

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

TRADE OFF, LLC

and

LOCAL 79 CONSTRUCTION AND
BUILDING LABORERS

TRADE OFF, LLC, AND TRADE OFF
PLUS, LLC, AS SINGLE AND/OR
JOINT EMPLOYERS

and

LOCAL 79 CONSTRUCTION AND
BUILDING LABORERS

Case Nos.: 2-CA-199415
2-CA-205658
2-CA-212872

Case No. 2-CA-207414

**POST-HEARING BRIEF ON BEHALF OF RESPONDENTS
TRADE OFF, LLC AND TRADE OFF PLUS, LLC**

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STATEMENT OF THE CASE

At issue before Your Honor are one alleged refusal to consider/hire/discharge, four alleged discharges, one *Bill Johnsons/BE&K* allegation, and six alleged Section 8(a)(1) claims. It is fair to say that these are “run of the mill” claims that Your Honor and other ALJs of the NLRB regularly hear and decide.

What makes this situation different is that Your Honor happened to preside over a protracted NLRB litigation between two parties that are embroiled in an extensive public dispute outside of the NLRB context. The parties’ dispute stems from the increased use of non-union labor for construction in NYC, and the Mason Tenders union’s targeting of non-union Trade Off and Trade Off Plus to show it is trying to do something to thwart the trend of non-union construction. Given this context, the record is replete with testimonial and documentary evidence that does not relate to the Complaint allegations that you are charged with deciding.

Rather, Your Honor’s role is to determine whether or not the General Counsel met its burden of proving the allegations contained in the Complaint, and nothing more. This brief details the *relevant* record evidence and assesses such evidence under NLRB and court precedent. The record evidence does not support a single violation of the Act, as alleged.

Laborer Riccie Haneiph was terminated for arriving to the jobsite wearing his Adidas sneakers. Indeed, all communications about Haneiph reference his wearing of sneakers on the jobsite. Even Haneiph’s own testimony about his post-termination communications with General Superintendent Justin Hagedorn repeatedly reference his termination for wearing Adidas on the jobsite. The only conclusion that can be reached is that Trade Off terminated Haneiph’s employment for reporting to work in sneakers and never engaged him again for that very reason.

Laborers Larry Kerr and Willie Zimmerman were terminated because they concocted a scheme whereby Kerr told Zimmerman to report to work without having approval from management. It is undisputed in the record, including through third-party testimony of the site safety manager, that Trade Off did not schedule or authorize Zimmerman to work. Rather, Kerr was twice directed by his foreman to check with General Superintendent Hagedorn for approval. The site safety manager also directed Kerr to get approval from Trade Off. Without gaining such approval, Zimmerman reported to work. For this reason alone, both Kerr and Zimmerman were terminated. The General Counsel tried to build a case that Kerr and Zimmerman engaged in protected concerted or union activity by going to the union's training center the day before their terminations. However, the record evidence establishes that General Superintendent Hagedorn decided to terminate them before the alleged trip to the union's training center and there is no record evidence that anyone at Trade Off even knew Kerr and Zimmerman went to the union's training center. Indeed, reliance on Kerr's and Zimmerman's travel to the union's training center backfired because it revealed that Kerr and Zimmerman admittedly stole two-plus hours of time from Trade Off to go to the training center mid-shift. Therefore, even if the General Counsel proved its case of unlawful terminations (which it did not), reinstatement is not an available remedy due to their newly discovered theft of time.

Laborers David Robinson and Darrell Thomas were terminated for insubordination on the jobsite. They openly refused the direct orders of their foreman, Delbert Hall, to report to clean the basement. Both Robinson and Thomas admitted that the foreman dictates where they work in the building, and that they refused Hall's direct orders that one of them is to work in the basement (as opposed to the 9th floor). Even if they engaged in union activity prior to their terminations, the record evidence firmly establishes Robinson's and Thomas's insubordination

and that Trade Off terminated them for such insubordination. The only “twist” to this allegation is that Thomas tries to shift blame to Robinson, but that ploy is exposed in this brief. There is no basis to conclude that the terminations were due to prior protected concerted or union activity.

The General Counsel also failed to meet its burden of proof to establish any violations of Section 8(a)(1), as discussed herein. Trade Off’s state court lawsuit that the General Counsel unavailing cites as evidence for the 8(a)(1) violation was filed due to the outright mistruths of the union and former employees Darrell Jamison and Ricardo Pimentel about Trade Off’s alleged lack of benefits and lack of jobsite safety. As an initial matter, there is an abundance of record evidence shows that Trade Off provides employee benefits and a safe work environment. In turn, under the Supreme Court’s *Bill Johnson’s* test, there was a reasonable basis for the filing of the state court lawsuit, and it is therefore insulated from an 8(a)(1) attack. To the extent the General Counsel disputes the record evidence, this allegation still must be dismissed under *Bill Johnson’s* because the Board is precluded from drawing inferences from disputed facts, making credibility resolutions or determining state-law legal questions. Clearly, Trade Off had a reasonable basis to file and maintain the lawsuit, which has remained pending for the past 22 months.

For evident reasons, there is no record evidence to support the Complaint allegations.

STATEMENT OF FACTS

I. Background

Trade Off and Trade Off Plus are construction firms that provide general conditions labor for construction projects in New York City. This includes unskilled work, such as sweeping, cleaning, moving materials, offloading trucks, and operating hoists. (Tr. 829). For the limited purpose of litigating NLRB case numbers 2-CA-199415 et al., the parties stipulated that Trade Off, LLC and Trade Off Plus, LLC have operated as joint employers of employees of Trade Off Plus working at the job sites located at 520 West 30th Street and 264 West Street, New York, New York. (Tr. 6).¹

A. Trade Off's Workforce

Trade Off's day-to-day operations are led by Vice President of Operations, Jason Abadie ("Abadie") and General Superintendent, Justin Hagedorn ("Hagedorn"). (Tr. 679, 823). Hagedorn has overall responsibility for the assignment of workers and disciplinary actions. Reporting to Hagedorn are his team of field supervisors (including Jose Bonilla, Tom Murphy and Jonathan Morales). Field supervisors travel between and visit Trade Off's jobsites to check-in with the foremen, ensure that paper work and tools are in order, speak with clients, and confirm that work is being performed by Trade Off's laborers. (Tr. 825). Foremen (including Delbert Hall and Rich Cotrite) are charged with assigning the laborers to specific locations within the building and directing the laborers to perform specific tasks.²

¹ The companies are hereinafter collectively referred to as "Trade Off" for ease of reference.

² At some jobsites, the client/general contractor provides its own foreman instead of contracting with Trade Off for a foreman. (Tr. 828).

Trade Off's laborers come from diverse backgrounds and with diverse skill sets. (Tr. 971). They are recruited through various independent referral agencies, including the Saint Nicks Alliance, Urban Upbound, Jobs Plus, Building Skills, the Hannah Legacy, and the Center for Employment Opportunities ("CEO"). (Tr. 860).³

"B" laborers are general housekeepers, responsible for cleaning the site, moving material, sweeping, cleaning, mopping, restocking the bathroom, and operating the hoist. The "A" laborer is a more skilled laborer who may be able to do minor patchwork, operate most hand tools, and has the ability to perform concrete and masonry work. (Tr. 828).

Hagedorn decides how many laborers are needed on a jobsite. Supervisors and foremen do not decide how many or which laborers are assigned to a jobsite. (Tr. 849, 851). Laborers do not have authority to decide which specific laborers can work on a jobsite. (Tr. 851). Hagedorn also decides if there needs to be a "manpower cut" at a jobsite. A manpower cut is a layoff until more work is needed, not a termination. (Tr. 861). Not all laid off laborers get recalled. (Tr. 862). If Hagedorn decides to recall a laid-off laborer, he will send a text message or call the laborer. (Tr. 861-862). Absent receiving such text or call, the laborer is not recalled and permitted to work. (Tr. 862).

Hagedorn also decides where laborers are to report to work on any given day. (Tr. 862). Any changes in laborers' work assignments are communicated to laborers via text or cell phone. (Tr. 863). Once on the jobsite, laborers are required to follow the orders of the jobsite's foreman. "They're given their daily job assignments by the foremen" and then "[t]hey're told to get the job

³ While it is admirable that Trade Off hires individuals referred by the CEO who have served time in prison to give them a second chance, the Union perverts this goodwill gesture by characterizing Trade Off's laborers as convicts or worse.

done safely, efficiently and in a reasonable amount of time.” (Tr. 892). If a laborer does not follow a direct order of a foreman, they are terminated for insubordination. (Tr. 892).

B. Workers’ Wages and Benefits

Trade Off’s employees are hired at competitive pay rates and provided with benefits. More specifically, Trade Off hires laborers at \$15.00 per hour and Trade Off Plus hires laborers at \$20.00 per hour. (Tr. 856). Laborers are eligible for pay increases not on a set date, but based on their merit for taking steps to improve themselves such as receiving additional OSHA certifications. (Tr. 443, 490, 856-857). All Trade Off employees are entitled to and receive benefits. All Trade Off employees receive a paid sick day benefit of five days. (Tr. 103, 104, 319, 859-860). All Trade Off employees receive health insurance benefits. (Tr. 102-103, 104, 859-860). Trade Off employees receive, at no cost to them, Magnacare coverage and Trade Off Plus employees receive a bronze-level health plan. (Tr. 318, 859-860, 916, 993-994). All Trade Off employees receive workers compensation benefits and unemployment benefits under state law. Some Trade Off employees are eligible for a 401(k) Plan, whereas Trade Off Plus employees are eligible for a retirement benefit to which the Company contributes \$2.00 per hour worked. (Tr. 103, 331, 860). Some Trade Off Plus employees also receive a commuter benefit. (Tr. 860).

C. Worker Safety is of Paramount Importance

As the record evidence illustrates, Trade Off takes many steps to ensure its employees are provided with a safe work environment. At the top, Trade Off has a safety committee of three people with significant safety and construction experience who hold monthly meetings and implement/enforce safety protocols. (Tr. 830-831). Trade Off maintains and strictly enforces a Code of Conduct for its employees. (Tr. 838; R.Exs. 6, 7). The Code of Conduct mandates, *inter*

alia, the wearing of personal protective equipment (“PPE”) on the jobsite, the prohibition against using drugs and alcohol on the jobsite, the possession of an OSHA 10-Hour certificate at all times, and an employee’s timely reporting of any unsafe or hazardous situation. (Tr. 837-838). All employees sign-off on acknowledging receipt of the Code of Conduct. (R.Ex. 11; Tr. 838, 840).

To meet its safety protocols, the Company provides high visibility vests, orange Trade Off shirts, safety glasses, gloves, and dust masks. (Tr. 833). Workers are responsible for bringing their own construction boots and hard hats (which is common in the construction industry). (Tr. 130, 833).⁴

In furtherance of its safety protocols and in the development of its workforce, Trade Off significantly invests in training initiatives. In addition to the weekly toolbox talks (a/k/a pre-shift safety meetings) held at jobsites, Trade Off offers its employees the ability to attend training, at no cost to the employees, to receive additional safety certifications. (Tr. 130, 221, 717-719, 825, 832, 837). This includes training for 32-Hour scaffold installer and remover class, 4-Hour scaffold user card, 4-Hour flagger card, confined space entry card, OSHA 10-Hour card, OSHA asbestos awareness card, OSHA crystalline silica training, FDNY certificates, S56 fire safety manager training, F60 fireguard training, OSHA 30-Hour cards, and CPR, AED and first aid training. (Tr. 832-833). Trade Off is proud to state that 97% of its employees are OSHA 30-Hour training certified and compliant with Local Law 196. (Tr. 832).

