

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

INTERNATIONAL ASSOCIATION OF SHEET  
METAL, AIR, RAIL AND TRANSPORTATION  
WORKERS LOCAL NO. 28

And

Case 29-CB-214675

HOWARD BIRNS, an Individual

*Genaira L. Tyce, Esq.*,  
for the General Counsel.  
*Damien O. Maree, Esq.*,  
for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on September 18 and October 11, 2018, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 29 of the National Labor Relations Board (NLRB). Howard Birns (charging party) filed the charge on February 12, 2018,<sup>1</sup> and the General Counsel issued the complaint on May 31.<sup>2</sup>

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<sup>1</sup> All dates are in 2017 unless otherwise indicated.

<sup>2</sup> The counsel for the Respondent moved to dismiss the complaint on September 14, 2 days prior to the hearing date. On September 17, the counsel for the General Counsel opposed the motion to dismiss the complaint. The General Counsel argued that the motion to dismiss was improper because Board rules and procedures require that the dismissal is made to the Board prior to the hearing and not to the administrative law judge. I agree. Sec. 102.50 of the Board's Rules and Regulations states

Whenever the Board deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, it may, at any time, after a complaint has issued pursuant to §102.15 or §102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any Board Member. The provisions of this subpart, insofar as applicable, govern proceedings before the Board or any Board Member pursuant to this section, and the powers granted to Administrative Law Judges in such provisions will, for the purpose of this section, be reserved to and exercised by the Board or the Board Member who will preside.

The complaint alleges that the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers Local 28 violated Section 8(b)(1)(A) of the National Labor Relations Act (Act) when it brought internal union disciplinary charges against Birns for allegedly refusing to use his position as foreman to persuade the employer to rehire a union board member (GC Exh. 1).<sup>3</sup>

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

#### FINDINGS OF FACT

##### I. JURISDICTION AND UNION STATUS

At all material time, the employer, United Sheet Metal Corp (United Sheet) is a corporation with an office and place of business located at 27–20 Skillman Avenue, Long Island City, New York. United Sheet is engaged in the manufacture, installation and service of ventilation, heating and air condition systems. Joseph Grgas, director, testified that United Sheet is one division of United Air Conditioning Corp., the parent company (Tr. 246). United Sheet is a member of the Sheet Metal and Air Conditioning Contractors Association of New York City, an employer association and follows the terms of the Project Labor Agreement (PLA), an agreement that the employer association has with various union locals (GC Exh.16). The Respondent Union maintains a collective-bargaining relationship with the employer association and has a collective-bargaining agreement with United Sheet, effective from August 1, 2014, to July 31, 2017 (Tr. 245–250). During the past 12 months, United Sheet, in conducting its business operations described above, derived gross revenue in excess of \$500,000. United Sheet purchased and received at its Staten Island jobsite, goods and materials in excessive of \$50,000

In addition, the General Counsel argued that the motion was untimely filed just 2 days prior to the hearing. Sec. 102.24(b) states that all motions for summary judgment or dismissal must be filed with the Board no later than 28 days prior to the scheduled hearing. As such, I find that the Respondent’s motion was also untimely filed. Finally, I find that the complaint includes an allegation in the charge that clearly specified the conduct that violated Section 8(b)(1)(A) of the Act. The charge filed alleges that business representative Sal Starace brought charges against Howard Birns for violation of the collective-bargaining agreement (GC Exh. 1(A)). This charge was clarified by the Region on May 24, 2018, when the only allegation remaining in the charge was whether the Respondent violated Sec. 8(b)(1)(A) of the Act when it initiated and process internal union charges against Birns for his failure to support the Union by using his position as foreman to rehire Shop Steward James Callahan on the Empire Outlets jobsite (GC Exh. 1(F)). As such, the Respondent was adequately noticed as to the specified NLRB charge against it.

<sup>3</sup> The exhibits for the General Counsel are identified as “GC Exh.” The Respondent’s exhibits are identified as “R. Exh.” and joint exhibits have been identified as “JT. Exh.” The closing briefs are identified as “GC Br.” and “R. Br.” for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as “Tr.”

from suppliers located outside of the State of New York.<sup>4</sup> As such, I find that United Sheet is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act (GC Exh. 1).

