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**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Matthew Dougherty, Counsel for the General Counsel in the above case, submits this post-hearing brief to the Honorable Robert Ringler, Administrative Law Judge.

STATEMENT OF THE CASE

A. Introduction

Upon hire, discriminatee Eric Bracewell (Bracewell) was instructed not to discuss his pay at work. A few months later, discriminatees Bracewell and Tony McGinty (McGinty) discussed how much they were earning. Based on their conversations, other employees discovered how much the discriminatees were earning and were not happy because the discriminatees were earning more than what they earned. Believing they should be earning more than the discriminatees, several employees complained to management about their pay. Within hours of the other employees complaining that they should be earning more than the discriminatees, Respondent discharged the two discriminatees because they discussed their wages at work.

B. Proceedings Before the Hearing

On December 12, 2016, McGinty filed charge 15-CA-189655 with Region 15 of the National Labor Relations Board (Board), alleging Strongsteel of Alabama, LLC (Respondent) engaged in unfair labor practices in violation of Sections 8(a)(1) of the National Labor Relations Act (the Act). GC-2(a)(1)(a).¹ On January 19, 2017, McGinty amended the charge, alleging additional violations of Section 8(a)(1) of the Act by Respondent. (GC-2(a)(1)(c)).

¹References to the Exhibits of the General Counsel and Respondent Exhibits will be designated as "GC- #" and "R- #," respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr. at." An Arabic numeral(s) after "Tr. at" is a reference to a specific page of the transcript, and Arabic numerals following page citations reference specific lines of the page cited.

On January 19, 2017, Bracewell filed charge 15-CA-191573 with the Board alleging Respondent violated Section 8(a)(1) of the Act. GC-2(a)(1)(e).

On March 3, 2017, McGinty filed charge 15-CA-194178 with the Board alleging Respondent violated Section 8(a)(1) of the Act. GC-2(a)(1)(g).

On March 30, 2017, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued (CNOH) with a hearing scheduled for July 24, 2017. GC-2(a)(1)(i). On April 12, 2017, Respondent filed Respondent's Answer (Answer). GC-2(a)(1)(k).

At the start of the hearing on July 24, 2017, Administrative Law Judge Robert Ringler, over the objections of the General Counsel, approved a non-board settlement between Respondent and discriminatees Bracewell and McGinty on the condition that if Respondent failed to make the scheduled backpay installment payments that the matter would be reset for trial. GC-2(b).

On January 12, 2018, Administrative Law Judge Robert Ringler issued an Order directing Respondent to Show Cause by January 19, 2018, as to why the non-board settlement should not be set aside and the matter set for trial based on Respondent's failure to make the scheduled backpay installment payments. GC-2(d).

Because Respondent failed to respond to the Administrative Law Judge Robert Ringler's January 12, 2018 Order, the matter was set for trial on March 27, 2018. GC-2(f).

Administrative Law Judge Robert Ringler presided over the hearing on March 27, 2018, in Daleville, Alabama.

C. Overview of the Facts

1. Background of Respondent's Facility

Respondent, a limited liability company, operated a steel manufacturing facility in Andalusia, Alabama (Respondent's facility). GC-2(a)(1)(k). Anthony Attalla (Attalla) is Respondent's owner. *Id.*

2. Respondent Maintained a Work Rule in its Handbook Titled "Employee Conduct."

Respondent maintained an employee handbook, and within that handbook was a section titled Employee Conduct, which stated the following:

Employee Conduct

All employees are expected to conduct themselves in a respectful manner at all times. Employees shall not conduct themselves in a manner that causes a distraction or a decrease in work production on the shop floor during working hours. If any employee cannot conduct themselves appropriately, that employee may be subject to termination and removed from the property. GC-5.²

3. Upon Hire, Respondent Warned Bracewell not to Discuss Pay

On July 18, 2016, Bracewell started working for Respondent at the rate of \$11 per hour. GC-4. Bracewell testified that when Supervisor Jonathan Brooks (Supervisor Brooks) offered him the job, Supervisor Brooks specifically told Bracewell not to discuss his pay with anyone. Tr. at 76: 25-25; 77:1-8.³ Although Respondent admits in its Answer that Brooks was a supervisor during the relevant time period, Respondent did not call Supervisor Brooks as a witness to refute Bracewell's testimony.