⁴ Although there was significant mention of safety harnesses at hearing, safety harnesses are not required PPE. Neither OSHA nor the New York Department of Building code require a certain number of safety harnesses per jobsite. (Tr. 836). Regardless, Trade Off prefers its laborers do not do any work that needs harnesses and prefers to engage those who are trained to use harnesses. If safety harnesses are needed for Trade Off’s scope of work, which is infrequent, then Trade Off or the General Contractor at the jobsite provides the needed safety harness(es). (Tr. 834-835, 866). Under no circumstances are Trade Off’s employees required to perform work that needs a safety harness if no such harness is available. (Tr. 835-836). In that regard, Trade Off has never refused to provide a safety

To support Trade Off's jobsite safety, a third-party site safety manager is usually contracted by the jobsite's general contractor. (Tr. 846-847). The designated site safety manager is on the jobsite whenever a laborer is working on the jobsite. (Tr. 847). The site safety manager's license, responsibilities and authority emanate from Chapter 33 of the New York Building Code. (Tr. 506, 519, 847). The site safety manager's role is to "make sure that all the workmen on the job site work in a safe environment, that they have proper tools, proper protection, equipment for themselves, personal PPEs they call it, and also for the general public that's -- that walks on the sidewalks around this building." (Tr. 506, 847). If the site safety manager learns that a worker does not have a valid OSHA certificate or engages in an unsafe practice, then the site safety manager has the authority to remove the worker from that jobsite. (Tr. 848). The site safety manager's functions are limited solely to the safety of the jobsite. (Tr. 519-520, 848). The site safety manager does not have authority to terminate the employment of any worker. (Tr. 521, 848-849). Similarly, the site safety manager does not have any authority or involvement in deciding which employees a contractor sends to work on a jobsite. (Tr. 519-520, 849). For that reason, Hagedorn testified that he is not aware of a single occasion in his five years with Trade Off that a site safety manager decided or directed Trade Off to employ a specific laborer. (Tr. 851). So long as the worker appears with a valid OSHA certificate and engages in safe practices on the site, then the worker remains on the site. Only Hagedorn, the project managers and the client decide the number of workers and who it sends to a jobsite. (Tr. 849). Trade Off's employees are informed that the site safety manager has authority to ensure

harness when needed. No employee has ever been disciplined or terminated for requesting a safety harness. (Tr. 835).

they have their OSHA certificates and are working safely. (Tr. 849). But Trade Off's employees are also informed that all other authority comes from the foreman or Trade Off supervisors.⁵

D. The Union's Efforts to Damage Trade Off

Although not relevant to the Complaint allegations, the record contains evidence as to the Union's efforts to damage Trade Off's reputation. For more than two years, the Union engaged in a pattern of harassment and intimidation of Trade Off's management team and employees. Trade Off personnel have been followed and threatened. As Your Honor saw, Hagedorn was visibly shaken in the presence of Union representative Paris Simmons ("Simmons") at the hearing and refused to testify in his presence (which was the Union's tactic in bringing Simmons to the hearing only on the day Hagedorn was scheduled to testify). The record also contains evidence that the Union created unsafe working conditions on the job. At least three litigations are pending between the parties outside of the NLRB. The instant charges are the Union's use and abuse of the NLRB's process to put more pressure on Trade Off.

For its part, Trade Off has exercised its rights under Section 8(c) of the Act to discuss the Union's actions with its employees. Trade Off remains committed to protecting its management team and personnel from any harassment and intimidation. Trade Off will continue to perform its construction services for its clients and will continue to abide by the law.

⁵ It is anticipated that the Union will use its post-hearing brief to further smear Trade Off's reputation by claiming it provides unsafe working conditions. However, the record is silent as to any OSHA or New York Department of Building citations, or any credible evidence as to unsafe conditions. Of course, an employee testifying that a construction jobsite is dusty or his belief that more dust masks are needed, does not amount to an unsafe work environment as that would deem all construction sites, which are inherently dusty, as being unsafe.

II. Riccie Haneiph's Discharge

Haneiph was referred through the CEO and hired by Trade Off in June 2016. Upon hire, Haneiph, like all other Trade Off employees, was provided with the Company's Code of Conduct (R.Exs. 6, 7) which explained that the wearing of proper PPE, including construction boots, was required at all times on the jobsite. Haneiph signed-off that he received the Code of Conduct and reported to work thereafter wearing PPE. (R.Ex. 11).

As required by Trade Off before dispatching a worker to a jobsite, Haneiph possessed his OSHA 10-Hour training certificate. Judicial notice should be taken that part of the OSHA 10-Hour training includes review of OSHA standard 1910.136(a) which provides:

General requirements. The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, or when the use of protective footwear will protect the affected employee from an electrical hazard, such as a static-discharge or electric-shock hazard, that remains after the employer takes other necessary protective measures.

Moreover, while working at Trade Off, the Company paid for and facilitated Haneiph's receiving his OSHA flagger certification. (Tr. 221).

Haneiph worked briefly and sporadically for Trade Off, as confirmed by his payroll records in evidence as R.Ex. 10. Haneiph's last day of work was June 20, 2017 when he worked at 118 Fulton Street.⁶ (GC.Ex. 8; Tr. 867). Haneiph's last paycheck, dated June 23 for the payroll week of June 14-June 20, 2017, shows he was paid for his 8 hours of work on June 20. (See R.Ex. 10 last page). Haneiph did not work after June 20.

On June 21, Haneiph received a call from field supervisor CJ Erickson to report to work at the 202 E. 95th Street jobsite. Haneiph reported to work in his Adidas sneakers, as first seen by

⁶ All dates hereinafter are 2017 unless otherwise noted.

foreman Derrick Howard (“Howard”). (Tr. 867-868). Howard called Hagedorn and Hagedorn instructed Howard to send Haneiph home. (Tr. 868). Hagedorn decided to terminate Haneiph’s employment at that time effective June 21 because he reported to work in sneakers. (Tr. 867, 868-869).

After the June 21 termination, Hagedorn never again referred Haneiph to a jobsite, as he was terminated. (Tr. 869). Hagedorn rightfully believed that Haneiph was unreliable because he could not even show up in proper PPE. (Tr. 869).

At hearing, Haneiph admitted reporting to the 202 E. 95th Street jobsite in sneakers and being sent home at the direction of Hagedorn. (Tr. 163-168). Haneiph further admitted at hearing that he violated safety rules by wearing Adidas on a construction site. (Tr. 196). Haneiph correctly reflected upon causing his own termination by stating “I feel like I was being on punishment for showing up without -- showing up to work in sneakers.” (Tr. 229).

III. Larry Kerr’s and Willie Zimmerman’s Discharges

In November 2017, Kerr and Zimmerman started working as laborers at the 220 E. 95th Street jobsite. Shortly thereafter, due to the stage of the construction, Hagedorn decided to implement a manpower cut of laborers at this jobsite effective December 23. Zimmerman was one of the laborers included in this manpower cut, but Kerr was not. (Tr. 879-880). As with prior manpower cuts, the laid off employees were to wait recall by Hagedorn. (Tr. 880).

Kerr and Zimmerman, who call each other “god brothers,” contrived a scheme to get Zimmerman back to work at 202 E. 95th Street. On Saturday, January 6, Kerr approached foreman Cesar Ordonez (“Ordonez”) and told Ordonez that Zimmerman would be working at the jobsite that day. Ordonez (as could be expected) said that is not protocol and that Kerr needed

Hagedorn's approval. (R.Ex. 12; Tr. 883). Kerr admitted that Ordonez told him twice to get Hagedorn's approval.

Q. Do you remember when you had this conversation with Cesar?

A. A little after I sent Justin the text message, when he didn't respond. And he -- Cesar told me to ask Justin. I said, I did already.

Q. What did you say to . . . Cesar?

A. I said, Michelle at site safety asked for Willie to come back. And he said, you have to talk to Justin. I said I sent him a text message already.

Q. Okay. So Cesar said you have to talk to Justin?

A. Um-hum.

Q. You said, I sent him a text message. And then what did Cesar say?

A. All he said was okay, pretty much.
(Tr. 461).

The conversation between Ordonez and Kerr ended there. Ordonez then called Hagedorn to report that Kerr had said Zimmerman would be coming to work, and that he (Ordonez) said it had to be cleared by Hagedorn. (Tr. 883). Shortly thereafter, Hagedorn received a text from Kerr stating that "Michel", the jobsite's site safety manager, "said she wants Willie [Zimmerman] back here on this site . . . I told her I would contact you first though." (GC.Ex 17). Hagedorn did not respond to Kerr's text or approve Zimmerman coming to work. (Tr. 460, 475, 880-881, 882). Without receiving Hagedorn's approval (even though Ordonez twice told him it was needed and Kerr texted Hagedorn seeking such approval), Kerr called Zimmerman and Zimmerman reported to work.

Significantly, at hearing, Kerr admitted that he needed Hagedorn's approval, never received it, yet still called in Zimmerman to work!

Q. You sent this text message to Justin because you needed his approval to have Willie work on the job site, is that right?

A. Yes.

Q. And you never received Justin's approval to have Willie work on the job site; is that correct?

A. He didn't respond to the text message.
(Tr. 487).

Similarly, Zimmerman testified that he knew Hagedorn did not approve his reporting to work, but did so anyway.

Q. And the text from Larry to Justin was to get approval from Justin?

A. Yes.

Q. And Larry also told you that Justin never responded to that text; is that right?

A. I believe, yes. That particular day, yes.

(Tr. 431-432).

Concerned that a laborer decided to call another laborer to work, on January 6, Hagedorn wrote a detailed email to his supervisors informing them of Kerr's and Zimmerman's actions. (Tr. 883; R.Ex. 12). That same day, Hagedorn decided to terminate Kerr's and Zimmerman's employment based on this clear violation of policy and industrial norms.⁷ (Tr. 886; R.Ex. 12).

The following work day, Monday January 8, Hagedorn went to the jobsite to speak with site safety manager, Michelle Depew ("Depew"), to confirm that she had not overstepped her authority by asking Kerr to have Zimmerman report to the jobsite. (Tr. 884-885). Depew denied doing so.⁸ (Tr. 882, 884-885). Similarly, at hearing, Depew testified that Kerr approached her and asked "if it would be okay if Zimmerman could come back" and she told Kerr that he had to get approval from his Trade Off foreman if Zimmerman was to work on the jobsite. (Tr. 514, 519).

Emboldened by what he heard from Depew, Hagedorn followed through with his decision to terminate Kerr's and Zimmerman's employment. On January 9, Hagedorn went to the jobsite and met separately with Kerr and Zimmerman. He explained that they were being terminated for

⁷ Hagedorn's decision to terminate on January 6 predates the protected activity the General Counsel relies upon to prove its case; namely, Kerr and Zimmerman visiting the Mason Tenders' training center on January 8. Though Abadie considered giving a break to Kerr and Zimmerman but he was overridden by Hagedorn who has final decision-making authority.

⁸ Depew further testified at hearing that she did not have the authority to tell a foreman that a particular employee should be assigned to a job. (Tr. 519-520, 524).

violating Trade Off's policies and not following orders, and handed them termination letters. (GC.Exs. 18, 24; Tr. 886-887). Hagedorn had no knowledge that Kerr and Zimmerman went to the Mason Tenders training center on January 8 until the hearing before Your Honor. Hagedorn certainly did not know about the January 8 field trip on January 6 when he initially decided to terminate their employment and on January 8 after he met with Depew and confirmed his prior decision.

