

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

TRADE OFF, LLC

and

**LOCAL 79 CONSTRUCTION AND BUILDING
LABORERS**

**Case Nos. 02-CA-199415
02-CA-205658
02-CA-212872**

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

and

**LOCAL 79 CONSTRUCTION AND BUILDING
LABORERS**

Case No. 02-CA-207414

**COUNSEL FOR THE GENERAL COUNSEL'S POST-TRIAL BRIEF
TO ADMINISTRATIVE LAW JUDGE HONORABLE BENJAMIN W. GREEN**

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COUNSEL FOR THE GENERAL COUNSEL'S POST-TRIAL BRIEF

Jacqueline Tekyi, Counsel for the General (“the General Counsel”) in the above-captioned case, submits this post-trial brief to the Honorable Benjamin Green, Administrative Law Judge.

I. PROCEDURAL HISTORY

On May 24, 2017, Construction and General Building Laborer’s Local 79, herein Union, filed Case No. 02-CA-199415 alleging, in relevant part, that Respondent Trade Off, LLC violated Sections 8(a)(1) of the Act by filing a frivolous lawsuit against Darrell Jamison and Ricardo Pimentel in retaliation for their concerted activity. G.C. Exh. 1(A).¹

On September 5, 2017, the Union filed the initial charge in Case No. 02-CA-205658, alleging, in relevant part, that Respondent Trade Off LLC violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging employee Riccie Haneiph in retaliation for his concerted activity. G.C. Exh. 1(C). On April 30, 2018, the Union amended the charge in Case 02-CA-205658 to allege, in relevant part, that the Respondent Trade Off, LLC refused to hire and/or consider for hire Riccie Haneiph because of his protected activity. G.C. Exh. 1(K).

On October 4, 2017, the Union filed the initial charge in Case No. 02-CA-207414 alleging, in relevant part, that Respondent Trade Off Plus, LLC violated Sections 8(a)(1) and (3) of the Act by discharging employees David Robinson and Darrell Thomas for their concerted activity; interrogating employees about their union and concerted activities; surveilling

¹ G.C. Exh. ___ refers to General Counsel’s Exhibit followed by the exhibit number; R Exh. ___ refers to Respondent’s Exhibit followed by exhibit number; C.P. Exh. ___ refers to Charging Party’s Exhibit followed by exhibit number; “Tr. _:___” refers to transcript page followed by line or lines of the unfair labor practice hearing held on October 1, October 3-5, October 22-24, November 5, and December 6-7, 2018. Respondent’s Answer is GCX 1(s) and (t).

employees union and concerted activities. G.C. Exh. 1(E). On October 16, 2017, the Union amended the charge in Case 02-CA-207414 to allege, in relevant part, that Respondents Trade Off and Trade Off Plus are joint and/or single employers and that the Respondents violated Section 8(a)(1) and 8(a)(3) by threatening employees with discipline and/or discharge for engaging in concerted protest activity. G.C. Exh. 1(G). On April 30, 2018, further amended the charge in Case 02-CA-207414 to allege that the Respondents Trade Off and Trade Off Plus, LLC, through its representative, directed employees not to engage in protected activity. G.C. Exh. 1(M).

On January 9, 2018, the Union filed the charge in Case No. 02-CA-212872 alleging that Respondent Trade Off, LLC violated Sections 8(a)(1) and 8(a)(3) of the Act by surveilling the activities of employees Larry Kerr and Willie Zimmerman and discharging them in retaliation for their concerted activity. G.C. Exh. 1(I).