4. The Discriminatees Discuss their Wage Rates at Work and are Discharged

² See Paragraph 7 of the CNOH. Although the CNOH asserts that since September 3, 2016, Respondent has maintained the noted work rule, the evidence clearly demonstrates that because the rule was used by Respondent to discharge the discriminatees, that the rule was in effect at Respondent's facility on August 4, 2016.

³ See Paragraph 6(a) of the CNOH.

In June 2016, Respondent employed McGinty as a laborer at the rate of \$10 or \$11 per hour. Tr. at 77: 9-10.

On August 3, 2016, McGinty asked Bracewell about his wages. Tr. at 77:20-25; 78:1-12; 99: 5-20. Because Bracewell had been instructed by Supervisor Brooks not to discuss his pay, McGinty had to ask Bracewell three or four times before Bracewell would answer him. Tr. at 78: 7-15. According to Bracewell, “[McGinty] had asked me, I think it was about the third or fourth time that day, you know, what I made, and I finally told him how much I made.” Tr. at 78: 7-9.

Later that same day, McGinty told employee Donnell Ellison (Ellison) how much McGinty earned per hour. Tr. at 36: 11-13; 50:6-25. Ellison then informed other employees, including Eric Moody (Moody), as to how much McGinty earned per hour. Tr. at 36:13-23; 52: 10-16. Upon learning that McGinty, a general laborer, earned more than he did, Moody decided to discuss the pay discrepancy with owner Attalla. Tr. at 36: 24-25; 37: 1-11; 53: 3-8.

On August 4, 2016, Moody told Attalla that there was no way McGinty’s job should pay more than Moody’s job. Attalla responded that he would “handle the situation” and “take care of it.” Tr. at 37: 5-10. Although Attalla testified at the hearing in this matter, he did not deny telling Moody that he would “handle the situation” and “take care of it.” Later that same day, Moody testified that Attalla told him that he (Attalla) “had given me a raise, which was effective immediately. And that he would handle the situation with Mr. McGinty.” (Tr. at 38: 13-16). Attalla also told Moody that employees should not discuss their salaries. Tr. at 38: 22-25.⁴

Despite testifying at the hearing, Attalla did not specifically deny telling Moody that he would handle the situation with McGinty, that employees should not discuss salaries, or that he

⁴ See Paragraph 6(b) of the CNOH.

had given Moody a raise on August 4, 2016. In fact, in Attalla's⁵ cross-examination of Moody, Attalla admits and Moody confirmed that Moody was given a raise on August 4, 2016. Tr. at 42: 6-10.

After Moody met with Attalla, supervisors Brooks and Brian Hall (Supervisor Hall) called Bracewell and McGinty into a meeting. Tr. at 78:18-25; 79: 1-11; 100: 3-16. At this meeting, Supervisors Brooks and Hall asked McGinty and Bracewell if they had been discussing their pay. Tr. at 100: 17-25.⁶ Bracewell and McGinty admitted they had been discussing their pay. Tr. at 81: 4-6; 100: 25; 101: 1-2. Hall informed Bracewell and McGinty that they "had created a shit storm by discussing pay." Tr. at 80: 19-22. Supervisors Brooks and Hall then informed discriminatees Bracewell and McGinty that Attalla would later make a decision about whether or not to terminate them for discussing their pay. Tr. at 81: 11-22⁷. Although Respondent admitted in its Answer that Supervisors Brooks and Hall were supervisors during the relevant time period, Respondent did not call them as witnesses to refute any of the testimony noted above.

Shortly after their first meeting with supervisors Hall and Brooks on August 4, 2016, discriminatees Bracewell and McGinty met with supervisors Hall and Brooks for a second time that same day. At this second meeting, supervisors Hall and Brooks told McGinty and Bracewell they were terminated. Tr. at 82: 11-21; 101: 24-25. Discriminatees Bracewell and McGinty were told that they were fired for discussing their pay. Tr. at 83: 7-12; 101: 5-8.⁸ Discriminatees Bracewell and McGinty were also told that it was Attalla's decision to fire them. Tr. at 83: 19-

⁵ At the hearing, Attalla conducted all the direct and cross-examinations on behalf of Respondent.