5 I also find that at all times material, the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

10 The complaint states that James Callahan, union shop steward and employee of United Sheet, was terminated on about June 26, 2017, from the employer's Empire Outlets jobsite in Staten Island, New York. The complaint further states that Salvatore Starace, the Respondent's Union representative, filed internal union charges against Howard Birns because Birns, in his position as foreman at the jobsite, failed and refused to persuade the employer to rehire Callahan.  
15 The complaint alleges that Respondent restrained and coerced Birns in the exercise of his rights guaranteed in Section 7 of the Act in violation of Sec. 8(b)(1)(A) of the Act (GC Exh. 1).

### *The alleged threat to Howard Birns*

20 Howard Birns (Birns) testified that he has been employed as a foreman with Sheet Metal since April 2016 at the Empire jobsite (GC Exh. 2). Birns was the heating, air condition, and ventilation (HVAC) foreman at the site. At the time, his direct supervisor onsite was Mike Destiffano and his second-line supervisor was Ozzy Barsrudin, who was usually not at the jobsite. In addition to his supervision of the HVAC work, Birns also conducts safety talks by  
25 holding meetings with the workers and reading excerpts from the company safety manual at least once a week (Tr. 39, 40). Birns has been a member of the Respondent Union since 1989.

Salvatore Starace (Starace) is the Respondent Union business representative. Starace testified that he was elected to the position as a business representative and among his other  
30 duties, he is responsible for getting work for union members; visit jobsites to make sure members are following the CBA; and assess and determine that members are working in a safe manner on the jobsite. Starace testified that his position as business representative is a full-time job and he does not have a laborer or contract job. One of his areas of responsibility was the Empire jobsite. Starace would visit the jobsite and assess the safety conditions and conduct safety talks with the  
35 union members at the site. Starace would communicate with Birns to arrange for union members to meet for the safety and tool talks at the jobsite (GC Exh. 3; Tr. 38).

Birns knows James Callahan (Callahan) as a shop steward and employee at the Empire jobsite. Birns is aware that Callahan serves on the Respondent's executive board. Birns testified  
40 that Callahan was laid-off by Barsrudin during the week of June 23 (Tr. 46). Birns stated that Barsrudin asked for Callahan's work hours because the employer was going to lay him off. Birns believed he was asked by Barsrudin for Callahan's work hours on Monday because the

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<sup>4</sup> The counsel for the General Counsel amended the complaint in par. 2(c) to ". . . the employer purchased and received at its Staten Island jobsite, goods and materials valued in excess of \$50,000 (instead of \$5,000) from suppliers located outside of the State of New York" (Tr. 243).

timecards needed to be in by Wednesday in order to get paid by Friday (Tr. 49). As a shop steward, Callahan is given notice 3 days prior to his layoff date.

5 Birns testified that on the 2nd day of the 3-day notice for Callahan's lay-off, Birns was informed by Job Superintendent Billy Crothfield and Site Safety Manager Anthony Castellano that Callahan was observed drinking at a bar during lunch hour. Birns believe the date was June 26. Birns stated that Castellano observed Callahan drinking. Upon Callahan's return to lunch between 12-12:30 p.m., all three individuals were waiting at the turnstile for Callahan. In addition, Ann Capoccia, security director and part owner of the employer, was also waiting at the 10 turnstile. Ian Elms, another worker and Birns' apprentice, was also present. Callahan tried to enter the jobsite through the turnstile, but his entry card had been revoked. Castellano explained to Callahan that he saw Callahan drinking at the bar. Callahan denied he was drinking. At about this time, Starace appeared and maintained that he was with Callahan and no one was drinking. The parties argued back and forth. Security was called and Callahan was denied entrance 15 (Tr.51-58). Birns did not testify that he said anything during this back and forth exchange between Callahan, Castellano, and Starace. However, according to Birns, Callahan then turned to Birns and said he was a "scumbag and a disgrace to the union." Callahan also told Birns that, "It's not over yet. You did this." Birns denied any involvement in Callahan's discharge (Tr. 58).

20 According to the employer, the project manager, Juned Quazi, reported to Joseph Grgas, by letter dated June 27, that on June 23, the project superintendent witnessed Callahan in a bar across from the jobsite. The superintendent informed Castellano, who followed Callahan back to the bar on June 26 and observed him, drinking during working hours. This information was given to Capoccia, who revoked Callahan's entry card on that date, thereby barring his entrance 25 to work at the site (GC Exh. 7).