On June 29, 2018, the Regional Director, Region 2, issued a Consolidated Complaint and Notice of Hearing in Case Nos. 02-CA-199415, 02-CA-205658, 02-CA-212872, 02-CA-203161 and 02-CA-207414. G.C. Exh. 1(O). The Consolidated Complaint alleged that Respondents Trade Off and Trade Off Plus, LLC, individually and as joint and/or single employers violated Section 8(a)(1) of the Act by filing a baseless and retaliatory lawsuit against employees Darrell Jamison and Ricardo Pimentel; by engaging in surveillance of employees to discover their union and concerted activities; by interrogating employees about their union activities and sympathies; by prohibiting employees from engaging in protected activity; by threatening employees with unspecified reprisals if they maintained contact with Local 79; by threatening employees with discipline and/or discharge for engaging in protected leafleting; and by terminating the employment of Larry Kerr and Willie Zimmerman because they engaged in concerted and union

activities. G.C. Exh.1(O). The Consolidated Complaint further alleged that Respondents violated Section 8(a)(3) of the Act by refusing to consider for hire or hire Riccie Haneiph for employment and by terminating the employment of David Robinson and Darrell Thomas because of their union and concerted activity. G.C. Exh.1(O). On July 13, 2018, Respondents, by Counsel, filed an Answer to the Region's Consolidated Complaint. G.C. Exhs.1(s) and (T).

On September 27, 2018, the Regional Director issued an Order Amending Consolidated Complaint, Withdrawing Complaint Allegations and Approving Withdrawal of the Charge in Case No. 02-CA-20316. G.C. Exh. 1(U). The Order withdrew all allegations of the Complaint related to Case No. 02-CA-20316 (paragraphs 4, 7, 9(b), 18, 19, 22, and 25) and revised paragraphs of the Complaint to reflect the removal of the Employer in the withdrawn case (paragraphs 26 and 6(b)). G.C. Exh. 1(U).

The trial in this matter was held before Administrative Law Judge (ALJ) Benjamin Green on October 1, October 3-5, October 22-24, November 5, and December 6-7, 2018. Upon the opening of the record, on October 1, 2018, and at trial on October 3, 2018, Respondents Trade Off and Trade Off LLC, stipulated, for the purposes of this proceeding, to operating as joint employers of employees of Trade Off Plus working at the job sites located at 520 West 30th Street and 264 West Street and to being jointly and severally liable for any alleged unfair labor practices. Tr. 6: 3-11; 26: 13-25. October 3, 2018, Respondents also stipulated Delbert Hall is a supervisor of Trade Off and Trade Off Plus, under Section 2(11) of the Act. Tr. 27: 2-13. Further, at trial, General Counsel moved to Amend the Amended Consolidated Complaint to allege that Respondent Trade Off discharged employee Riccie Haneiph because of his concerted and union activity and to allege that Respondents Trade Off and/or Trade Off Plus, by Jose Bonilla, (a) Interrogated employees about their union activities and sympathies at the worksite at

30-02 Queens Blvd, Queens, NY; (b) Interrogated employees about their union activities at or near the worksite located at Purves Street, Queens, NY; and (c) Engaged in surveillance of employees at or near the worksite located at Purves Street, Queens, NY to discover their union and concerted activities. Tr. 607-611; G.C. Exh. 36. These Motions were accepted by the ALJ. Tr. 611.

II. ISSUES

1. Are Respondents Trade Off and Trade Off Plus Single Employers as defined by the Act?
2. Did Respondents Trade Off and Trade Off Plus violate Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities, by threatening employees with discharge because of their support for and activities on behalf of the Union; by interrogating employees about their support for the Union; and by maintaining a baseless lawsuit against employees Darrell Jamison and Ricardo Pimentel in retaliation for their Section 7 activity?
3. Did Respondents Trade Off and Trade Off Plus violate Sections 8(a)(1) and (3) by discharging employees David Robinson, Darrell Thomas, Larry Kerr, Willie Zimmerman, and Riccie Haneiph?

III. STATEMENT OF THE FACTS

A. Respondents' Business Operations

Respondents Trade Off, LLC, and Trade Off Plus, LLC (referred to jointly as "Respondents") are non-union construction contractors that provide laborers to general contractors in the building construction industry. Tr. 949, G.C. 44; Tr. 952. The Respondents' laborers carry out construction site clean-up services and perform hoist and elevator operator

services on construction jobsites. Tr. 829. The Respondents' labor force is not unionized. Tr. 952: 17-18.