⁶ See Paragraphs 8(a) and 8(b) of the CNOH.

⁷ See Paragraph 8(c) of the CNOH.

⁸ See Paragraphs 8(c), 8(d), and 9(b) of the CNOH.

21; 102: 24-25; 103: 1-4. Discriminatees Bracewell and McGinty were given termination slips that stated their terminations were due to “violation of employee conduct policy.” Tr. at 83:24-25; 84:1-2; 103:13-16; GC-3; GC-4.⁹ Supervisors Brooks and Hall informed discriminatees Bracewell and McGinty that they violated the employee conduct policy by discussing their pay. Tr. at 85: 13-16; 106: 4-7.¹⁰ Discriminatees Bracewell and McGinty were not given any other reason for their terminations. Tr. at 85: 19-22; 94: 21-24; 106: 11-24. Respondent did not call Supervisor Hall or Brooks as witnesses at the trial to refute any of the above-noted testimony.

According to Respondent’s bookkeeper, Jennifer Armstrong (Bookkeeper Armstrong), Supervisors Hall and Brooks told her that discriminatees Bracewell and McGinty were discharged because they caused a disruption on the work floor when they discussed their pay at work. Tr. at 121:20-25; 122: 1-10. Similarly, Respondent’s Vice President of Sales and Marketing, William McMillion (Vice President McMillion) testified that Supervisors Hall and Brooks told him the discriminatees talked about their pay, which led to other employees getting together to talk about their pay, and this was disruptive. Tr. at 141; 1-7; 20-25.¹¹ Respondent did not call Supervisor Hall or Brooks as witnesses at the trial to refute Armstrong and McMillion’s testimonies.

The same day discriminatees Bracewell and McGinty were terminated, employees Ellison, Moody, and two other employees had a meeting with Attalla and Supervisors Brooks and Hall to discuss the pay discrepancy among employees. Tr. at 53: 11-25; 54: 11-25. Ellison testified that during this meeting, Attalla told the employees that “we’ve gotten rid of all the troublemakers, which kind of worried everybody, because there were no troublemakers.” Tr. at

⁹ See Paragraph 7 of the CNOH.

¹⁰ See Paragraph 8(e) of the CNOH.

¹¹ See Paragraph 8(e) of the CNOH.

53: 19-25; 56: 3-5. Upon returning to the work floor after the meeting, Ellison learned that discriminatees Bracewell and McGinty had been discharged.

Prior to their discharges on August 4, 2016, discriminatees Bracewell and McGinty had not received any written or verbal discipline, counseling, warning, or corrective action of any kind from Respondent. Tr. at 85: 86: 1-7; 107:5-17. Similarly, Bracewell and McGinty's personnel files contained no evidence of any problems with their work performance or conduct at work. GC-3; GC-4.

Although Attalla testified that McGinty was terminated for theft of company property, constantly talking to himself, and "other strange things happening around the factory," Respondent did not produce any documentary evidence of theft of company property or any witness who testified to seeing McGinty unlawfully taking company property. Tr. at 150: 6-13; 166: 18-19. Furthermore, Moody and Ellison testified that Bracewell and McGinty were good employees, they did not have any problems with Bracewell or McGinty, the discriminatees did not bully anyone at work, and they did not taunt, goad, or brag about their pay. Tr. at 39: 1-10; 51: 22-25; 60: 22-25; 61:1-4, 21-23.