Kerr and Zimmerman were terminated for this scheme. Kerr knew that only Hagedorn could direct a laborer to report to a jobsite. Kerr was twice told by Ordonez and by Depew that Trade Off/Hagedorn had to approve Zimmerman reporting to the jobsite. Yet, Kerr ignored these directives and had Zimmerman report to work without authorization.

At hearing, Kerr and Zimmerman tried to explain away their deceit by further lies and obstructionist testimony. Their testimony also revealed that they both stole two-plus hours of time on January 8 by leaving the jobsite to go to the training center, further demonstrating their lack of reliability and disdain for Trade Off's policies.

IV. Darrell Robinson's and Darrell Thomas's Discharges

On October 4, 2017, Robinson and Thomas were at the center of what almost became a riot outside of the jobsite at 264 West Street. Apparently, Robinson, Thomas and Union representative Paris Simmons ("Simmons") went to the jobsite to get employees to sign a petition about a then-recently announced change in Trade Off's pay practice. (GC.Ex. 5). At the jobsite, Robinson and Thomas acted aggressively towards foreman Delbert Hall ("Hall"). Thomas recalled that both Robinson and him were "getting riled up" and "it got hot." (Tr. 366). Robinson testified this was a "big commotion" that involved "like, you know, cursing, yelling.

Big confrontation. . . Basically, it was a confrontation between Delbert, me, . . . and Darrell Thomas.” (Tr. 76). Some of this exchange is captured on the video in evidence as GC.Ex. 3.⁹

In response to this display of aggression, Trade Off employee Jerry Industrious reported to Hagedorn that he was concerned for worker safety. Specifically, Industrious said that “there’s a lot of commotion going on at the site,” and that “lot of people are yelling and screaming.” (Tr. 893-894; R.Ex. 28). Also, the jobsite’s site safety manager Al Calderone (“Calderone”) reported to Hagedorn that Thomas and Robinson were causing a serious problem that raised concern about the safety, health and well-being of Trade Off workers. (Tr. 898; R.Ex. 28). Calderone reported that multiple fights almost broke out before the 7:00 am shift start. Similarly, Trade Off hoist operator Tiuana Greene called Abadie to complain that she was being harassed by Thomas and Robinson. (R.Ex. 28).

Despite being aggressively confronted, Hall did not prohibit Robinson or Thomas from seeking to get employees to sign the petition. Rather, he endured their wrath and ordered all to report into the building for work at the 7:00 a.m. shift start time, which they did without incident.

But Robinson’s and Thomas’s aggression towards Hall spilled over into the workplace. Both Robinson and Thomas refused direct orders by Hall that one of them had to clean the basement.

Robinson testified that he and Thomas went inside the building and took the hoist with Hall to the 9th floor. (Tr., 85). Once they got to the 9th floor, Thomas walked off the hoist first. Then, as Robinson was walking off the hoist, Hall “tapped [his] shoulder and said you got to go

⁹ The recording in evidence does not capture the entirety of the “big commotion” according to the testimony of many witnesses who provided details beyond what is seen in the recording. Thomas testified that “even when you see the video with me and Delbert going into -- you know, you only see a piece and it got heated. (Tr. 281, 365). Respectfully, Your Honor should not rely on the video clips as they should not have been admitted into evidence at hearing over Respondents’ multiple objections.

to the basement.” (Tr. 86-87, 134-135). Robinson kept walking and did not go to the basement as directed. Although Robinson had worked in the basement before, he did not want to split up from Thomas because “[w]e always was partners on the site.”¹⁰ (Tr. 88-89).

Thomas corroborated that he went in the hoist to the 9th floor with Robinson and Hall. He admits that when the hoist got to the 9th floor, he walked out first, and Hall told Robinson (who was second to leave the hoist) that either one of them, Robinson or Thomas, had to go work in the basement. (Tr. 354-355). According to Thomas, Robinson conveyed Hall’s directive to him, “probably like a couple of seconds, 10, 15 seconds” after they got out of the hoist. (Tr. 356). Despite Robinson communicating Hall’s directive that one of them had to go to the basement, Thomas refused to acknowledge at the hearing that he was directed by Hall to go to the basement because Hall did not directly speak with him. (Thomas’s contention that he was not the one directly ordered to go to the basement is an obvious ploy to pin the insubordination on Robinson, and his lack of credibility is discussed below.)

It is undisputed throughout the record that neither Robinson nor Thomas reported to the basement for work as ordered by Hall.

Thereafter, Robinson and Thomas refused a second directive for one of them to report to work in the basement. According to Thomas’s testimony and his sworn affidavit (R.Ex. 2), later that same day, Hall “approached Robinson and me and said we have to go to the basement.” (Tr. 361-362, 386). Thomas admitted that he did not go to the basement then either. “No, I went back to the ninth floor to finish my work.” (Tr. 362). Thomas fessed up to his insubordination in

¹⁰ Hagedorn credibly testified that there is no policy in place for laborers to work in teams. Whether laborers work alone or together depends on the tasks. (Tr. 914). It is for the foreman to decide if laborers work alone or with other laborers. (Tr. 915).

direct response to questions from Your Honor in recalling that Hall said that he wants “one of us to go to the basement” and they both went back to the 9th floor instead of the basement. (Tr. 386).

That morning, Hagedorn arrived at the jobsite and was “greeted” by Simmons who followed him around the perimeter of the jobsite.¹¹ After enduring Simmons’s harassment, Hagedorn entered the building. He first spoke with Hall who reported that Robinson and Thomas were not complying with his work orders. (Tr. 902). Hagedorn then found Robinson and Thomas hanging around the loading dock, which is located on the ground floor area near the hoist. (Tr. 903-904). Hagedorn asked Robinson and Thomas why they were not working and they responded they wanted to have a meeting. (Tr. 904). Hagedorn refused to meet with them and left to find Hall. When Hagedorn returned to the loading dock, Robinson and Thomas “were still standing there, not doing any work, just walking in circles, talking amongst themselves” instead of “one was supposed to be in the 9th floor and one was also to be cleaning in the basement.” (Tr. 904-905). Hagedorn told them that if they were not going to do their work that they would be asked to leave the site. In response, Robinson and Thomas “both became very upset. They both started to scream, yell, curse. Mr. Darrell Thomas lunged at foreman Delbert Hall. Mr. David Robinson had to step in between the two of them to stop him from striking him.” (Tr. 905-906). Thereafter, Hagedorn told Robinson and Thomas that their employment was being terminated for insubordination, and they were escorted out of the building. (R.Ex. 2; Tr. 364, 906).

The record evidence established that: (1) foreman assign work to laborers, (2) laborers are required to follow the foreman’s orders, and (3) laborers who refuse to follow a foreman’s orders are deemed insubordinate and terminated. Both Robinson and Thomas admitted that they

refused to follow Hall's directives for one of them to work in the basement. (Tr. 107-108) Due to their insubordination, Hagedorn terminated their employment on October 4, which was consistent with his terminations of all other insubordinate employees.

V. State Court Litigation Against the Union and Former Employees

On April 20, 2017, Trade Off filed a lawsuit in the Supreme Court of the State of New York, County of Nassau, against the Union and former employees Ricardo Pimentel ("Pimentel") and Darrell Jamison ("Jamison"). The lawsuit, docketed as *Trade Off, LLV v. Construction & General Building Laborers' Local 79, et al.*, Index No. 603451.2017 ("Lawsuit"), is limited to alleged state law violations for defamation and libel *per se*. (GC.Ex. 22). The false statements at issue in the Lawsuit include but are not limited to statements made by the defendants that: (1) at Trade Off "you gotta" fight, argue and push for a safety harness "because you gotta do a lot of dangerous things just being a laborer"; (2) at Trade Off "[t]here was no benefits"; (3) Trade Off's "firing of a worker who requested a safety harness on the job; and (4) when Jamison complained about not having a safety harness a "supervisor 'pretty much cursed me out,' threatened to cut his pay by \$5 an hour, and hung up on him."

There is ample record evidence that will be used to support Trade Off's prosecution of the Lawsuit for state law violations. As to the unlawful statements regarding benefits, the record evidence contains documentary and testimonial evidence that Trade Off provides benefits. As stated above in Section I.B, all Trade Off employees are entitled to and/or or eligible for paid sick day benefits, health benefits, unemployment benefits, and workers compensation benefits. Additionally, some Trade Off employees are eligible for retirement benefits. Witnesses testified

¹¹ As set forth in R.Ex. 8 and testimony at hearing, Simmons's harassment on October 4 at the jobsite is consistent with his aggression towards Hagedorn on other occasions.

that they were entitled to benefits, had discussions with management about benefits, had discussions with co-workers about benefits, and received benefits. (Tr. 44, 102, 103-104, 206-207, 331, 866, 915, 991). Even the Union's handout targeted at Trade Off, in evidence at GC.Ex. 4, states that Trade Off provides benefits "We can't get access to the questionable retirement benefits they promise us. The so called 'health insurance' is awful." GC.Ex. 4 explicitly confirms the Union's understanding that Trade Off provides benefits (albeit benefits that employees allegedly cannot seem to access or of alleged poor quality).

As to the unlawful statements regarding an unsafe work environment, the record evidence does not contain a single, credible example of an unsafe work condition. Conversely, the record contains an abundance of evidence that Trade Off takes safety very seriously. More specifically, as to safety harnesses, the record evidence is undisputed that no Trade Off employee was ever disciplined or discharged for requesting a safety harness. (Tr. 835).

Twenty-months have passed and the Lawsuit remains pending in State court which shows that no Motion to Dismiss was filed by defendants or granted in their favor. The Lawsuit will continue to be litigated.

LEGAL ARGUMENT

I. The Section 8(a)(3) Allegations

A. The Legal Standards

The Complaint contains one failure to consider/hire/discharge allegations (Haneiph) and four unlawful discharge allegations (Kerr, Zimmerman, Robinson, Thomas). Following are the relevant legal standards.

For a refusal to consider and hire allegation, the General Counsel has several requirements it must satisfy. First, the General Counsel must establish that the applicant “is someone genuinely interested in seeking to establish an employment relationship with the employer.” *Toering Elec. Co. & Foster Elec.*, 351 NLRB 225, 228 (2007). In order to establish a genuine interest, there must be a showing that “(1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer.” *See id.* at 233. The burden of proof for prong one is placed on the General Counsel, and for prong two on the employer.¹² In the event the employer puts forth evidence that contests the genuineness of the application, the General Counsel “must then rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer.” *See id.*

If the General Counsel is able to establish that there was a genuine application for employment, it then must meet its *FES* refusal to hire burden. *See Toering Elec. Co.*, 351 NLRB at 225 (“By imposing [the *Toering Elec. Co.*] requirement under *FES*, we shall prevent those

¹² “[T]he employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon

who are not in any genuine sense real applicants for employment from being treated by the Board as if they were”). Pursuant to the *FES* standard, the General Counsel must first establish

at the hearing on the merits: (1) that the 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, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, A Div. of Thermo Power, 331 NLRB 9, 12 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). This framework requires a “showing of an available opening ... that the applicant had experience or training relevant to the announced or generally known requirements of the opening.” *See id.*

If the General Counsel meets its burden, the employer is required to “show that it would not have hired the applicants even in the absence of their union activity or affiliation.” *FES*, 331 NLRB at 12. As an initial matter, the employer may rebut the General Counsel’s argument by introducing evidence that the applicant did not genuinely apply for the position that the employer was hiring for. *See Toering Elec. Co.*, 351 NLRB 225, 238, n. 53 (“Such evidence may also be probative of the employer’s rebuttal burden under *FES*, as would the applicant’s failure to apply in the manner lawfully required by the employer”). Additionally, the employer can show that it would not have hired the applicants by establishing “the applicants were not qualified for the positions it was filling” because “they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications.” *See FES*, 331 NLRB at 12.

the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.” *Toering Elec. Co. & Foster Elec.*, 351 NLRB at 233.