On June 27, Callahan was at the jobsite to retrieve his tools. Birns testified that Starace was at the jobsite because Starace had scheduled a safety talk with the members for 12:30 p.m. The text from Starace requested Birns to gather the workers together for a tool talk. Birns 30 replied to Starace's text that only he, Callahan, and Ian Elms were present. Starace said that would be fine (GC Exh. 3). Callahan, Birns, Starace, and Elms attended the safety talk.<sup>5</sup>

Starace began the talk stating that the jobsite was unsafe and he was going to file a grievance with the company. According to Birns, at the end of the talk, everyone was walking 35 back to the site when Starace mentioned to Birns that he needed to get Callahan rehired. Birns testified that Elms was present when this comment was made by Starace. Birns told Starace that he had nothing to do with Callahan's layoff. It is alleged that Birns were told by Starace, "Either I (Birns) get him back on the jobsite, or I (Birns) will be brought up on charges." Birns replied that it was not up to him to hire or fire workers. According to Birns, nothing else was said that 40 day. Birns maintained, however, that he had other conversations with Starace on several occasions about brining Callahan back (Tr. 66).

The counsel for the General Counsel called Ian Elms (Elms) as a witness who was present at the safety talk when Starace allegedly made the comments to Birns. Elms was 45 employed as a sheet metal worker by United Sheet and worked at the Empire jobsite from March

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<sup>5</sup> Actually, there were two other workers in attendance for the talk (GC Exh. 4).

2017 to August 28, 2018. Elms is also a member of Local Union 28. Elms is familiar with Callahan as a union and executive board member. Elms knew that Callahan was previously employed at the Empire jobsite as a worker and shop steward. Elms testified that Callahan informed him that he was taken off the job and was leaving in June (Tr. 17–19).

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Elms knows Starace as a business agent and that he conducts safety talks with the workers. Elms recalled two 30 minute safety talks conducted by Starace. Elms recalled one specific meeting when Birns and Callahan were present at the talk.<sup>6</sup> Elms testified that no one spoke at the safety talk except Starace. After the talk, they were walking back to the jobsite. Elms stated that he was about 10 feet behind Starace and Birns. According to Elms, Starace was speaking to Birns slightly off to the side. Elms admitted that he was not fully paying attention to their conversation, but did overhear Starace saying to Birns, “that if he (Birns) didn’t bring Jimmy (Callahan) back, he would bring him (Birns) up on charges” (Tr. 21–26). Elms did not recall that any other comments were made.

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Starace knows Callahan as a union member and a member of the executive board. In contrast to Birns’ testimony, Starace denied he threatened Birns that he will bring charges because Birns did not persuade the employer to rehire Callahan. Starace also denied accusing Birns that “it was you” who had caused the employer to bar Callahan from the site. Starace said that he made his own efforts to rehire Callahan by talking to Joe Grgas (Tr. 212–214).

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#### *The charges against Howard Birns*

Callahan was not reinstated at the Empire jobsite. On August 17, Starace filed an internal union charge against Birns. The charge was addressed to James Cuiffo, the union recording secretary at the time. The charge stated that Birns violated the Constitution and Ritual of Sheetmetal Workers International Association, specifically, article 17, sections 1(B), 1(C), 1(E), and 1(M) and Local 28 Collective-Bargaining Agreement under article XV, section 25 (Jt. Exh. 1; Tr. 71–73). The charge stated

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Sequence of events took place between the dates of June 22–30, 2017. Howard Birns, IA # 822096 is the foreman for United Sheet Metal Corp. at Empire Outlets on Staten Island. The job site was extremely unsafe, (no railings on the staircases, improper coverings over roof openings, 8 feet of water in elevator shaft in the basement, etc.) Myself and Shop Steward, Jim Callahan, asked the general contractor numerous times for the job site to be brought up to proper safety code, with no luck. Both myself and Jimmy asked Howard Birns not to put any apprentices or journeymen/women down in the basement to work or up on the roof because the elevator shafts were not blocked off properly and rain water filled them with 8 ft of water in the basement and the holes on the roof were not properly covered. We were worried someone would fall into the water in the shaft and drown or through a hole 2 stories. Howard still put members to work in the unsafe areas further-placing workers in danger, making job site conditions worse and engaging in conduct that was detrimental to our union.

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<sup>6</sup> Elms was uncertain as to the exact date in June.