5. Respondent Refuses to Rehire Discriminatees because of their Concerted Activities

Although the discriminatees were told at the time of their terminations they could reapply after thirty days, Respondent has refused to rehire them. McGinty attempted to reapply on at least three separate occasions. Tr. at 107: 18-24; 109: 16-25; 109: 1-18. The first time he tried to reapply, sometime around September of 2016, McGinty asked if he could have his job back, and Supervisor Hall told McGinty that Respondent was not hiring. Tr. at 107: 22-25; 108: 1-15. The second time McGinty attempted to reapply, he spoke to Glen Attalla, the owner's son. McGinty

told Glen Attalla that McGinty would like his job back and that he never meant to cause any trouble. Tr. at 109:1-2. In response to McGinty's efforts to be rehired, Glen Attalla stated he would see what he could do. Tr. at 3-5. However, Respondent never responded back to McGinty. Tr. at 108: 16-25; 109: 1-5. The third time McGinty contacted Respondent, he spoke with Bookkeeper Armstrong, and asked to speak to Glen Attalla and to tell Glenn Attalla McGinty called. Tr. at 109: 6-12. Bookkeeper Armstrong told McGinty that Glen Attalla was not there, but she would tell Glen Attalla about the call. Tr. at 109:6-12. Again, Respondent did not call McGinty back. Respondent did not call Supervisor Hall or Glenn Attalla as witnesses at the trial to refute McGinty's testimony.

On September 3, 2016, Bracewell called Supervisor Brooks and asked Supervisor Brooks if he could reapply. Supervisor Brooks responded that "they weren't hiring right now." Tr. at 86: 8-18. Respondent did not call Supervisor Brooks as a witness at the trial to refute Bracewell's testimony.

Although discriminatees Bracewell and McGinty were told Respondent was not hiring, Respondent hired employees during this same time period. Employee Aaron Parker was fired and then rehired by Respondent around September or October of 2016. Tr. at 162: 15-25. Employee Daniel Long was fired and then subsequently rehired sometime in the early fall of 2016. Tr. at 163: 1-13. Both employees were hired during the same time period when Respondent informed McGinty and Bracewell that it was not hiring.

Despite the attempts by discriminatees Bracewell and McGinty to return to work for Respondent, Respondent never offered them a job. Tr. at 83: 21-23.¹²

ARGUMENT

¹² See Paragraph 9(c) of the CNOH.

I. Paragraphs 6(a), 6(b), 8 (a), 8(b), 8(c), 8(d), and 8(e) of the CNOH

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section (a) (1) of the Act. *First Transit, Inc.*, 360 NLRB 619, 626-627 (2014); *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 281 (2003); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 fn. 14 (2004); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (dissatisfaction with wages and benefits is the “grist” and “sinew” for concerted action); *Mobile Exploration & Producing U.S., Inc.*, 323 NLRB 1064, 1068 (1997), *enfd.* 156 F.3d 182 (5th Cir. 1998).

a. Paragraphs 6(a), 6(b), and 8(e) of the CNOH

Paragraph 6(a) alleges Respondent, through Supervisor Brooks, threatened employees by telling them they were prohibited from discussing their wage rates. The undisputed evidence is that when Supervisor Brooks offered Bracewell a job in July 2016, Supervisor Brooks specifically told Bracewell not to discuss his pay with anyone. Although the rule was not in writing, supervisor Brooks’ verbal statement to Bracewell violated Section 8(a)(1) of the Act. *See Flamingo Las Vegas Operation Co.*, 360 NLRB No. 41 (2014); *Lucky Cab Co.*, 360 NLRB No. 43 fn. 20 (2014) (an unlawful directive or instruction made to only a limited number of employees is an unlawful prohibition or threat). As a result, Supervisor Brooks violated the Act as alleged in Paragraph 6(a) when he told Bracewell not to discuss his pay with anyone.

Paragraph 6(b) alleges Respondent, through owner Attalla, threatened employees by telling them they were prohibited from discussing their wage rates. It is undisputed that employee Moody met with owner Attalla to discuss the discrepancy in wages. During this

meeting Attalla told Moody that he would “handle the situation” and “take care of it.” Tr. at 37: 5-10. That same day, discriminatees Bracewell and McGinty were discharged. It is also undisputed that Attalla gave Moody a pay raise that same day. Although Attalla denies prohibiting employees from talking about their wages, Moody credibly testified that Attalla told him that employees should not discuss their salaries. Tr. at 38: 22-25. As in the case of Supervisor Brooks’ statement to Bracewell, Attalla’s directive to Moody not to discuss his salary is also violative of Section 8(a)(1) of the Act. *First Transit, Inc.*, 360 NLRB 619, 626 (2014).