Ron Lattanzio is the President of Trade Off, Trade Off Plus, and Luca Holdings, LLC. Tr. 679-680; 944. Jason Abadie is employed by Luca Holdings and serves as the Vice-President of Operations for Respondent. Tr. 679. Abadie, whose job duties include overseeing Respondent's projects and financials, reports directly to Lattanzio. Tr. 679; 823. Justin Hagedorn, the General Superintendent for Trade Off and Trade Off Plus, manages the Respondent's 4 field supervisors, approximately 30 foremen, and approximately 300 laborers employed by Respondents. Tr. 823-826; 828:18-21; 918. Hagedorn reports to Abadie, and together the two run the Respondent's field operations. Tr. 823. David Townsend is Respondent's superintendent for construction. Tr. 831. Townsend is responsible for going to jobsites and checking the operation to review that safety gear is in compliance and making sure that all paperwork is up to date. Tr. 831. Jose Ramirez is a project manager for Respondent. Tr. 831. He is responsible for tracking manpower and financials on all Trade Off construction sites. Tr. 832. Respondent's field supervisors Jonathan Morales, Thomas Murphey, Jose Bonilla, and Edwin Muniz are expected to visit the various construction job sites to conduct site inspections, which include reviewing paperwork, personal protective equipment (PPE), tools and other equipment. Tr. 825. Field supervisors are not assigned to any particular job site. Tr. 825. Rather, each day, Hagedorn assigns them particular job sites to visit. Tr. 826. Foremen report directly to field supervisors. Tr. 826.

Respondent employs approximately 300 laborers, many of whom are recruited from worker referral agencies such as Center for Employment Opportunity (CEO), the Saint Nicks Alliance, Urban Upbound, Jobs Plus , Building Skills and Hannah Legacy. Tr. 860: 15-21; 861:4-5; U Ex. 1. Some of the laborers recruited by Respondent referral organizations do not

have any prior construction experience. Tr. 971:15. Respondent's laborers report directly to foremen. Tr. 828.

Employees who are hired under Respondent's Trade Off, LLC, umbrella are generally paid a lower wage and receive fewer benefits than those who work under Trade Off Plus, LLC. Tr. 856; 859, 860. For instance, the new hire rate for Trade Off laborers is \$15 an hour, while Trade Off plus pays a starting rate of \$20 per hour. Tr. 856:12-14; 23-25. Trade Off Plus laborers also receive a monthly MetroCard. Tr. 259: 12-13. Former employees Jamison, Pimentel, and Robinson testified during the hearing that they did not receive health insurance benefits while employed by Trade Off, LLC.

General Superintendent Justin Hagedorn determines daily job assignments for laborers. Tr. 862:19-21. If a laborer is supposed to report to a jobsite Management communicates with them through text message or a phone call—whereby they are given the address and start time. Tr. 862: 24-25.

At times, Respondents deems it necessary, for whatever reason, to decrease the number laborers at a jobsite—referred to as manpower cuts. Tr. 861:12-14. Hagedorn and Trade Off project managers make decisions regarding the increase or decrease in the number of laborers at job sites. Tr. 860; 861: 15-18. Hagedorn testified that a manpower cut is not a termination, but rather, it is just a reduction at the site and it is explained to the laborers by phone call or text message. Tr. 861:20-24. In the event of a manpower cut, laborers are told by Respondent's managers that they are not to return to the job site the following day, but if a job opportunity presents itself at that site or another site, they will be contacted. Tr. 861:20-24; Tr. 862:1.

B. Local 79's Efforts to Organize Respondents Employees and Respondent's Animus

From as early as 2016, Local 79 organizers began to frequent the Respondent's job sites and speak to its employees. During Hagedorn's first contact with Local 79, one of the representatives asked if Trade Off wanted to be unionized. Tr. 107. A few Local 79 organizers told Hagedorn the process for the Union becoming the representative of Respondent's employees and how it would go. Tr. 107: 4-21. Hagedorn also learned of the unionization process by talking with his "project team as to the whole process and how it worked out." Tr. 107: 4-21.