The above-stated *FES* standard applies in the refusal to rehire context. See *US Foods, Inc.*, 364 NLRB No. 156, *1, n. 1 (Dec. 1, 2016) (applying *FES* in the refusal to rehire context).

For a discharge allegation, the mixed-motive theory governs. In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the NLRB restated and refined its *Wright Line*¹³ test for determining whether there has been a violation of Section 8(a)(3) of the Act in so-called mixed motive cases. Under the test, the NLRB has always required the General Counsel to persuade that anti-union sentiment was a substantial or “motivating factor” in the challenged employer decision. The classic elements commonly required to make out a *prima facie* case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge of it, and employer animus. *Caribe Ford*, 348 NLRB 1108 (2006). See *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991) (“[I]n the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.”). The General Counsel “must establish a motivational link, or nexus, between the employee’s protected activity and the adverse employment action.” *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Generalized animus towards union activity is insufficient to satisfy this burden. Without proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of union activity — the allegation must fail.

If the General Counsel establishes a *prima facie* case, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Office of Workers’ Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2552, 2557-2558 (1994). Furthermore, it is well-established in Board law that the *Wright Line* test is a subjective standard that focuses on the genuineness of

the employer's stated reason for the action(s) taken, not on the correctness of the action(s) taken. *See e.g., Retlaw Broadcasting Co.*, 310 NLRB 984, 992 (1993). It is not for the Board to evaluate whether or not the reasons asserted make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. *See Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993) (“[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change”); *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position”).

Where the employer meets its burden of persuasion that it would have taken the action regardless of the employee's protected activity, the General Counsel is required to demonstrate that such affirmative defense(s) are pretextual and that the alleged discriminatory conduct would not have taken place but for the employee's protected activity. *Kmart Corporation*, 320 NLRB 1179, 1180 (1996).

Throughout this burden shifting analysis, the ultimate burden remains on the General Counsel to prove the elements of an unfair labor practice by a preponderance of the evidence. Indeed, despite the commonly used jargon of “*prima facie*” case, the *Wright Line* analysis

¹³ 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir, 1981), *cert. denied* 455 US. 989 (1982).

mandates that the General Counsel possess at all times the overall burden of persuading the factfinder that the employer engaged in unlawful discrimination.

B. The General Counsel Failed to Prove the Company Violated Section 8(a)(3) of the Act by Discharging and then Failing to Consider for Hire or Hire Riccie Haneiph as Alleged in Complaint Paragraph 12

The General Counsel sought to prosecute a refusal to consider or hire claim, as alleged in Complaint Paragraph 12, but failed to adduce supporting evidence. Instead of withdrawing the allegation, the General Counsel chose to hedge its bets by amending the Complaint mid-hearing to also allege an unlawful discharge of Haneiph. This belated and alternative pleading illustrates the weakness in the General Counsel's evidence and lack of conviction regarding Haneiph's claims. A review of the record evidence manifests that the General Counsel failed to prove that Trade Off unlawfully discharged Haneiph or failed to consider for hire or hire Haneiph, as alleged.

It must be noted at the onset that Charge 2-CA-205658 initially contained the allegations that Trade Off unlawfully discharged Haneiph. After investigation, the discharge allegations were withdrawn on May 31, 2018. Only the allegations regarding the refusal to consider for hire or hire of Haneiph were set for hearing in Complaint Paragraph 12.¹⁴

As detailed in the Statement of Facts, the record evidence establishes that Trade Off terminated Haneiph's employment after he reported to the 202 E. 95th Street on June 21 wearing Adidas sneakers instead of construction boots (which is, of course, required PPE for construction work). Indeed, Haneiph's testimony corroborated the reason for his termination because whenever he reached out to Hagedorn for work, Hagedorn repeatedly told Haneiph that Haneiph

¹⁴ Although Your Honor can deduce this withdrawal from the formal documents in the record, Your Honor should take judicial notice of the attached printout from the NLRB's website showing the May 31, 2018 withdrawal. A printout of the NLRB's website is attached at Tab A for your ease of reference.

would not be rehired due to Haneiph previously reporting to work in Adidas. (Tr. 178-179: “he just kept on telling me that I showed up with -- without boots. And that's all I kept hearing. Oh, you showed up without boots”, Tr. 181-182: “It was basically the same as others, him bringing up the fact that I showed up to work without boots.”; Tr. 200: “He just kept on saying that I showed up without boots, that I showed up with sneakers. I kept on asking for work and his -- the only thing he just kept on saying was that he would give me a call when there's -- when there's something available. But he always brought up the fact that I had sneakers on.” Haneiph rightfully felt “like I was being on punishment for showing up without -- showing up to work in sneakers” because he was. (Tr. 229). Haneiph was never offered work after June 21 for that reason.

1. The General Counsel Did Not Prove that the Company had Knowledge of Haneiph’s Alleged Protected Activity to Support a Violation under *Wright Line*

Despite the fact that the non-discriminatory basis for Haneiph’s termination is iron-clad, the General Counsel cannot set forth a *prima facie* case under *Wright Line* because the record does not contain an iota of evidence that Haneiph engaged in protected activity of which the Company had knowledge when it discharged Haneiph on June 21.

The record establishes that, on July 18, about one month after his termination, Haneiph for the first time posted on Facebook his involvement with the Union. (GC.Ex. 10). This Facebook post is the General Counsel’s proffered evidence of Haneiph’s protected activity on which it prosecutes (*see* Complaint Paragraph 12(a)), and no other evidence, credible or otherwise, exists in the record connecting Haneiph to any protected activity of which Trade Off had knowledge before his June 21 termination. Indeed, Hagedorn did not even learn about the July 18 Facebook posting until July 26. (Tr. 871; GC.Ex. 15).

In the event the General Counsel points to some other testimony of Haneiph’s to manufacture concerted protected activity preceding June 21, such testimony does not rise to the

level required to establish such activity. Haneiph's testimony that he complained about dust masks cannot be used to establish protected concerted activity. His testimony was vague and unreliable in that he did not testify as to any specific dates, locations, times or complaints he allegedly made. He also could not remember any coworkers he spoke with about dust masks. (Tr. 147). Moreover, generalized requests for additional dust masks on a construction site cannot be deemed protected concerted activity or else all employees at all times could be deemed engaged in protected concerted activity as requests for dust masks occur all the time.

Similarly, Haneiph's story about having to work on a jobsite without a safety harness was implausible as he testified about work that Trade Off does not perform. (Tr. 877). Regardless, he never lodged a complaint to Hagedorn or anyone else regarding safety harnesses, and if he did, such a complaint was limited to his own personal gripe. Indeed, Hagedorn credibly testified that he did not receive any complaints from Haneiph about safety harnesses or other safety issues before his June 21 discharge. (Tr. 870).

Haneiph's individualized complaints about Trade Off fall well short of protected concerted activity. *Alstate Maintenance*, 367 NLRB No. 68 (January 11, 2019); *Meyers Industries*, 281 NLRB 882, 887 (1986), (the Board clarified its definition of concerted activity encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management). The mere griping by an employee without any evidence of being authorized to speak or speaking on behalf of others does not rise to the level of protected concerted activity. See e.g., *Adelphi Institute, Inc.*, 287 NLRB 1073 (1988), *Goodyear Tire & Rubber Co.*, 269 NLRB 881 (1984).

Given this undisputed sequence of events, there is no evidence of any protected activity by Haneiph of which Trade Off had knowledge before his June 21 termination. It goes without saying that Trade Off's termination of Haneiph could not have been casually connected to his Facebook posting that the Company learned about more than one month after his June 21 termination.

2. Even Assuming it Had Knowledge of Haneiph's Protected Activity and Harbored Animus, the Company Would Have Discharged Haneiph for his Policy Violation

Trade Off firmly established in the record without contradiction that OSHA regulations Trade Off's policy and common sense mandate employees wear PPE, including construction boots, on the jobsite.

Haneiph admitted to wearing Adidas sneakers instead of construction boots to the 202 E. 95th Street jobsite. He did so despite having his OSHA 10-Hour card, signing-off on Trade Off's policies, and previously reporting to Trade Off jobsites with his construction boots

In sum, all evidence proves that the Company would have terminated Haneiph for not wearing PPE, and there is no evidence to the contrary.

3. The General Counsel Did Not Prove that the Company's Legitimate Business Reasons for Discharging Haneiph were Pretextual

To resuscitate its case, the General Counsel will likely point to alleged inconsistencies in the factual record to claim that Trade Off's reason for discharging Haneiph – because he wore sneakers to a jobsite, is pretextual. But these factual inconsistencies fall short of establishing pretext.

First, the General Counsel will likely target the absence of a single document stating that Haneiph's employment was terminated on June 21. The absence of a termination document is

insignificant as the record evidence shows that Trade Off does not always issue termination letters, and the Company's Human Resources practices were inconsistent given turnover in the department. (Tr. 697, 720, 922).¹⁵ More importantly, the record evidence conclusively establishes June 21 as Haneiph's termination date. Hagedorn testified that he is certain June 21 is the date. (Tr. 868, 929-930). Haneiph worked at 118 Fulton Street on June 20 and his payroll documents show that was his last paid day of work. (R.Ex. 10; GC.Exs. 8, 39, 40). Haneiph was then asked by Hagedorn through CJ Erickson to report to the 202 E. 95th Street job on June 21. (Tr. 931). However due to his failure to wear the appropriate PPE, Haneiph was refused work on June 21, not paid for this date, and discharged. Logic dictates that if Haneiph's last day of work was June 20 and he never reported to work again after showing up in Adidas, then the Adidas incident was indeed June 21 as Hagedorn testified. The Adidas incident could not have occurred before June 21 – it makes no sense that Hagedorn would have removed Haneiph from the jobsite for wearing Adidas, then let him report back to work in the future, only to then refuse to permit him to work after June 20 for his prior wearing of Adidas to a jobsite. Trade Off's payroll records, coupled with Hagedorn's testimony, conclusively establishes that Haneiph's last day of employment with Trade Off was June 20 and the sneaker incident occurred on June 21.

Furthermore, although Haneiph testified on direct examination that the sneakers incident happened in February or March 2017, he admitted on cross examination that "it sounds about right" that the sneaker incident happened in June 2017. (Tr. 196). He better recalled that it was a "nice day. The sun was shining; it wasn't very cold or anything like that." (Tr. 196). His other testimony about working at various jobsites *after* the sneaker incident, such as at Clinton Street

¹⁵ Trade Off has gone through six Human Resources managers in the Company's short existence. (Tr. 720, 984). At times termination letters are not issued. (Tr. 922, 984).

when “it was starting to get chilly” show his overall confusion and that he was guessing at dates/months when testifying. (Tr. 204). Indeed, Haneiph admitted that “I’m not so good with the time.” (Tr. 206). Haneiph also failed to present any text messages or other communications to show that the Adidas incident happened in February or March.