Paragraph 8(e) alleges Respondent, through Supervisors Hall and Brooks, orally promulgated and since then has maintained a rule prohibiting employees from discussing their wage rates. It is undisputed that on August 4, 2016, Supervisors Hall and Brooks told discriminatees Bracewell and McGinty that they were discharged for discussing their wages. It is also undisputed that after telling discriminatees Bracewell and McGinty they were discharged for talking about their wages, Supervisors Hall and Brooks told Bookkeeper Armstrong and Vice President McMillion that discriminatees Bracewell and McGinty were discharged because they discussed their wages. Through these statements to individual employees, Respondent continued to promulgate and maintain its unlawful rule prohibiting employees from discussing their wages in violation of Section 8(a)(1) of the Act. *Flamingo Las Vegas Operation Co.*, 360 NLRB No. 41 (2014); *Lucky Cab Co.*, 360 NLRB No. 43 fn. 20 (2014).

b. Paragraphs 8(a) and 8(b) of the CNOH: Respondent Interrogated the Discriminatees about their Concerted Activities

Paragraph 8(a) alleges, that on August 4, 2016, Respondent, via Supervisors Hall and Brooks, interrogated employees about their protected concerted activities. Moreover, Paragraph 8(b) alleges that on August 4, 2016, Respondent, via Supervisors Hall and Brooks, interrogated

employees about their discussions of wage rates. The Board uses a totality of the circumstances test to determine whether questioning employees constitutes unlawful interrogation. *Emery Worldwide*, 309 NLRB 185, 186 (1992) (citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom. Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)).

The undisputed evidence is that prior to August 4, 2016, Supervisor Brooks warned discriminatee Bracewell not to talk about his pay with anyone. On August 3, 2016, discriminatees Bracewell and McGinty discussed their pay at work. Thereafter, McGinty told employee Ellison how much he earned. In turn, Ellison told employee Moody. On August 4, 2016, Moody then complained to owner Attalla that McGinty should not be earning more than him. Immediately after Moody's complaint to Attalla, Supervisors Brooks and Hall asked discriminatees McGinty and Bracewell if they had been discussing their pay. Tr. at 100: 17-25. After the discriminatees admitted to talking about their wages, the discriminatees were discharged. Based on the undisputed facts of this case, Respondent's interrogation of the discriminatees violated the Act as alleged in Paragraphs 8(a) and 8(b) of the CNOH. *Unique Personnel Consultants*, 364 NLRB No. 112 (2016); *Westwood Health Care Center*, 330 NLRB at 935. *Cumberland Farms, Inc.*, 307 NLRB at 1479; *Rossmore House*, 269 NLRB at 1178; *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 458 (2010) (citing *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002)); *Stoody Co.*, 320 NLRB 18 (1995); *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964).

c. Paragraphs 8(c) and 8(d) of the CNOH: Respondent Threatened Employees with Termination for Protected Activity

Paragraph 8(c) alleges that on August 4, 2016, Respondent, via Supervisors Hall and Brooks, threatened employees by telling them they were being discharged because they

engaged in protected concerted activities. Under current Board law, it is unlawful for an employer to inform employees they are being discharged because of their protected concerted activities. See *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014), *Extreme Building Services Corp.*, 349 NLRB 914, 914 fn. 3, 929 (2007) (employer violated Sec. 8(a)(1) by telling an employee he was discharged because of his union membership); *Watts Electric Corp.*, 323 NLRB 734, 735 (1997) (employee unlawfully informed that he had been discharged for distributing union flyers), “*revd. in part, vacated in part mem. 166 F.3d 351 (11th Cir. 1998)*).

Here, it is undisputed that at the first meeting on August 4, 2016, Supervisor Hall told Bracewell and McGinty they “had created a shit storm by discussing pay.” Tr. at 80: 19-22. Immediately thereafter, Supervisor Hall told them that owner Attalla would later make a decision about whether or not to terminate them for discussing their pay. Tr. at 81: 11-22. At the second meeting on August 4, 2016, discriminatees Bracewell and McGinty were told they were being fired for discussing their pay. Tr. at 83: 7-12; 101: 5-8.