From at least early 2017, Local 79 representatives have regularly visited the Respondent's job sites talking to its employees about their pay, benefits and other terms and conditions of employment. I.e. G.C. Local representatives have assisted employees in the use of traditional protected activity such as leafletting and petitioning for better wages and terms and conditions of employment. Some of Respondent's employee's have attended meetings at the union hall and joined the Union at rallies opposing unsafe working conditions at Respondent's jobsites.

Despite the testimony of Respondent's sole witness Justin Hagedorn to the contrary, the evidence is clear that in 2017 Respondent implemented a system intended to thwart unionization and rid itself of Local 79 and employees believed to support the Union, by any means necessary. At the hearing, Hagedorn provided inconsistent testimony regarding his reaction to Local 79's presence near Trade Off jobsites. Tr. 851-853. Initially, on direct, Hagedorn testified that he only instructed his field team, Jonathan Morales, Thomas Murphy, Edwin Muniz, Jose Bonilla that if they had any contact with Paris Simmons he needed "an email, a phone call, a text message. You know, they've got to communicate with me so that I can alert the legal team as quick as possible." Tr. 852:2-7. He claimed, however, that he did not require field supervisors or foremen

to report any time a laborer was seen talking to any union representatives. Tr. 852: 8-10. Only Paris Simmons because of alleged, but unsubstantiated, claims of harassment by Simmons. Tr. 852:11-16. On cross Hagedorn admitted to holding meetings with foremen about Local 79. Tr. 976. He also admitted on cross-examination that there may have been meeting with upper management to discuss Local 79. Tr. 976.

Contrary to Hagedorn's claim at the hearing that he was only concerned with Paris Simmons, his and Respondent's interest in Local 79 clearly went beyond just Simmons. For example, Hagedorn did investigatory work on Local 79, regularly checking its Facebook page for notifications of Local 79 rallies. Tr. 972: 21-25; 973: 4-8. On cross-examination Hagedorn admitted to sending workers to Local 79 meetings to "see what they were saying about Trade Off" and to come back and report to him. Tr. Tr. 1020: 22-25;1013: 22.

On April 19, 2018, by e-mail, Hagedorn notified Ron Lattanzio and other Trade Off/Trade Off Plus representatives of "[h]eavy presence in LIC with Local 79" and that "[b]usiness agents/Organizers are crawling all over LIC." G.C. Exh. 43.² Hagedorn noted that they had "close to 75 Tradeoff workers in a 2 block radius. Easy pickings for the Union. Most of the guys in LIC have already told 79 to fuck right off. Company guys of ours. Core guys. Guys that know what 79 has been doing to myself and the rest of management. They have our backs. Maybe they grabbed one or two people." G.C. Exh. 43.

On April 20, 2017, Hagedorn and the Trade Off management team communicated by email regarding an upcoming Local 79 and Local 3 rally. G.C. Exh. 32.

On May 4, 2017, by e-mail, Hagedorn notified Jason Abadie and other Trade Off managers that he had been advised by a Trade Off laborer of an upcoming Local 79 Union

² This e-mail was not produced by Respondent although responsive to General Counsel's subpoena requests. Rather it was obtained by Charging Party in connection with another unrelated matter.

meeting to which he had been invited. G.C. Exh. 35. Hagedorn stated in the e-mail “I feel that this could be a great opportunity to possibly put an undercover with Francisco and possibly infiltrate this meeting. It's just a thought by local 79 continues to show up at our sites and they continue to harass and badger our work force.” G.C. Exh. 35.