Second, the General Counsel will take aim at the letters written by Trade Off’s Human Resources personnel. Admittedly, review of the letters shows the poor quality of Trade Off’s Human Resources and the glaring disconnect between management and Human Resources. GC.Ex. 37 states that Haneiph voluntarily quit his job, yet no party is making that claim. GC.Ex. 37 also states that, on July 19, Haneiph asked Human Resources for a letter stating that he is no longer employed with Trade Off. Because of the lack of communications between Human Resources and Hagedorn, Human Resources wrote a standard employment reference letter on July 19 wrongly stating that Haneiph remained employed and worked 40 hours per week. (GC.Ex. 9; Tr. 874). Both statements were erroneous as Haneiph was terminated on June 21 and, prior to that date, he infrequently worked for Trade Off and, when he did, it was for less than 40 hours per week. (R.Ex. 10). If anything, these Human Resources letters are useful to show that as of July 19 Haneiph was aware that his employment had been terminated as he requested confirmation of same from Human Resources to file for unemployment. Human Resources’s failure to provide an accurate letter does not change the fact that he was indeed terminated on June 21 (or, for purposes of this allegation, on any day before the Company learned of his Facebook post on July 26).

Similarly, GC.Ex. 38, which also contains inaccuracies at the behest of Human

Resources, supports the finding that Haneiph was indeed terminated by no later than July 17.¹⁶ The fact that Haneiph filed his unemployment claim seeking benefits for the period effective July 17 confirms that he knew he was terminated as of July 17 at the latest. (That date is still before the Company learned of Haneiph's Facebook post on July 26.) To the extent the General Counsel claims that Haneiph may have filed for unemployment due to a reduction in work as opposed to a termination, no such evidence exists in the record. In fact, even though Haneiph previously had sporadic work from Trade Off (R.Ex. 10), never before did he file for unemployment according to the record evidence.

Third, the General Counsel will point to the emails between Hagedorn and the CEO to bolster its claim that something other than Haneiph's wearing of sneakers to the job was behind the termination. Such emails do not show anything more than Hagedorn informing the CEO that Haneiph, who the CEO referred, was terminated for not wearing PPE and then sought to disparage Trade Off. (Tr. 872; GC.Ex. 15).¹⁷

Far from proving pretext, all other evidence establishes that Haneiph was terminated for reporting to work in his Adidas. Again, it bears repeating that Haneiph himself repeatedly testified that he was told over and over again after June 21 that he was not being assigned to work due to his wearing Adidas to the jobsite. All communications from June 21 forward stated that Haneiph was let go for wearing Adidas to the jobsite, which is evidently why he felt punished for wearing Adidas to work. (GC.Exs. 16, 20; Tr. Tr. 869-870, 874). Moreover, all of

¹⁶ GC.Ex. 38 is the second page to GC.Ex. 37 as both documents reference "Claimant" and were completed by Human Resources on August 3. GC.Ex. 38 erroneously reports that Haneiph voluntarily quit and that his last day worked was July 26. Human Resources likely used July 26 as the date because the NY DOL mailed the form back to Trade Off on July 26 as indicated on the top right of the form.

¹⁷ It is common practice to provide feedback to anyone who makes a referral for any reason, whether it is a referral to a restaurant, hair cutter, realtor, car salesman, etc. This is especially true for an ongoing referral source.

the evidence the General Counsel cites in support of its theory that Haneiph's termination did not occur on June 21 is belied by the fact that Haneiph was not paid for a day's work after June 20.

4. The General Counsel Did Not Prove its Alternative Theory that the Company Failed to Consider for Hire or Hire Haneiph Due to his Alleged Protected Activity to Support a Violation under *FES*

The General Counsel's alternative theory that Trade Off failed to consider for hire or hire Haneiph is an admission that Haneiph was previously terminated by Trade Off. Stated differently, had Haneiph not been previously discharged then this refusal to rehire claim could not exist. Therefore, in essence, the General Counsel concedes in bringing this claim that Trade Off did indeed terminate Haneiph. As stated above, Trade Off's termination of Haneiph on June 21 was lawful.

Like the discharge allegation, the General Counsel failed to prove a refusal to rehire allegation. The General Counsel failed to prove that Haneiph applied for work at Trade Off after his June 21 termination. Haneiph's vague recollection that he spoke with or texted Hagedorn was not substantiated. Indeed, after his June 21 termination, the only record evidence of Haneiph's communication with Trade Off is his August 2 text to Hagedorn which does not seek employment. (GC.Ex. 20). Despite being subpoenaed, Haneiph did not produce any texts other than the August 2 text. The inference is that no such texts exist. Correspondingly, as per subpoena, Hagedorn produced all texts he received from Haneiph and no texts exist to show Haneiph sought work from Trade Off post-June 21. (Tr. 703). Haneiph's testimony about having calls with Hagedorn was just as vague and unreliable. Like his inability to provide a consistent timeline as to the sneaker incident, Haneiph did not provide any dates, times, locations, durations or even what was allegedly said during the alleged calls with Hagedorn. Therefore, any testimony from Haneiph or Hagedorn about Haneiph asking for work may have occurred *before*

Haneiph posted on Facebook and Hagedorn came across such posting on July 26.

Even crediting Haneiph that he called Hagedorn, it appears that Haneiph was merely looking for the answer as to why he was no longer being asked to report to jobsites. He knew that the wearing of sneakers was the cause, but having never received a formal termination letter and instead receiving Human Resources's erroneous letters, Haneiph likely felt misled:

I'm going to say this -- can I say -- all right. I never knew that it completely ended, you understand? Meaning like, I'm trying -- I'm calling you because you never told me I'm fired. You're just saying -- it's basically like they didn't know what -- I'm on time out, I feel like punishment. I feel like I was being on punishment for showing up without -- showing up to work in sneakers. And it's like, okay, you showed up to work in sneakers, but no, you're not fired. (Tr. 229).

That said, Haneiph was not seeking re-employment. Thus, the General Counsel failed to prove prong one under *Toering Elec. Co.* and *FES*.

Assuming *arguendo* the General Counsel met its initial burden of proof under *Toering* and *FES* in that Haneiph "applied" for rehire through his alleged texts and calls to Hagedorn, the record evidence proves that Trade Off would have refused to consider for rehire or rehire Haneiph even in the absence of his protected activity. Haneiph's employment was terminated on June 21 for reporting to work wearing Adidas sneakers instead of construction boots. His flagrant violation of Company and industry-wide protocols showed his unreliability and lack of fitness for the job. There is no reason whatsoever that Trade Off (or any construction firm) would seek to employ a worker who fails to adhere to basic (and obvious) safety protocols. Given Trade Off's lawful termination of Haneiph on June 21, its subsequent refusal to rehire and employ him shortly thereafter his lawful termination does not violate the law. *See, e.g., Ozark Mountain Interiors*, WL 1492075 (June 25, 2004) (finding that the General Counsel had not met its burden, despite the fact that a former employee applied for a position while wearing union clothing, because the employer established "in light of its previous experience with him" that it

“would have refused to consider [him] for employment or to hire him regardless of his union affiliation or activities”); *Monfort of Colorado*, 298 NLRB 73 (1990) (receipt of prior discipline is lawful basis on which to determine hiring criteria). Simply put, an employee who was discharged for non-discriminatory reasons cannot proceed with a refusal to rehire case on the basis that he was not put to work right after his lawful termination.

* * *

Accordingly, Trade Off lawfully discharged Haneiph for legitimate business reasons. It had no obligation to consider or rehire Haneiph. The allegations contained in Complaint Paragraph 12 must be dismissed.

C. The General Counsel Failed to Prove the Company Violated Section 8(a)(3) of the Act by Discharging Larry Kerr and Willie Zimmerman as Alleged in Complaint Paragraph 14

Kerr and Zimmerman were caught red-handed scheming to have Zimmerman report to work without approval from management. It is undisputed in the record that only Hagedorn decides which laborers report to work and that Hagedorn did not authorize Zimmerman to report to work on January 6. Kerr’s and Zimmerman’s scheme included Kerr lying about receiving approval from the site safety manager for Zimmerman to report to work. Moreover, Kerr told Zimmerman to report to work despite Kerr’s knowledge that Zimmerman needed Hagedorn’s approval – the foreman twice told Kerr that he needed Hagedorn’s approval for Zimmerman to work. In turn, Kerr texted Hagedorn for his approval but Hagedorn did not reply with his approval. Knowing that he needed Hagedorn’s approval but did not have it, Kerr called Zimmerman and Zimmerman reported to work. For this legitimate reason alone (not that any more is needed), Hagedorn decided, and documented, on January 6 to terminate their employment.

The General Counsel's attempt to build a case on Kerr's and Zimmerman's going to the Union training school on January 8 as evidence of protected activity was easily dismantled at hearing. No credible record evidence was elicited that Trade Off had knowledge of their visit to the training center on January 8. The General Counsel's case is based solely on the loose testimony that Kerr and Zimmerman saw a green Hyundai in the area with an Hispanic looking guy. This flimsy "evidence" cannot prove that one of Trade Off's Hispanic supervisors was in the car and observed the alleged protected activity. In any event, the alleged protected activity occurred on January 8 whereas Hagedorn made the termination decision on January 6. To make matters worse for Kerr and Zimmerman, their testimony uncovered their previously unknown theft of two-plus hours of time each when they sneaked off the job on January 8 to go to the Union's training school, which makes them unfit for any potential reinstatement remedy.

Kerr's and Zimmerman's misconduct is indefensible, yet the General Counsel tried and failed to prove a violation of the Act.

1. The General Counsel Did Not Prove that the Company had Knowledge of Kerr's and Zimmerman's Alleged Protected Activity to Support a Violation under *Wright Line*

Uncertain to adduce supportive evidence at hearing, the General Counsel alternatively, and vaguely, pled in the Complaint that Kerr and Zimmerman were discharged for "engaging in activity in support of Local 79 and discussing their wages and terms and conditions of employment." There is no evidence in the record that Kerr and Zimmerman engaged in Union activity or that they engaged in protected concerted activity as defined in the Act. Instead, the General Counsel's case rested on Kerr's and Zimmerman's testimony that they went to the Mason Tenders training center on January 8 to file apprenticeship applications. Despite the contradictions in Kerr's and Zimmerman's testimony as to these events, what is certain is that

both Kerr and Zimmerman admitted to sneaking away from work during their shift for two-plus hours to go to the training center, and Trade Off paid them for this stolen time.

There is no evidence, credible or otherwise, that Trade Off had knowledge of Kerr's and Zimmerman's protected activity at the training center. For starters, there is no evidence that Trade Off was aware of the January 8 enrollment at the training center. Further, there is no evidence that Trade Off was aware that Kerr and Zimmerman went to the training center on January 8 (as the Company must have thought they were working at their assigned jobsite). The General Counsel's attempt to show Trade Off's knowledge never materialized – because Trade Off did not have knowledge. Kerr and Zimmerman testified as to a mysterious green Hyundai that passed by the training center twice that morning. Zimmerman testified that when he was waiting in line at the training center he saw the green Hyundai with two people in it, but “I couldn't even see their faces.” (Tr. 407). After he went into the training center, he again saw the green Hyundai but “I can't see who was in the car.” (Tr. 409). Zimmerman could not see their faces and admitted he “don't know” who was in the green Hyundai. (Tr. 428 1.23-429 1. 2). Similarly, Kerr testified that he saw the green Hyundai when at the training center, but he could not see the faces of the driver or passenger. (Tr. 468-469). When the Hyundai turned around and passed by again he still could not see their faces. (Tr. 473). And when he got out of the training center he saw the Hyundai parked, but again could not see who was in the car. (Tr. 474). On cross examination, Kerr admitted he saw the green Hyundai “in 2016 and 2015” but he “don't remember the dates,” and “don't know whose car it is.” Like Zimmerman, on January 8, Kerr did not know who was driving or in the passenger seat. (Tr. 491-492).