Based on the undisputed facts, the evidence clearly demonstrates Respondent violated the Act as alleged in Paragraph 8(c) of the CNOH.

Paragraph 8(d) alleges that on August 4, 2016, Respondent, via supervisors Hall and Brooks, threatened employees by telling them they were being discharged because they violated Respondent’s rule prohibiting its employees from discussing their wages. The undisputed evidence is that after discriminatees Bracewell and McGinty were told they were terminated the discriminatees were given termination slips that stated their terminations were due to violation of employee conduct policy. GC-3; GC-4. The supervisors informed the

discriminatees that they violated the employee conduct policy by discussing their pay. Tr. at 85: 13-16; 106: 4-7. Based on the undisputed facts, the evidence clearly demonstrates Respondent violated the Act as alleged in Paragraph 8(d) of the CNOH. *Automatic Screw Products Co.*, 306 NLRB 1072 (1992) (respondent violated 8(a)(1) by promulgating and maintaining rule prohibiting employee from discussing their salaries and also by disciplining an employee for violating that rule).

II. Paragraph 7 of the CNOH: Respondent Maintained an Unlawful Work Rule

Section 7 of the Act provides that employees have the right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”

a. Respondent Maintained an Unlawful Rule in its Employee Handbook

Under *Boeing Co.*, 365 NLRB No. 154 (2017), the Board will find a rule unlawful if it explicitly restricts the NLRA-protected activity of employees. If the rule is facially neutral but has the potential to interfere with NLRA rights, “the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.* at 4. If the employer’s justifications for the rule outweigh the possible interference with employee rights, the Board will consider the rule to be lawful. However, if the potential interference with employees’ rights outweighs the employer’s justifications for the rule, the Board will deem the rule unlawful. *Id.*

Here, it is undisputed that Respondent's employee handbook contained the following Employee Conduct rule. Tr. at 165; 7-15),

“All employees are expected to conduct themselves in a respectful manner at all times. Employees shall not conduct themselves in a manner that **causes a distraction or a decrease in work production on the shop floor during working hours.**¹³ If any employee cannot conduct themselves appropriately, that employee may be subject to termination and removed from the property.” GC-5.

The rule's broad prohibition against employee conduct that “causes a distraction or a decrease in work production on the shop floor during working hours” is overly broad, ambiguous, generic, and fails to identify and define permissible conduct. *Boeing Co.*, 365 NLRB No. 154 (2017). As noted in *Hawaiian Telcom, Inc.* 2012 WL 3865119, such non-specific language related to causing disruptions is unlawful. Further, rules prohibiting employees from “causing, creating, or participating in a disruption of any kind during working hours on Company property” are also unlawful. *Purple Communications*, 361 NLRB No. 43 (2014). In *Advance Transportation Co.*, 310 NLRB 920, 925 (1993), the Board similarly found a rule barring “harassment, intimidation, distraction or disruption of another employee” unlawful because “it is vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying Respondent with the power to define its terms and inhibit employees from exercising their rights under Section 7 of the Act.” Respondent offered no justification for this rule. Accordingly, by maintaining the above noted overly broad rule Respondent violated Section 8(a)(1) of the Act.

b. Employee Conduct Rule was Applied in Unlawful Manner

The undisputed evidence is that Respondent repeatedly warned employees not to talk about their wages in violation of Section 8(a)(1) of the Act. After Respondent discovered that

¹³ Emphasis added.

discriminatees Bracewell and McGinty had discussed their wages at work, Supervisor Hall told them that owner Attalla would later make a decision about whether or not to terminate them for discussing their pay. Tr. at 81: 11-22. Thereafter, they were discharged and informed they violated Respondent's Employee Conduct policy by talking about their wages.