Furthermore, Howard proceeded to lower the amount of workers on the job site below the allotted number to retain a shop steward so he can lay off Jimmy. On Jimmy's final day, Howard went to the project manager and the job site safety coordinator and made up a story so that my shop steward would not be allowed to re enter the site, Jim Callahan's entry card was taken away. Howard made our union and one of it's brothers look bad when he could have come to me to address any issues he felt were not ok.

Starace did not sign the charge, but printed his name and title "Business Representative" at the bottom of the charge letter. Starace testified that the last paragraph had nothing to do with the charge but it was put in by him as background information.

Starace testified that the Empire jobsite was very unsafe. He noted that the some areas had no railings and the basement was filled with water. Starace said he was repeatedly informed by Birns of the unsafe conditions and had met with Birns and the other workers in mid-April to discuss these conditions. Starace also had called or texted Birns on the phone at least 4 times per week about safety issues. Starace testified that part of the jobsite was shut down due to safety issues on June 22 for water on the floor and the entire jobsite was closed on July 17, by the Department of Buildings for safety issues (Tr. 192-195).

James Cuiffo (Cuiffo) is the financial treasurer and recording secretary for Local 28. Among his duties, Cuiffo is responsible for informing the charged party and charging party of the charges and date/time for trial. Cuiffo said that once the charges are filed with him, his role is to prepare a letter, explain the articles and sections of the constitution that the party is charged with violating. Cuiffo testified that parties are permitted one postponement of the trial date. He stated that the charging party prosecutes the charge and not the union. Cuiffo stated that the union executive board is the judge at the trial, but the Constitution allows for the convening of a trial committee (Jt. Exh. 2: article 18, section 2(b)). Cuiffo stated the Local 28 had always used the executive committee as the judge in these proceedings. Cuiffo noted that the trial transcript is not mandatory and if a party request a transcript, the requesting party pays for the stenographer's services for the written transcript (Tr. 143-148).

Cuiffo stated that once he received the charge from Starace, he sent a letter to Birns on December 7, setting forth a trial date on December 27 (Jt. Exh. 2). By email dated December 14, Birns requested a postponement of his trial date due to the December holidays (GC Exh. 6). The new trial dated was rescheduled for January 24, 2018 (Jt. Exh. 3). The trial was again postponed and Cuiffo scheduled a new trial date for February 28, 2018 (Jt. Exh. 4).

Cuiffo testified that the procedures for bringing charges against a union member or officer is found in the SMART Constitution, specifically articles 17 and 18 (Jt. Exh. 2). Cuiffo knows Birns as an active member and in good standing with the union. Cuiffo said he never spoke to Birns once the charge was filed, but did attempt to communicate with him over questions that Birns had about the proceeding. According to Cuiffo, Birns wanted to know about the specifics of the charge (GC Exh. 10) and that he attempted to contact Birns on February 12, 2018 (GC Exh. 8). Cuiffo replied that he did not know any more than what was stated in Starace's charge letter (Tr. 166). Cuiffo also denied speaking to Callahan and Starace about the charges (Tr. 164). He stated that he did not speak to anyone about the charges except during the trial. Cuiffo said he had processed approximately 30 trials as the recording and financial

secretary and most resulted in a penalty, which could be a fine and/or expulsion from the union (Tr. 156).

5 The trial was held on February 28, 2018. Birns had private representation for his trial. Birns was given the opportunity by the executive board if he wanted to remove any members. Birns challenged two members of the executive board and his request for their removal was granted (Tr. 159). Callahan was present at the trial as a witness for Starace and not in his capacity on the executive committee. Cuiffo stated that Birns' trial was held and all charges were dismissed (Tr. 149; Jt. Exh. 7). However, Cuiffo did not testify as to the deliberations of the executive committee after the trial or the reasons for all charges being dismissed. Starace testified that the charges were dismissed because he had cited the wrong date of when the unsafe conditions occurred. Starace stated that the two incidents happened on June 21, but he cited in his charge that the incidents occurred from June 22 to 30 (Tr. 212).

15 Thomas Gallagher (Gallagher) testified that he has been the vice president of the Union Local 28 for the past 2 years and is a part-time sheet metal worker. Gallagher confirmed that the recording secretary accepts the charges filed by a member or officer of the union regarding an alleged violation of the constitution. He stated that if the charge is properly made, the Union cannot refuse a trial unless the charge is withdrawn. Gallagher testified that the union does not prosecute the charge. He also stated that the union's past practice is to have the executive board serve as the judge at the trial (Tr. 179).