The General Counsel's and Union's decision not to subpoena the alleged driver and/or passenger of the green Hyundai speaks volumes. Simply put, Kerr and Zimmerman have no idea

who was in the green Hyundai, and the evidence adduced at hearing did not provide further clarity. Accordingly, the General Counsel and the Union did not subpoena the car's occupants – which would, of course, have been conclusive as to the allegations that Trade Off was tailing Kerr and Zimmerman. Absent evidence of any Trade Off manager or supervisor owning or being in the Hyundai on January 8, the General Counsel sought to draw a racially offensive connection that because someone in the car looked Hispanic then it must have been field supervisor Jose Bonilla. (Tr. 470). Aside from being racist, this conjecture cannot meet the General Counsel's *prima facie* case.

Not only did Kerr and Zimmerman fail to identify who was in the green Hyundai, they could not testify as to whose car it was. To the contrary, the irrefutable record evidence is that none of Trade Off's managers or supervisors own or drive a green Hyundai. (Tr. 855). Rather, the record evidence established that Bonilla drives a white Chevy Traverse, Edwin Muniz drives a red Ford Explorer, Tom Murphy drives a white Ford pickup truck, Jonathan Morales drives a silver Nissan pickup truck, David Townsend drives a BMW, Hagedorn drives a gray Chevy Silverado, and Abadie drives a white pickup truck. (Tr. 127, 590-592, 854-855).

Even if Kerr's and Zimmerman's testimony identified certain Trade Off managers or supervisors as being in a green Hyundai near the training center on January 8, there is still no record evidence that the purported Trade Off managers or supervisors knew of Kerr and Zimmerman and saw them waiting on line at the training center.

Furthermore, to the extent the General Counsel seeks to credit Kerr's and Zimmerman's guesses as to which Trade Off supervisors *may* have been present at the training center, their testimony cannot be credited. They both lack overall honesty and credibility. First, they both

sneaked away from work without authorization on January for two-plus hours.¹⁸ Second, they both stole time by accepting payment for the two-plus hours they were away on January 8. Third, they both concocted a scheme to get Zimmerman to work without Trade Off permitting Zimmerman to work. Fourth, Kerr lied in stating that site safety manager Depew requested Zimmerman report to work on January 6. Indeed, Depew credibly testified that Kerr *asked her* if his cousin could work and she said you need to ask Trade Off. Fifth, Kerr ignored foreman Ordonez's directives to receive approval from Hagedorn if Zimmerman is to work – Kerr did not receive approval from Hagedorn, which, in turn, is insubordination of Ordonez. Sixth, Kerr repeatedly lied under oath at hearing. For example, he testified that on January 8 he worked a full day, but moments later admitted he snuck away from the jobsite for over two hours. (Tr. 464).

Thus, there is no credible evidence in the record that Kerr and Zimmerman engaged in any protected activity of which Trade Off was aware before their terminations. This fact is fatal to the General Counsel's case. Unfortunately for the General Counsel, Your Honor presides over a court of law, not a fiction writing class. Accordingly, the record evidence does satisfy the General Counsel's burden for a Section 8(a)(3) claim, and this Complaint allegation warrants dismissal.

2. Even Assuming Trade Off Had Knowledge of Kerr's and Zimmerman's Protected Activity and Harbored Animus, the Company Would Have Discharged Kerr and Zimmerman Due to Their Misconduct

Assuming, *arguendo*, that Kerr and Zimmerman engaged in protected activity of which Trade Off was aware and that such protected activity was a motivating factor in Trade Off's

¹⁸ R.Ex. 13 shows that Kerr and Zimmerman signed-in at 6:30 a.m. and signed out at 3:30 p.m. As they did not report their two-plus hour absence from the jobsite and pocketed that pay, they engaged in textbook theft of time.

decision to discharge them, it is nonetheless indisputable in the record that Trade Off would have discharged Kerr and Zimmerman regardless of their supposed protected activity.

These two disreputable employees concocted a scheme to get Zimmerman paid for a day of work without approval from management. To do so, Kerr lied about a discussion with the site safety manager and disregarded two direct orders from his foreman Ordonez to get approval from Hagedorn. Knowing Hagedorn did not approve his working, Zimmerman reported to work anyway. Hagedorn decided to terminate when he learned of this scheme on January 6, pending confirmation with the site safety manager the next work day. Indeed, Hagedorn documented his decision to terminate Kerr and Zimmerman in a January 6 email. The following work day, January 8, Hagedorn spoke with site safety manager Depew who confirmed that she did not tell Kerr to have Zimmerman report to work.¹⁹ Thereafter, Trade Off informed Kerr and Zimmerman that they were terminated for their January 6 scheme.

Trade Off acted within its rights to discharge Kerr and Zimmerman for this scheme. It should go without saying that employees do not decide for themselves if they are allowed to work or if their friends, god-brothers, or whomever can work. That decision is for management and, in this case, Hagedorn's sole discretion. What's more, Kerr and Zimmerman lied to cover up their scheme. Moreover, Kerr also disobeyed his supervisor's direct orders to get Hagedorn's approval. No employer should have to tolerate this extensive misconduct.

It is well-established that the *Wright Line* test focuses on whether the employer's stated reason for the action(s) taken is genuine. *See Retlaw Broadcasting Co.*, 310 NLRB 984, 992 (1993). It is not for the NLRB to evaluate whether or not the reasons asserted make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-

discriminatory business reasons. *See Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993) (“[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.”), *citing NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enforcing in part 137 NLRB 306 (1962); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the NLRB should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position”).

Accordingly, this allegation warrants dismissal.

3. The General Counsel Did Not Prove that the Company’s Legitimate Business Reasons for Discharging Kerr and Zimmerman Were Pretextual

Any claim by the General Counsel that the Company’s reasons for discharging Kerr and Zimmerman were pretextual to mask discrimination are simply incredible. As discussed above, there is no record evidence that the Company knew Kerr and Zimmerman went to the Mason Tenders training center to establish a *prima facie* case. Notwithstanding, Kerr’s and Zimmerman’s attendance at the training center, Hagedorn decided to terminate – *before* Kerr’s and Zimmerman’s protected conduct. Because the decision to terminate occurred prior to any protected conduct, the claim must be dismissed. *See Hilman Rollers*, 2001 WL 1603788 (N.L.R.B. Div. of Judges Feb. 9, 2001) (no violation of the Act when the decision to terminate occurs prior to protected activity).

¹⁹ Both Hagedorn and Depew knew she did not have the authority to decide which laborers report to the jobsite.

Trade Off's reason for the terminations has remained consistent from the January 9 issuance of the terminations through the present. All evidence proves that what Kerr and Zimmerman did was dead wrong, and that Trade Off's decision to terminate had nothing to do with anything protected by the Act.

It is expected that the General Counsel will advance a handful of arguments to create doubt in Your Honor's judgment of the clear record evidence. As described below, these arguments are all unavailing.

First, the General Counsel will likely argue that there is no written policy against employees calling other employees to report to work. This is the classic red herring. It is akin to claiming no written policy exists that an employee can't decide on his own what time he wants to start and stop his shift. It is inherent in management's role and in Trade Off's practice that Hagedorn decides which laborers report to work on any given day.

Second, the General Counsel may argue that Hagedorn bears responsibility and condoned Zimmerman's working on January 6 because he never responded to Kerr's text seeking approval or had Zimmerman removed from the jobsite. Hagedorn was off work on January 6. (Tr. 934). Instead of dealing with this issue on his day off, Hagedorn wrote a detailed email to his team stating his decision to terminate. (R.Ex. 12). What's more, Hagedorn chose to override Abadie who suggested a last warning be issued. (GC.Ex. 45). Hagedorn makes the final decisions as to discipline and discharge. (Tr. 921).

Third, the General Counsel may argue that the termination letters issued to Kerr and Zimmerman contain multiple reasons for termination. (GC.Exs. 18, 24). Truth be told, Kerr's and Zimmerman's scheme could be couched as many things, including failure to follow policy and not following orders from a supervisor. As to the former, the policy breach is that laborers

do not schedule other laborer to work. As to the failure to follow orders, Kerr and Zimmerman refused the directive that only Hagedorn decides who reports to work. Kerr also failed to follow Ordonez's orders to obtain approval from Hagedorn before Zimmerman could work.

Fourth, the General Counsel may argue that Ordonez condoned Zimmerman's working on the jobsite. The record is clear, however, that Ordonez did not approve Zimmerman's working. Rather than approve Zimmerman's work, Ordonez twice told Kerr to check with Hagedorn and then the discussion ended – nothing more. (Tr. 461). Moreover, when Zimmerman arrived at the jobsite, Ordonez did not give any work orders to Zimmerman, establishing Ordonez's lack of approval. (Tr. 463).

Not a single word in the record contradicts Trade Off's stated reason for terminating Kerr's and Zimmerman's employment for their misconduct. Kerr and Zimmerman caused their own terminations and the NLRA cannot be abused to condone what they did. As stated above, the record is absent of pretext to counter the Company's legitimate business reasons for discharging Kerr and Zimmerman, and the allegations warrants dismissal.

* * *

To the extent Your Honor condones Kerr's and Zimmerman's scheme, you will signal to all employees that they can decide on their own when they report to work and that the NLRA can be used to undermine workplace stability.

Moreover, to the extent Your Honor ignores the record evidence and ignores the law (which, of course, is not expected), Kerr and Zimmerman's theft of time, discovered after the fact, effectively forfeits their potential reinstatement rights. They both admitted at hearing that they left the jobsite without permission, failed to report they did so, and accepted payment for this stolen time. Had the Company known about this theft of time, it certainly would have

terminated their employment. (Tr. 889-890). In that regard, the record contains unrefuted evidence that Trade Off does not tolerate and discharge employees who are caught stealing time. (See R.Exs. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26). Accordingly, notwithstanding the fact that Kerr and Zimmerman are not entitled to reinstatement, reinstatement is precluded and not an appropriate remedy.

Accordingly, Trade Off lawfully discharged Kerr and Zimmerman for legitimate business reasons. Your Honor cannot condone employees calling each other into work. The allegations contained in Complaint Paragraph 14 must be dismissed.

D. The General Counsel Failed to Prove the Company Violated Section 8(a)(3) of the Act by Discharging David Robinson and Darrell Thomas as Alleged in Complaint Paragraph 17.

While true that Robinson and Thomas engaged in Union activity on September 15 and October 4, their terminations for insubordination are straight-forward cases. Immediately preceding their October 4 shift, Robinson and Thomas stood in the street trying to get employees to sign a petition and harassed their direct supervisor, Delbert Hall (“Hall”). Their subsequent shift was filled with aggression towards Hall; they openly refused his direct orders – given twice on two occasions – that one of them had to work that day in the basement rather than the 9th floor. Robinson admitted that he received this order and refused to go to the basement. Thomas, being slick in his testimony, tried to cast blame on Robinson, but also ended up admitting that he, too, refused Hall’s order to go to the basement. Therefore, both Robinson and Thomas were properly terminated for insubordination. The undisputed evidence is that Trade Off terminates all employees who are insubordinate, and so treated Robinson and Thomas.

1. Even with Knowledge of their Union Activity, the Company Would Have Discharged Robinson and Thomas Due to Their Misconduct

The record evidence is clear that laborers are to follow their foreman's orders or else they will be terminated for insubordination. Robinson admitted that laborers take orders from the foreman on the jobsite and that he was required to listen to his foreman.