Under *Boeing*, the Board established three categories of work rules. According to *Boeing*, an example of a Category 3 work rule that would be violative of the Act is a rule that "prohibits employees from discussing wages or benefits with one another." *Boeing*, 365 NLRB No. 154 at pg. 4 (2017). Since Respondent's Employee Conduct policy was applied in violation of the Act, the discipline issued to the discriminatees violated the Act.

III. Paragraph 9(b) of the CNOH: Respondent Terminated Discriminatees

a. Respondent Terminated the Discriminatees because of their Protected Concerted Activities

The evidence clearly demonstrates discriminatees Bracewell and McGinty engaged in protected concerted activity when they discussed their pay at work. Under current Board law, an employer violates Section 8(a)(1) of the Act when: 1) employees engage in protected concerted activities; 2) the employer knows of its employees' concerted activity; and, 3) the employer then takes adverse action against the employees motivated at least in part by the protected activity. *Amelio's*, 301 NLRB 182 (1991).

Regarding the first element, discriminatees Bracewell and McGinty engaged in protected concerted activity on August 3, 2016, by discussing their pay at work. *Parexel International, LLC*, 356 NLRB 516, 518 (2011) citing *Triana Industries*, 245 NLRB 1258, 1258 (1979)(the Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.").

Regarding the second element, it is undisputed that Respondent knew discriminatees Bracewell and McGinty discussed their pay at work. The discriminatees testified they discussed their pay at work. Employee Ellison testified he spoke with McGinty about McGinty's pay and told employee Moody about McGinty's pay. In turn, Moody complained to Attalla about McGinty's pay. Attalla said he would take care of McGinty. Tr. at 38: 14-16; 53: 19-25. Thereafter, Supervisors Hall and Brooks interrogated discriminatees Bracewell and McGinty about discussing their pay, and the discriminatees confirmed they had talked about their pay. Attalla also admitted he had heard about discussions about pay. Tr. at 31:10-11; 152: 23-24.

Regarding the third element, it is undisputed that after finding out the discriminatees had talked about their pay at work, Supervisors Hall and Brooks told them that Attalla would decide rather or not to discharge them. Within a few hours, discriminatees Bracewell and McGinty were told that they were discharged.

In Respondent's defense, Attalla testified discriminatees were discharged because of theft, poor work, and other strange things happening around the factory. Tr. at 166: 18-19. However, Respondent did not produce any other evidence to support its position. In particular, the discharge slips do not mention any of the defenses announced at trial. Moreover, Respondent did not call as witnesses any of the discriminatees' immediate supervisors to support its position that the discriminatees had problems with their work performance. Additionally, the discriminatees' personnel files do not contain any language to support Attalla's testimony that there were issues of theft, poor work performance, or any other strange occurrences involving discriminatees Bracewell and/or McGinty. Finally, discriminatees Bracewell and McGinty were told by Supervisors Brooks and Hall they were being fired for discussing their pay.

Attalla's testimony is totally self-serving and is not supported by any direct evidence.

Based on the evidence, it is evident Respondent discharged the discriminatees in violation of the Act as alleged in Paragraph 9(b) of the CNOH.

IV. Paragraph 9(c) of the CNOH: Respondent Refused to Rehire the Discriminatees because of their Protected Concerted Activities

Respondent's refusal to rehire discriminatees, despite telling them they could reapply 30 days after their terminations, was in retaliation for their protected concerted activity of discussing their wages at work, and therefore was a violation of the Act. In order to establish a discriminatory refusal to hire, it must be shown that: (1) Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative the employer had not adhered uniformly to such requirements, or that the requirements themselves were pretextual or were applied as a pretext for discrimination; and (3) that animus against protected activities contributed to the decision not to hire the applicants. Once this is established, the burden shifts to the Employer to show that it would not have considered the applicant even in the absence of their union activity or affiliation. *FES, A division of Thermo Power*, 331 NLRB 9 (2000).

An alternative analysis for finding a discriminatory refusal to rehire was established in *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843 (2002), which questioned the Board's analysis in *FES, A division of Thermo Power*, claiming it "obviates an examination of whether the excluded applicants are qualified for the applied-to position, or even if any position exists at all to be filled." *Pneu Elec.* 309 F.3d at 857. In *Pneu Elec.*, the Fifth Circuit adopted the Sixth Circuit's analysis in *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir.1998), which required: (1) that

animus existed; (2) that there was a failure to rehire; and (3) that the employees not rehired were qualified for the jobs and that jobs were available. *Pneu Elec.*, 309 F.3d at 858.