25 Gallagher was on the executive board for Birns' trial. He was aware that Birns challenged two members and both were recused. He identified the two board members as Christopher Meslin and Fernando Robles. Gallagher stated that no reason is required for the challenges. All four charges were dismissed. Gallagher did not testify as to the reasons the charges were dismissed.

#### Discussion and Analysis

30 The counsel for the General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by filing charges against Birns because Birns, as foreman, refused to persuade the employer to reinstate James Callahan. The counsel for the Respondent argues that the charges filed against Birns were an intraunion matter. The Respondent further argues that Starace filed the charges as a union member and not as an agent of the union.

35 *Salvatore Starace was an agent of Respondent within the meaning of Section 2(13) of the Act*

40 As a preliminary matter, the Respondent first defends the 8(b)(1)(A) allegation by contending that Salvatore Starace is not an agent for the Union within the meaning of Section 2(13) of the Act. The Respondent argues that Starace was not an agent and did not act on behalf of the Union when he allegedly made the comment to Birns and when he filed the charges against Birns. The Respondent argues that any member of the union has the right to file a charge against another member. I find this argument without merit.

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Regarding statutory agency, the Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. See, e.g., *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. See, e.g., *Pan-Oston Co.*, supra, citing *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. mem. sub nom. 974 F.2d 1329 (1st Cir. 1992).

The General Counsel submits that Starace is an agent and brought the charges against Birns on behalf of the Union. The counsel for the General Counsel argues that (1) charges against members of any local union may be filed by the local union or council or any officer or representative (Jt. Exh. 2 at p. 99); and, (2) Starace signed the union charges as “Business Representative” (Jt. Exh. 1)

The record shows that Starace’s position, as a union business representative, is a full time position. Starace testified that he did not work for a contractor and was elected full time by the membership. Under the SMART Constitution, a member of the International Union (and the local union) must be a worker in one or more industries covered by the jurisdictional claims of the International Union (Jt. Exh. 2 at p. 78). The counsel for the General Counsel maintains that Starace’s membership application was not valid because it did not bear a seal from the International Union of its recognition of Starace’s membership and did not contain an initiation date (GC Br. at 47; GC Exh. 18).<sup>7</sup> I agree. As such, Starace never held a membership with the international or the local union at the time he filed the charge against Birns. Therefore, the only authority for him to file the charge was in his position as business representative. Gallagher testified that the union officials are the other members of the board, business agents, trustees, wardens and conductor and believed a union representative is the same as a union business agent (Tr. 173, 174). Starace certainly acted as a union agent when he sat beside Respondent’s counsel during the entire time of the trial and assisted in the presentation of Respondent’s rebuttal case. I find under these circumstances, that one would reasonably believe that Starace’s initiation of charges against Birns reflected Local Union 28 policy and that he was acting on behalf of the executive committee.

Having determined that Salvatore Starace is a statutory agent, I turn to the substantive charges alleging violations of Section 8(b)(1).

#### *Credibility Assessment*

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness’

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<sup>7</sup> GC Exh. 18 was admitted into the record on November 1, 2018, when it became available for review by the General Counsel.

testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 5 sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

10 Before addressing whether there was a violation of the Act, a credibility assessment must be made of Respondent's contention that the threat made by Starace to Birns never occurred and that Ian Elms' testimony is unworthy of brief.

15 On June 26, Castellano and Crothfield approached Birns and Birns was informed that Callahan was seen drinking at a bar during lunch. When Callahan attempted to reenter the jobsite, his ID card was revoked by Ann Capoccia. Castellano confronted Callahan about his drinking at the bar, which Callahan denied. Starace arrived at the scene during this confrontation. Callahan and Castellano argued back and forth. Callahan was escorted away from the jobsite by security. Birns, who had said nothing during this entire time, was accused by Callahan as a disgrace to the union and a scumbag. Callahan also threatened Birns by stating "it wasn't over yet" and that Birns "had done this." As Callahan was being escorted away, Starace 20 said to Birns that he knew that Birns caused Callahan to be removed (Tr. 58).