Q. When you work on a job site, you take your work orders from the foreman of the job site. Is that accurate?

A. Yes, sir.

Q. And is it accurate that when a foreman tells you to go to the second floor to work, you're supposed to follow the foreman's directive and go to the second floor and work; is that right?

A. Yes.

Q. And is it true if the foreman tells you to go to the tenth floor and work, you're supposed to follow the foreman's directive and go to the tenth floor and work; is that right?

A. Yes.

(Tr. 107-108).

Notably, Robinson did not testify that laborers are to question a foreman's direction to report to a location within a jobsite.

Inconsistent with his understanding of how work is assigned, Robinson admitted that Hall told him to go to the basement but he did not do so. On cross examination, Robinson admitted that he refused to follow Hall's order to work in the basement, which is clear insubordination.

Q. Sure. On October 4th, you admit that you refused to go to the basement when Delbert Hall directed you to do so; is that right?

A. I asked why.

Q. Did you go to the basement?

A. I did not go to the basement.

Q. So you refused to go to the basement as directed; is that right?

A. I didn't refuse. I just asked why.

Q. Did you do it?

A. I didn't.

(Tr. 108)

Given these admissions, it is irrefutable that Robinson engaged in insubordination when he questioned, rather than followed, a direct order to report to the basement.

Thomas approached his testimony differently than Robinson. Instead of admitting to what he did (or did not do for that matter), Thomas claimed that only Robinson was directed to go to the basement because Hall spoke directly to Robinson. Thomas's denials of being directed by Hall to work in the basement are incredulous. In essence, Thomas pleads that he was a victim of circumstance. Hall directed that either Robinson or Thomas go to the basement. However, neither did. Had Robinson left the hoist first, then Hall would have given the directive to Thomas to relay to Robinson. The reality is that Hall gave the directive as both were leaving the hoist that either Robinson or Thomas had to go to the basement. The directive was not given to just Robinson to go to the basement as Thomas would like Your Honor to believe.

Thomas's testimony about what he said to Hagedorn once Hagedorn terminated him further shows he was insubordinate. After Hagedorn told Thomas that he was being fired for insubordination because "the foreman told you to work and you're refusing to work," Thomas responded "I repeated I'm not refusing to work, but we work on the ninth floor." (Tr. 363). His admission to Hagedorn that he works on the 9th floor, rather than the location on which his supervisor tells him to work, underscored his insubordinate refusal to work in the basement.

By chance there remains any doubt that Thomas's denials of being insubordinate are credit-worthy, it must be noted that Thomas's overall testimony was unreliable. It was full of inconsistencies which he defended to no end. For example, Thomas testified at hearing that he had Magnacare health benefits but when shown his NLRB Affidavit (R.Ex.2) which stated he did not have benefits, Thomas refused to acknowledge the inaccuracy. (Tr. 319). Also, Thomas approached being a witness with a chip on his shoulder to argue whenever he could. For

example, when asked if he was paid for working eight hours on September 15, Thomas went off on an antagonistic rant. (Tr. 343). Moreover, Thomas was a biased witness who had effectively been bought off by the Union when it facilitated his receipt of journeyman status within 1-2 months of leaving Trade Off. (Tr. 323-324).

As if one act of insubordination was not enough, according to Thomas's testimony and his sworn affidavit (R.Ex. 2), later that same day, Hall approached Robinson and Thomas again and directed one of them to go to the basement. This time, Thomas admitted he did not go to the basement as ordered. (Perhaps Your Honor's questioning made him come clean. (Tr. 386)).

All told, Thomas's refusals to go to the basement, as well as Robinson's refusals, were clear-cut insubordination. Trade Off's decision to terminate Robinson and Thomas due to their insubordinate conduct is consistent with its treatment of other insubordinate employees. In that regard, the record contains unrefuted evidence that Trade Off does not tolerate insubordination, and discharges employees who do so. (See R.Exs. 40, 41, 42).

2. The General Counsel Did Not Prove that the Company's Legitimate Business Reasons for Discharging Robinson and Thomas Were Pretextual

Not a single word in the record contradicts Trade Off's stated reason for terminating Robinson's and Thomas's employment for their insubordination – to which they admit doing. Hagedorn, Robinson and Thomas corroborate that Hagedorn stated that they were terminated for insubordination (which makes sense as they were openly insubordinate). The Company's consistent treatment of other cases of insubordination bolsters the Company's defense and counters any contrived arguments of pretext. Nothing in the record points to pretext.

Absent evidence of pretext, the General Counsel failed to rebut Trade Off's legitimate business reason for terminating their employment.

* * *

Accordingly, Trade Off lawfully discharged Robinson and Thomas for legitimate business reasons. Insubordinate employees are not protected by the Act. The allegations contained in Complaint Paragraph 17 must be dismissed.

II. The Section 8(a)(1) Allegations

A. The General Counsel Failed to Prove the Company Violated Section 8(a)(1) of the Act by Filing and Maintaining the Lawsuit Against Darrell Jamison and Ricardo Pimentel as Alleged in Complaint Paragraph 11

In Complaint Paragraph 11, the General Counsel asks Your Honor to disregard U.S. Supreme Court and Board precedent to find that Trade Off's ongoing state court lawsuit against the Union and two former employees is "baseless" and filed with a retaliatory motive to enjoin activity protected by the Act. Without question Supreme Court and Board precedent mandate that Your Honor dismiss this allegation.

The Supreme Court has consistently held that, except in the rarest of circumstances, an unfair labor practice charge cannot be based on the maintenance of a state court action. In *Bill Johnson's v. NLRB*, 461 U.S. 731, 748-49 (1983), the Court held "that the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." Indeed, in *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531-32 (2002), the Court subsequently held that even a non-meritorious lawsuit can be reasonably based, thus enjoying protection from an attack pursuant to the Act.

On remand from the Supreme Court, the Board in *BE & K Constr. Co.*, 351 NLRB 451 (2007), held that both completed and ongoing "reasonably based lawsuit[s] could not be enjoined

as an unfair labor practice even if the lawsuit had a retaliatory motive” because “declaring a reasonably based, unsuccessful lawsuit to be an unfair labor practice burdens the First Amendment right to petition.” *Id.* at 456-57. In turn, the *BE & K* Board adopted the following standard to determine whether a lawsuit is reasonably based: “a lawsuit lacks a reasonable basis, or is objectively baseless, if no reasonable litigant could realistically expect success on the merits.” *Id.* at 457.

The General Counsel’s own guidance as contained in GC Memorandum 08-02 (December 27, 2007) further provides that, in evaluating whether the lawsuit is “reasonably based,” “the Board’s inquiry into factual or legal claims or theories as part of its ‘reasonably based’ analysis is generally limited to whether the claims are ‘frivolous’ or ‘plainly foreclosed’.” Furthermore, in *BE&K*, the Board stated that it will continue to follow the *Bill Johnson’s* Court’s reasonable basis inquiry for an ongoing lawsuit. As GC Memo 08-02 summarizes:

[w]hile the Board’s inquiry need not be limited to the bare pleadings, the Board cannot make credibility determinations or draw inferences from disputed facts as to usurp the fact-finding role of the jury or judge. Further, the *Bill Johnson’s* Court stated that just as the Board may not decide “genuinely disputed material factual issues,” it must not determine “genuine state-law legal questions.” These are legal questions that are not “plainly foreclosed as a matter of law” or otherwise “frivolous.” (citations omitted)

Here, there cannot be an honest dispute that the ongoing lawsuit is anything but “reasonably based.” Trade Off’s state court lawsuit claims that the defendants harmed Trade Off by alleging that Trade Off does not provide benefits and discharged an employee for complaining about an alleged failure to provide safety harnesses. Given the credible record evidence detailed above that Trade Off does indeed provide benefits and that no one was discharged for requesting a safety harness (Tr. 835), the Company submits that it will prevail in its lawsuit. Clearly, the lawsuit is not plainly foreclosed as a matter of law or otherwise frivolous which are preconditions

to a valid unfair labor practice. Assuming *arguendo* the General Counsel and Union do not concede that Trade Off provides benefits, then there is a genuinely disputed material fact that the Board cannot decide as per *Bill Johnson's*. Assuming *arguendo* the General Counsel and Union do not concede that witnesses credibly testified that Trade Off provides benefits, then there are credibility determinations that the Board cannot make as per *Bill Johnson's*. Moreover, the causes of action in this ongoing lawsuit are genuine state-law legal questions that the Board is foreclosed from deciding.

Respectfully stated, Supreme Court precedent, Board precedent and General Counsel guidance prevent Your Honor from finding that Trade Off's filing and maintain the lawsuit violated Section 8(a)(1) of the Act as alleged.²⁰ The allegations contained in Complaint Paragraph 11 must be dismissed.

B. The General Counsel Failed to Prove the Company Violated Section 8(a)(1) of the Act by Engaging in Surveillance as Alleged in Complaint Paragraph 13

This allegation likely pertains to Kerr's and Zimmerman's visit to the Mason Tenders' training center on January 8. As stated above, the General Counsel failed to prove that any Trade Off manager or supervisor was present at the training center or, even if they were there, that they recognized and saw Kerr and Zimmerman outside waiting in line. The vague testimony that a green Hyundai crossover had two guys in it, one who was a stocky Hispanic guy and the other who was a smaller Caucasian guy, does not amount to proof. (Bonilla credibly testified that it was not him.) Therefore, there is no basis to sustain this allegation.

²⁰ During the hearing, the Union filed two charges. Charge 2-CA-229765 alleging that the lawsuit in evidence as R.Ex. 8 violated the Act. Your Honor should take notice that, on January 15, 2019, the Region refused to issue complaint because it is an ongoing lawsuit. Charge 2-CA-229766 alleging that the lawsuit in evidence as GC.Ex. 44 violated the Act. Your Honor should take notice that this charge was submitted to the Division of Advice.

To the extent the General Counsel seeks to expand Complaint Paragraph 13 to other allegations of surveillance, such request must be rejected as procedurally defective. Complaint Paragraph 13 is limited to a specific allegation that allegedly occurred on January 8. Furthermore, before the close of the hearing record, the General Counsel did not move to conform the Complaint to the record evidence (as the General Counsel sometimes does) and cannot belatedly do so. Assuming Your Honor disregards these procedural hurdles, the record evidence does not support a surveillance violation. If the General Counsel claims that Robinson's testimony that, on September 15, 2017, Bonilla sat in his white SUV outside of the 520 West 30th Street building and watched employees working in the retail space, this claim is not plausible. (Tr. 65). Logic dictates that an individual cannot see through his car window and through a building's window into the interior retail space. And the record evidence does not establish the distance of the car from the building, the weather conditions, or any other facts that may make it more plausible. To the contrary, Bonilla credibly testified that he did not do so.²¹

C. The General Counsel Failed to Prove the Company Violated Section 8(a)(1) of the Act, Through Supervisor Delbert Hall, by Interrogating Employees and Prohibiting Them from Engaging in Protected Activity as Alleged in Complaint Paragraph 15

This allegation pertains to the October 4 "big commotion" between Robinson, Thomas and Hall outside of the 264 West Street jobsite before the shift commenced at 7:00 a.m. The record evidence does not support either alleged violation.

²¹ Bonilla candidly and credibly testified at hearing. For example, he admitted to reporting to Hagedorn that he observed Union representative Simmons speaking with a Trade Off employee. (GC.Ex. 21; Tr. 552). Bonilla reported Simmons's actions because he and Hagedorn are plaintiffs in the state court litigation wherein Simmons's misconduct is at issue. (R.Ex. 8).