On May 24, Hagedorn, in a daily report, noted that he had brought up in his last foreman meeting that for our foreman to please contact us if they see anyone from 79 outside their site or snooping around and identified 5 foremen who had followed his directive and reported back to him. G.C. Exh. 34, pg. 1. Hagedorn noted “[w]e know they are out there speaking with our work force every day. Most of our workers tell them to fuck right off.” G.C. Exh. 34, pg. 2.

On May 24, 2017, Hagedorn sent an e-mail daily report stating that he had “received word from Tradeoff Foreman Thomas Powierski that Paris Simmons from Local 79 was outside our site today at 50 Clinton street in Manhattan. Paris was speaking with all of our workers before Thomas stepped out of the field office onto the street.” G.C. Exh. 34, pg. 3. In that email Hagedorn also appears to have identified an individual, possibly an employee, he felt might be linked to the Union. G.C. Exh. 34, pg. 4. He wrote “I also find it very strange that whatever site Jalisa Mcrimmen is on, the 79 organizers gravitate towards that site. May be me just over analyzing it but it has happened too much to not to mention it.” G.C. Exh. 34, pg. 4. Pastor responded by encouraging Management inquiry into employees communication with the Union, asking “[h]ow did our workers respond to these questions. That’s the most important answer we need.” G.C. Exh. 34, pg.2. Hagedorn promptly responded, one minute later, “I will start my day at the site in the morning and have a detailed report for each worker.” G.C. Exh. 34, pg.2. Pastor replied enthusiastically, stating “[t]hat would be wonderful Justin and may be very helpful in assessing the risk of unionization.” G.C. Exh. 34, pg.2.

On May 25, 2017, by e-mail, Hagedorn notified Patricia Pastor and 7 other individuals about information obtained from workers who were approached by management regarding their communication with Local 79. G.C. Exh. 34, pg.1. Hagedorn noted “[a]ll of the workers on this site are core workers who have worked for us for 2+ years. All are loyal. All have stated if he or anyone else ever comes around they will chase them off the site and contact me immediately.” G.C. Exh. 34, pg. 1.

On June 7, 2017, by e-mail Hagedorn informed Respondent representative Patricia Pastor that Simmons was at a Trade Off site—a foreman had texted Hagedorn to let him know. G.C. Exh. 31. Pastor’s response was “[w]hy do we have guys in a full union site?” G.C. Exh. 31.

On July 13, 2017, Hagedorn sent an email to CEO Manager Terry Ellis, regarding an employee James Robinson Matos, who he identified as connected to the Union. G.C. Exh. 29. Ellis replied to the email with an angry face emoji. G.C. Exh. 29. Hagedorn replied “Yeah. Not a good day for us. Funny thing is The Union wouldn't even look his way if he didn't work for Tradeoff.” G.C. Exh. 29.

On July 14, 2017, communicated to Jason Abadie, Ron Lattanzio and other unidentified individual that he “[g]ot call about Union activity at 88 Madison. Went there. Spoke to Supers.” G.C. Exh. 33. He also notified them that he went to “200 east 95th to check on 79.” G.C. Exh. 33.

On July 25, 2017, field supervisor Jose Bonilla went to Respondent’s 30-02 Queens Blvd job site where he met with the Foreman Hector Ortiz and the two carpenters. G.C. Exh. 21. Bonilla gave each of them a flyer pertaining to Local 79. G.C. Exh. 21. Bonilla spoke to the foreman and the laborers regarding local 79. G.C. Exh. 21. In an email to Hagedorn dated July 25, 2017, Bonilla wrote “their response to me is that they are loyal to Tradeoff and would not want to be associated with them.” G.C. Exh. 21. Bonilla also reported to Hagedorn that on July

25, 2017 he observed Local 79 organizer Paris Simmons talking to an employee Shawn Person. G.C. Exh. 21. When Justin inquired about the identity of the employee, Bonilla snapped a photo of Person and emailed it to Hagedorn. G.C. Exh. 21. After observing the employee talk to Simmons Bonilla approached the employee and asked him what he and Simmons were talking about. G.C. Exh. 21. Bonilla's assessment to Hagedorn was that he thought Simmons was trying to convince the employee to join Local 79 and that he felt they needed "to keep an eye on Mr. Person." G.C. Exh. 21.