25 I credit the testimony of Birns on this point. Birns was consistent in his testimony to the events leading up to the confrontation. Birns provided details as to the names of the individuals present, when and what had occurred during the confrontation, and precisely what Callahan had accused him of doing (or not doing). Callahan was not called as witness by the Respondent and, as such, the Respondent did not rebut the testimony of Birns as to Callahan's accusations. Birns' testimony that Callahan accused Birns of being a disgrace to the union and a scumbag and this matter was not over yet is credible and was not rebutted by the Respondent. 30

35 On the following day, a safety meeting was called by Starace. Ian Elms attended the meeting. After the meeting, as Birns was walking with Starace to the jobsite, Starace threatened Birns that the Union would bring charges against Birns if Birns did not get Callahan's job back. Birns replied that it is up to the employer to hire and fire people. Elms testified that he was not part of this conversation, but was also returning to the jobsite and only several feet behind Birns and Starace. Elms specifically overheard Starace threat Birns if "he did not bring Jimmy back, he'd be brought up on charges" (Tr. 22, 23). Starace denied making that statement, but did not deny overhearing Callahan accusing Birns being a disgrace to the Union and a scumbag.

40 I credit Elms' testimony over Starace's denial on this point. Elms testified he was shocked in hearing this comment by Starace. Elms is an uninterested party to the conversation between Starace and Birns and had nothing to gain or lose in giving his testimony. Elms was not a friend of Birns. I find that Elms testified forthright and his testimony was consistent and corroborated the testimony of Birns. Even if Elms was not fully attentive to the entire 45 conversation between Birns and Starace, he was unwavering clear as to exactly what Starace said to Birns. On the other hand, Starace had a vested interest to get Callahan's job back. Callahan served as a shop steward and is a member of the executive board for the Union. Starace took

whatever means possible to have Callahan reinstated, which included threatening Birns. I find that Starace threatened Birns when he stated to Birns if “he did not bring Jimmy back, he’d be brought up on charges.”

*Legal Standard*

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Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act. Section 8(b)(1)(A) states: “It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7: 10 Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .” The Section 7 rights that are protected by the Act are set forth in that statute. It states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the 15 purpose of collective bargaining or other mutual aid or protection *and shall also have the right to refrain from any or all of such activities . . .* (emphasis added).”

The counsel for the General Counsel argues that Respondent violated Section 8(b)(1)(A) of the Act for three reasons, to wit: (1) the discipline of Birns carried with it the penalty of 20 expulsion from the union and Birns’ potential to lose access to the contractors who maintain exclusive relationships with the Respondent; (2) the filing of the charges was an attempt by Respondent to coerce Birns to support the incumbent union leadership in securing the rehire of the Respondent’s shop steward and member of the union executive board; and (3) the Respondent attempted to circumvent the collective bargaining agreement’s grievance and 25 arbitration procedure by compelling Birns to secure Callahan’s rehire (GC Br. at 33, 34).

The Board held in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), that a labor organization violates Section 8(b)(1)(A) of the Act in disciplining members if such discipline: (1) impacts on the employment relationship, (2) impairs 30 access to the Board’s processes, (3) pertains to unacceptable methods of union coercion, or, (4) otherwise impairs policies imbedded in the Act. Also, *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769 (2003). In *International Brotherhood of Teamsters*, 362 NLRB No. 64, fn.1 (2015), the Board made clear that “Sec[.] 8(b)(1)(A)’s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, 35 impairs access to the Board’s processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.”

*The Respondent violated Section 8(b)(1)(A) of the Act*

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Here, I find that Starace’s statements to Birns that the Union will file internal charges against Birns if he did not persuade the employer to rehire Callahan clearly impacts on the employment relationship and had the Union’s approval. The threatened discipline reasonably chills Birns’ exercise of his Section 7 rights to refrain from assisting or supporting the 45 Respondent’s attempt to have Callahan reinstated with the employer. Cuiffo testified that discipline against a union member could range from a monetary fine to expulsion from the union. In the latter situation, Birns’ expulsion from the Union as a penalty, would affect his ability to

work or to seek employment due to the fact that a worker was required to be a union member under an exclusive labor agreement that the employer association had with multiple unions.