Under the seminal interrogation case of *Rossmore House*, 269 NLRB 1176 (2003), the Board considers the totality of the circumstances, including whether the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. In making this determination the Board considers factors, *inter alia*, including the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002). Any statements that may be attributed to Hall during this “big commotion” cannot be deemed unlawful interrogation.

The record evidence is that Robinson and Thomas were on the street trying to get employees to sign a petition. (GC.Ex. 5). Hall approached them “and basically asked, did we get permission from the office to be doing this?” (Tr. 75). That is all Hall did, and nothing about this question (even if credited) can amount to surveillance. Rather, it is a question about whether the leafleters had permission to so leaflet. Relatedly, there is no evidence that Hall prohibited them from leafletting. In fact, Robinson and Thomas continued to do so until their shift started at 7:00 a.m.²² Therefore, both allegations contained in Complaint Paragraph 15 are without merit and warrant dismissal.

D. The General Counsel Failed to Prove the Company Violated Section 8(a)(1) of the Act, Through Supervisor Rich Cotrite, by Threatening Employees as Alleged in Complaint Paragraph 16

This allegation pertains to the September 15 incident at 520 West 30th Street when Robinson and Thomas, met Simmons, to hand out leaflets. (GC.Ex. 4). Robinson testified “I was positioned right on the side of the door where the workers come in, enter to work right in front of

²² If the General Counsel asks for an adverse inference by the Company’s failure to call Hall as a witness, no adverse inference may be drawn as Hall was terminated effective April 12, 2018 and is no longer in the control of Trade Off. (Tr. 824; R.Ex. 4).

the building.” (Tr. 50). Ten minutes after handing out the leaflet, Cotrite arrived at the jobsite, Robinson handed the leaflet to Cotrite, and Cotrite walked off. (Tr. 51). Cotrite did not say anything or otherwise try to stop their distribution. Robinson testified that he continued to distribute the leaflet, which shows he was not threatened or coerced. (Tr. 62). On direct examination, Robinson said that Cotrite came back and said “being I was handing our leaflets for Local 79, I could sign out and go home.” (Tr. 63). On cross examination, Robinson said that when he returned he said “I could be fired for this . . . And don’t conduct your business in front of the door, because it’s a residential building.” (Tr. 122). Thomas’s NLRB Affidavit corroborated that Cotrite said Robinson “could be fired for handing out leaflets and removed from the site.” (R.Ex. 2).

Robinson’s claim that Cotrite told him “to sign out and go home” is incredible. According to Robinson, Cotrite told him at 6:35 a.m. to sign out and go home. However, Robinson’s shift began at 7:00 a.m. (Tr. 99). Therefore it defies logic that Cotrite would have told Robinson to sign out, when Robinson had not even signed in. Robinson’s claim on cross examination is not a threat or coercion in that Cotrite allegedly said Robinson “could” be fired for doing so especially given its location at the front door. To the extent Robinson has misconstrued Cotrite’s direction to move, in that moment, Cotrite’s direction made logical sense given Robinson’s location in front of the jobsite’s doorway entrance.

Moreover, the fact that Robinson continued to hand out leaflets until his shift started undermines his claim that Cotrite threatened or coerced him. (Tr. 63, 340). For that matter, later in the work day during his coffee time and lunch break, Robinson and Thomas continued distributing leaflets outside but away from the front door, as per Cotrite’s request. (Tr. 65, 123-

124, 340). No one from Trade Off said anything or otherwise interfered with the distribution.²³ Robinson admitted that Cotrite's statements did not stop him from handing out leaflets. (Tr. 124).

For the above reasons, the allegations contained in Complaint Paragraph 16 are without merit and warrant dismissal.

E. The General Counsel Failed to Prove the Company Violated Section 8(a)(1) of the Act, Through Supervisor Jose Bonilla, by Interrogating and Surveilling Employees as Alleged in Complaint Paragraph 18

Near the conclusion of the hearing, the General Counsel amended the Complaint to allege that Bonilla, on or about July 25, 2017, (1) interrogated employees about their union activities and sympathies at the 30-02 Queen Blvd jobsite, (2) interrogated employees about their union activities and sympathies at or near the Purves Street worksite, and (3) engaged in surveillance of employees at or near the Purves Street worksite.

Portions of Bonilla's testimony when he answered general questions, such as whether he questioned employees about their communications with the Union (Tr. 537-538), do not prove unlawful interrogation. There are no dates, times and specifics attached to those discussions. Board law permits a supervisor to speak with employees about their union activities under Section 8(c) without violating the Act. Absent record evidence as to who Bonilla spoke with, there cannot be an interrogation violation as such mystery person may very well have been an open union supporter and the discussion lawful under the *Rossmore House, supra*, standard.

²³ Thomas's claim that he was assigned to the retail area to work in retaliation for handing out literature further shows his lack of credibility and bias. (Tr. 340-341). As a laborer, Thomas and other laborers are assigned where they are needed to clean. Even at that same building, Thomas had been previously assigned to clean the retail area. There was no difference in cleaning the retail area or some other floor, and laborers are paid the same wage for cleaning all floors. (Tr. 344, 912-914).

Specifically, the General Counsel has not proven the allegations contained in Complaint Paragraphs 18(a)-(c).

With regard to Paragraph 18(a) that Bonilla interrogated employees at 30-02 Queens Boulevard on or about July 25, the General Counsel is likely trying to prove a violation through Bonilla's email in evidence as GC.Ex. 21. Bonilla's testimony, however, was that he handed out a flyer about the Union's harassment and spoke with foreman Hector Ortiz and two Carpenters at 30-02 Queens Boulevard. As part of the discussion that ensued, the employees offered that they did not want to be associated with the Union. Nowhere in GC.Ex. 21, or elsewhere in the record, is there evidence that Bonilla asked the employees at 30-02 if they supported the Union or any other questions that may amount to unlawful interrogation. The evidence merely reflects that the employees openly offered their feelings about the Union, not that Bonilla interrogated them. (GC.Ex. 21; Tr. 543-544). Bonilla's handing out of a flyer and speaking about the Union was protected by Section 8(c) as well.

With regard to Paragraph 18(b) that Bonilla interrogated employees at or near the Purves Street jobsite on or about July 25, the General Counsel's referencing is unclear. There is no evidence that Bonilla spoke with anyone about the Union at Purves Street. To the extent the General Counsel is referring to Bonilla's discussion with employee Shawn Person ("Person") on July 25, Bonilla's honest testimony does not prove he engaged in unlawful interrogation of Person. Bonilla observed Simmons approach and speak with Person, while Person was outside a deli located near the jobsite. As Simmons is the main Union culprit in threatening and harassing Trade Off personnel (R.Ex. 8), Bonilla approached Person after Simmons left. Notably, Bonilla did not interfere with Simmons's speaking with Person as Bonilla waited to approach Person once Simmons left, and only spoke with Person to make sure that Person was okay.

Q. Why was it significant -- why did you feel it was necessary to talk to Mr. Person, after seeing him talk to Paris?

A. Because there was a lot, there's several times that I seen -- well, we have issues, harassments, when it comes, you know to Paris. So I wanted to make sure that he was okay. You know, and I wanted to know what they were talking about. Make sure he's not harassing Shawn Person.

Q. Yeah, why did you want to know what they were talking about?

A. Just to make sure that he's okay, and make sure he's not being harassed.

(Tr. 547).

There is no record evidence as to the details of the Bonilla-Person discussion. Indeed, the General Counsel did not produce evidence that Bonilla asked Person about Person's union sympathies. In turn, the General Counsel's argument is tortured, amounting to a claim that unlawful interrogation occurred based solely on the fact that Bonilla spoke to Person after Person spoke Simmons. Accordingly, under the *Rossmore House* analysis, there is no evidence of unlawful interrogation. Clearly, the circumstances of the Bonilla-Person discussion show that Bonilla approached Person to make sure he was okay in light of Simmons's known misconduct.

With regard to Paragraph 18(c) that Bonilla engaged in surveillance of employees at or near the Purves Street jobsite on or about July 25, the General Counsel is likely referencing the aforementioned incident with Simmons and Person. "[A]n employer may observe employees engaging in Section 7 activities in an open and public manner on or near its property. This observation is legal if done in a manner that is not out of the ordinary and absent coercive behavior." *Stahl Specialty Co.*, 2013 WL 5671093 (Sept. 30, 2013), *aff'd as modified*, 364 NLRB 56 (2016). As Bonilla merely observed what was publicly open for all to see, there cannot be a surveillance violation. Stated differently, Bonilla happened to leave the deli to go to his car and he saw Simmons speaking with Person. The law does not require Bonilla to avert his eyes otherwise a surveillance violation exists. *See PVM I Assocs., Inc.*, 328 NLRB 1141, 1142 (1999) (Holding that the employer's supervisors "presence at [a] restaurant on the same day as the union

meeting was the result of purely fortuitous circumstances. There is no reason that [the supervisors] had to leave the restaurant once the union representatives and an employee arrived there to conduct a union meeting”).

Accordingly, the General Counsel has failed to prove Bonilla engaged in unlawful interrogations or surveillance. The allegations contained in Complaint Paragraph 18 must be dismissed.

CONCLUSION

Based upon the record evidence, as well as the factual and legal analyses set forth herein, the General Counsel has failed to carry its requisite burden of proof for establishing that Trade Off violated the Act as alleged in the Complaint. It is respectfully requested that all Complaint allegations are dismissed.

Respectfully submitted,

LITTLER MENDELSON, PC
Attorneys for Respondents

By: /s/ Alan I. Model
Alan I. Model

Dated: February 12, 2019

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this date, I caused the original of the foregoing Respondent's Post-Hearing Brief to the Administrative Law Judge to be served upon Administrative Law Judge Benjamin W. Green, via e-filing and Federal Express, at the following:

Original and 3 copies to:

The Honorable Benjamin W. Green
National Labor Relations Board, Division of Judges
26 Federal Plaza, 41st Floor
New York, New York 10278

One **Copy** to:

Jacqueline Tekyi, Esq.
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Dated: February 12, 2019

/s/ Alan I. Model

Alan I. Model

TAB A

Search

Search Tools

Home » Cases & Decisions » Cases » Case Search

Trade Off, LLC

Case Number: 02-CA-205658

Date Filed: 09/05/2017

Status: Closed on 05/31/2018

Location: New York, NY

Region Assigned: Region 02, New York, New York

Reason Closed: Withdrawal Non-adjusted

Docket Activity

<u>Date</u> ▼	<u>Document</u>	<u>Issued/Filed By</u>
09/27/2018	Amended Consolidated Complaint (C Cases Only)*	NLRB - GC
07/13/2018	Answer to Complaint*	Charged Party / Respondent
07/13/2018	Answer to Complaint*	Charged Party / Respondent
07/12/2018	Answer to Complaint*	Employer
06/29/2018	Consolidated Complaint (C Cases Only)*	NLRB - GC
05/31/2018	Letter Approving Withdrawal Request*	NLRB - GC
05/01/2018	Amended Charge Letter*	NLRB - GC
05/01/2018	Amended Charge Letter*	NLRB - GC
05/01/2018	Signed Amended Charge Against Employer*	NLRB - GC
04/30/2018	Signed Amended Charge Against Employer*	Charging Party

1 2 next › last »

The Docket Activity list does not reflect all actions in this case.

* This document may require redactions before it can be viewed. To obtain a copy, please file a request through our FOIA Branch.

Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)
- 8(a)(3) Changes in Terms and Conditions of Employment
- 8(a)(3) Discharge (Including Layoff and Refusal to Hire (not salting))

Participants