Respondent did not present any justification in its Answer or at hearing for its refusal to rehire the discriminatees. When the discriminatees tried to reapply, they were told Respondent was not hiring. Tr. at 86: 8-18; 108: 8-15. However, Mr. Attalla admitted in his testimony that Aaron Parker and Daniel Long were hired during the same time period the discriminatees reapplied. Tr. at 162: 15-22; 163: 1-13.

As discussed above, discriminatees Bracewell and McGinty discussed their wages and were unlawfully discharged. Their discussions at work resulted in Respondent having to give other employees pay raises. Therefore, it is reasonable to infer that Respondent harbored animus towards Bracewell and McGinty because of their protective concerted activity of discussing their wages, and Respondent's failure to rehire Bracewell and McGinty was because of this animus. Whether following *FES* or *Fluor Daniel*, Respondent's discriminatory refusal to rehire Bracewell and McGinty is supported by substantial evidence. There were jobs available at the time discriminatees Bracewell and McGinty tried to reapply. Respondent has not presented any evidence that discriminatees Bracewell and McGinty were not qualified to be rehired. There is also sufficient evidence of animus established against discriminatees Bracewell and McGinty and that this animus contributed to Respondent's decision not to rehire them. Accordingly, the failure to rehire discriminatees Bracewell and McGinty was a violation of 8(a)(1) of the Act as alleged in Paragraph 9(c) of the CNOH.

CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Administrative Law find Respondent violated the National Labor Relations Act as alleged in the CNOH.

Therefore, Counsel for the General Counsel respectfully requests that an appropriate remedy be granted to rectify Respondent's unlawful conduct including posting and granting a remedy consistent with the attached Notice to Employees, as well as mailing the attached Notice to all employees who were employed by Respondent from July 18, 2016 to the present. (See Attachment A).

Respectfully Submitted,

/s/Matthew J. Dougherty
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I electronically filed a copy of the foregoing Counsel for General Counsel's Brief to the Administrative Law Judge with the National Labor Relations Board Division of Judges and forwarded a copy by electronic mail and U.S. mail, postage pre-paid to the following:

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(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT stop you from discussing wages.

WE WILL NOT ask you if you have exercised your right to discuss wages, hours, and working conditions with other employees.

WE WILL NOT inform you that you are being fired because you exercised your right to discuss wages, hours, and working conditions with other employees.

WE WILL NOT fire you because you exercise your right to discuss wages, hours, and working conditions with other employees.

WE WILL NOT refuse to rehire you or refuse to consider you for hire because you exercised your right to discuss wages, hours and working conditions with other employees.

WE WILL NOT maintain overly broad work rules in our Employee Handbook prohibiting you from exercising protected activity under the National Labor Relations Act.

WE WILL NOT orally promulgate overly broad work rules prohibiting you from discussing wages, hours, and working conditions with other employees.

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

WE WILL rescind and/or revise the Employee Handbook's Employee Conduct Policy, an overly broad work rule prohibiting you from discussing your wages, hours, and working conditions, and **WE WILL** notify you in writing that we have done so.

WE WILL rescind the orally promulgated overly broad work rule prohibiting you from discussing wages, hours, and working conditions with other employees, and **WE WILL** notify you in writing that we have done so.

WE WILL, within 14 days from the date of this Order, offer Eric Bracewell and Tony McGinty full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Bracewell and Tony McGinty whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Eric Bracewell and Tony McGinty, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL make Eric Bracewell and Tony McGinty whole for any loss of earnings and other benefits resulting from our failure to rehire them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of this Order, remove from our files all references to the failure to rehire Eric Bracewell and Tony McGinty, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the failure to rehire them will not be used against them in any way.

Strong Steel of Alabama

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place – 7th Floor
New Orleans, LA 70130-3413

Telephone: (504)589-6361
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.