5 Starace's charge against Birns also had the imprimatur of the Union's approval, and therefore, an unacceptable method of union coercion. The last paragraph in the charge stated

10 Furthermore, Howard proceeded to lower the amount of workers on the job site below the allotted number to retain a shop steward so he can lay off Jimmy. On Jimmy's final day, Howard went to the project manager and the job site safety coordinator and made up a story so that my shop steward would not be allowed to re enter the site, Jim Callahan's entry card was taken away. Howard made our union and one of it's brothers look bad when he could have come to me to address any issues he felt were not ok.

15 There has been no testimony at the hearing that Birns made up any story to the project manager about Callahan's drinking. Birns credibly testified that Castellano observed Callahan drinking at the bar. This was corroborated by the employer. According to the employer, the project manager, Juned Quazi, reported to Joseph Grgas, by letter dated June 27, that the project superintendent witnessed Callahan in a bar across from the jobsite. There was no mention of Birns' involvement in the employer's report (GC Exh. 7). Birns did not make up any story to get  
20 Callahan fired. As such, the charge against Birns was totally pretext to discipline Birns for not supporting Callahan's rehire.<sup>8</sup>

25 According, I find and conclude that the Respondent Union restrained and coerced Howard Birns in the exercise of his rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

#### CONCLUSIONS OF LAW

30 1. Respondent, the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

35 2. Respondent, the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, violated Section 8(b)(1)(A) of the Act by threatening that Howard Birns will be brought up on internal union charges because he failed to persuade the employer in support of the Union's effort to have the employer rehire James Callahan on about June 27, 2017.

40 3. Respondent, the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, violated Section 8(b)(1)(A) of the Act, when it scheduled and held

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<sup>8</sup> I also find that Starace's testimony over the safety of the jobsite was without merit. Starace testified that the jobsite was unsafe and that Birns placed workers in unsafe areas. However, no evidence was proffered to establish that Birns failed to adhere to safety standards. More glaringly, Starace testified that Birns allowed Elms to work without a safety harness, but the Respondent never corroborated Starace's testimony when Elms was available as a witness in cross-examination.

an internal hearing on disciplinary charges filed against Howard Birns on about February 28, 2018.

4. Respondent, the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, engaged in the above conduct because Howard Birns failed and refused to use his position as foreman to persuade the employer to rehire Callahan.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Union violated the Act, I shall order that it cease and desist there from and post remedial Board notices designed to effectuate the policies of the Act.<sup>9</sup> On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

ORDER

The Respondent, the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, by threatening or implying that an employee could be brought up on internal union charges for failing or refusing to support the union.

(b) Restraining and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, by holding internal disciplinary hearings against an employee for failing or refusing to support the union.

(c) In any like or related manner 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 after service by the Region, post at its business office and other places where notices to its members are customarily posted, including any bulletin board it may be allowed to use at the United Sheet Metal Corp. Empire Outlets jobsite, Staten Island, New

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<sup>9</sup> The charging party sought reimbursement when he ordered the transcript following the union internal disciplinary hearing. The charging party was not required to order the hearing transcript. Compensatory damages consist of a wide variety of relief including pecuniary and nonpecuniary damages. Pecuniary damages are intended compensation for out-of-pocket expenses. In *Katch Kan*, 362 NLRB No. 162 fn. 2(2015), the Board declined to order this type of relief at the time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004).

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 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.

York, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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 members are customarily posted. In addition to physical posting of paper notices, the 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 members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by United Sheet Metal Corp., if willing, at all places or in the same manner as notices to employees are customarily posted.

(c) 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.

Dated: Washington, D.C. January 29, 2019



Kenneth W. Chu  
Administrative Law Judge

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<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX  
NOTICE TO MEMBERS  
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 or imply that you will be brought up on internal union charges if you refuse or fail to support the International Association of Sheet Metal, Air, Rail and Transportation (SMART) Workers, Local 28, contrary to the interest of a fellow union member. **WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**INTERNATIONAL ASSOCIATION OF SHEET  
METAL, AIR, RAIL AND TRANSPORTATION  
(SMART) WORKERS, LOCAL 28**

\_\_\_\_\_  
(Employer)

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

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

Region 29  
Two Metro Center, 100 Myrtle Avenue, 5<sup>th</sup> Floor  
Brooklyn, New York 11201  
(718) 330-7713, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CB-214675](http://www.nlr.gov/case/29-CB-214675) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING  
AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY  
QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE  
DIRECTED TO THE ABOVE REGIONAL OFFICE'S  
COMPLIANCE OFFICER, (718) 765-6190.