB 319, 325 (2014), enfd. 833 F.3d 824 (7th Cir. 2016).[7] Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. If the General Counsel makes his initial showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. Id.

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

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

The Company's enforcement of the fall protection policy against Acevedo and Stevenson, however, produces a different result. They initially experienced adverse action by being suspended. Given the timing just before the election, the action became even more suspicious when Feliz took the unusual step

of discussing the incident with the Karps. As a result, Acevedo and Stevenson were discharged 23 days prior to the election for violating the fall protection policy. The Company knew that Acevedo was an active Union supporter and that he stood up to Feliz when the latter threatened lower wages. Stevenson was not an active Union supporter. However, I agree with the General Counsel's assertion that Stevenson, Acevedo's partner on May 16, was collateral damage, i.e., working alongside the wrong person at the wrong time.

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

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

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

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

The evidence of disparate treatment, combined with the timing of the suspensions and discharges shortly after Acevedo challenged Feliz about the merits of union representation during the peak of the pre-election period, provides a causal connection between the Company's antiunion animus and the decision to selectively enforce its fall protection policy and discharge Acevedo and Stevenson. Under the circumstances, it is evident that Acevedo and his partner at the time, Stevenson, would not have been suspended and then discharged in the absence of Acevedo's protected conduct.

Accordingly, the suspension and discharges of Acevedo 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 Acevedo and, by association, Stevenson, in retaliation for Acevedo's 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.

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

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

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

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

## III. THE CHALLENGED BALLOTS

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

It is well established that the burden of proving that an employee is ineligible to vote rests with the party asserting the challenge. *Sweetener Supply Corp.,* 349 NLRB 1122 (2007). The Company's ability to meet such a challenge with respect to Acevedo and Stevenson is precluded by the law of the case, i.e., they were unlawfully terminated after the Company discriminatorily enforced its fall protection policy against them because Acevedo engaged in protected conduct during the pre-election period. Accordingly, Acevedo and Stevenson were eligible to vote and their votes should be counted.

With respect to the following employees, there was insufficient credible evidence to satisfy the Company's burden with respect to their challenged ballots, thus, they were laid off by the Company with a reasonable expectation of rehire and their votes should be counted: John Smith, David Wrench, Jacob

Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson. The RFL forms produced by the Company purporting to show that each voluntarily quit were simply not reliable. In addition to other factors previously mentioned, these documents were not provided to the employees and they did not have an opportunity to dispute the accuracy of the representations therein. Under the circumstances, I gave these documents little weight in determining whether an employee quit or was laid off. See *NLRB v. Cal-Maine Farm, Inc.,* 998 F. 2d 1336, 1343(5th Cir. 1993) (self-serving business records received in evidence but trier-of-fact gave disputed contents little weight).

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

### IV. THE EXCELSIOR NAMES

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

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

Although the Company provided a voter list within the required two business days of the Stipulated Election Agreement, the list undisputedly did not include seven employees—Raymond Pearson, Robert Baker, Mark France, Robert Harvey, Robert Pietsch, George Reed, and David Wrench—who worked a sufficient number of hours for the Company in order to satisfy the *Steiny/Daniel* eligibility formula agreed to by the parties. However, France, Baker, Harvey, and Pietsch voluntarily resigned from Company projects prior to the election and, thus, were rendered ineligible to vote. The remaining three employees—Pearson, Reed, and Wrench were laid off and clearly satisfy the *Steiny/Daniel* eligibility formula. There was undisputed testimony that employees typically work an eight hour work day, and Company payroll records corroborate this testimony as they clearly identify hours as regular or overtime for each employee in question.

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

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

In situations where the results of the vote are a tie and there are fourteen challenges, three of whom were omitted from the voter eligibility list, the Company's conduct certainly has an effect on the results of the election. See *Woodman's Food Markets, Inc.,* 332 NLRB 503 (2000) (Board gives substantial weight to the number of eligible voters omitted from the eligibility list when they are sufficient in number to affect the results of the election). *Special Citizens Futures Unlimited, Inc.,* 331 NLRB 160 (2000); *Thrifty Auto Parts, Inc.,* 295 NLRB I1 18 (1989); *Gamble Robinson Co.,* 180 NLRB 532 (1970). By its actions, the Company failed to substantially comply with the Board's *Excelsior* requirements, the election should be overturned and a new one scheduled. *Shore Health Care Ctr.,* 323 NLRB 172, 323 NLRB 990 (1997).

### CONCLUSIONS OF LAW

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

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

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

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

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

6. The challenged votes of Luis Acevedo and Walter Stevenson, unlawfully discharged, should be counted. In addition, the challenged votes of the following laid-off employees should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed, and Raymond Pearson. Robert Harvey, Robert Baker, Mark France, and Robert Pietsch voluntarily resigned from the Company during the *Steiny-Daniel* period and their votes should not be counted.

7. The Company's conduct during the critical pre-election period, as alleged at Objections 1, 4, 5, and 8, was objectionable and tended to interfere with the election. Objections 2, 3, and 9 are overruled.

### REMEDY

Having found that the 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.

On these findings of fact, conclusions of law and the record as a whole, I shall recommend that 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 be counted; (2) that the challenges to votes cast by Robert Harvey, Robert Baker, Mark France, and Robert Pietsch be sustained; and that Objections 2, 4, 5, and 8 be sustained, while Objections 1, 3, and 9 should be overruled.

Based on the unfair labor practices, as well as the closeness of the results of the election, I shall recommend that a new election be directed if the Union does not prevail after the votes of the aforementioned 10 former employees are counted. See *Kingspan Benchmark*, 359 NLRB 248 (2012) (election set aside where the election results were close and the employer granted an employee a wage increase, implemented a shift differential and interrogated an employee).

Based on the foregoing, I issue the following recommended[55]

ORDER AND RECOMMENDATIONS

The Respondent, Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems, of Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening or implying that employees' wages will go down if they select the Union as their collective bargaining representative.

(b) Discharging or otherwise discriminating against its employees because they engaged in union or other protected concerted activity or to discourage them from voting in a representation election.

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

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

(a) The Respondent, having discriminatorily suspended and discharged Luis Acevedo and Walter Stevenson, must offer them full reinstatement as masons on the next available project and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

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

(c) The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

(d) Within 14 days after service by the Region, post copies of the attached notice marked Appendix[56] in both English and Spanish at its all of its active job sites and mail said notices, at its own expense, to all employees of the attached notice, at its own expense, to all bricklayers and masons employed who were employed by the Respondent at its Florida jobsites at the University of Tampa in Tampa, Florida Bethune-Cookman University in Daytona Beach, Westshore Yacht Club in Tampa, the Hermitage in St. Petersburg, and the Holiday Inn Express in St. Petersburg at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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

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

IT IS RECOMMENDED that (1) the challenged votes during the June 9, 2016 labor representation election of Luis Acevedo, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed, and Raymond Pearson be counted; (2) the challenges to votes cast by Robert Harvey, Robert Baker, Mark France, and Robert Pietsch be sustained; (3) Objections 1, 4, 5, and 8 be sustained; and (4) Objections 2, 3, and 9 be overruled.[57]

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[55] 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.

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

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

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you s because you engage in union or other protected concerted activity in order to discourage you from voting in a representation election.

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

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

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

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

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

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

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

ADVANCED MASONRY ASSOC. LLC D/B/A ADVANCED MASONRY SYSTEMS

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