On October 10, 2017, Hagedorn sent an email with the subject "Re: 55 Hudson Yard" to David Townsend and other members of the management team alerting them to "[e]xpect a massive rally at site on Monday." G.C. Exh. 30.

The Respondent's efforts against union activity went beyond just surveillance of the Union and its employees and interrogation of worker's seen communication with Local 79 representatives. As set forth below, once Respondent identified with certainty, employees it perceived had been "flipped"³ by the Union, Respondent retaliated against some with discharge and served others with a lawsuit.

C. Employees Darrell Jamison and Ricardo Pimentel Engage in Protected Activity, and are Shortly Thereafter Served by Respondent with a State Court Defamation Lawsuit

i. Darrell Jamison

Darrell Jamison was employed by Trade Off, LLC as a laborer from January 2016 until around January 2017. Tr. 640:17-20. Jamison testified that while at Trade Off, he never received health benefits and was never informed by Trade Off representatives that the company offered any health benefits. Tr. 640: 21-25; 641:1. Jamison also testified that he did not receive paid

³ Hagedorn testified that he concluded, for example, that employees who took photos of unsafe working conditions had been "flipped" by Local 79. Tr. 1014.

vacation and was not informed by anyone at Trade Off of any pension, 401(k), or other retirement plan offered to employees. Tr. 647: 2-10.

In November 2016, Jamison was working for Trade Off at a job site on 14th street. Tr. 662:12-15. One day, while at the 14th street site, Jamison had a conversation with a Local 79 organizer named Justice, who happened to be his friend. Tr. 663. After Jamison's conversation with the Local 79 organizer, Trade Off field supervisor Jonathan Morales questioned him about the exchange. Tr. 663.⁴ Once Morales learned that Jamison had been speaking to a Local 79 representative, he told Jamison that he should not talk to Local 79 because "they're no good." Tr. 663:8.⁵

In January 2017, Jamison was working for Trade Off at 180 Water Street, a residential building with 32 floors. Tr. 643; 2-3; 647:16-18; 664: 10-11. In early January, foreman Cesar Ordonez instructed Jamison to clean the 28th floor of the building—at the time, an open area with no safety netting. Tr. 648; 664. Knowing that safety gear is required for work over 6 feet, Jamison refused to clean the 28th floor without a harness, but Cesar did not provide one. Tr. 646: 12-13; 648. Jamison called Trade Off supervisor Jonathan Morales and complained about the lack of safety harnesses at the jobsite, particularly given that he had been asked to clean the unsecured 28th floor without proper safety gear. Tr. 646-647. Rather than addressing Jamison's concern, Morales cursed at Jamison and chastised him for calling. Tr. 647: 11-14. On another occasion, in January 2017, Cesar instructed Jamison and laborer Anthony to clean the roof of the building. Tr. 649: 21; 650: 17-20, G.C. Exh. 23(a)(b)(c). Again, Cesar did not provide harnesses.

⁴ Jamison referred to the supervisor as "Jonathan" however, based on the testimony of Justin Hagedern as well as several employee witnesses it appears that the supervisor referred to is Respondents field supervisor Jonathan Morales.

⁵ Respondent did not present Morales to testify, thus this conversation is un rebutted and Morales statement to Jamison is attributable to Respondent as a party admission.

Tr. 650: 21-22. Jamison and Anthony are not the only employees at the 180 Water Street jobsite who were left to clean upper-level floors without proper protective gear. Tr. 654; G.C. Exh. 25; 656-657; G.C. Exh. 19. During his time at that job site, Jamison recorded another Trade Off employee who he observed cleaning the 26th or 27th floor of the building. Tr. 654-655, 657-658; G.C. Exhs. 19, 25. In fact, while at 180 Water Street, Jamison did not see a single Trade Off employee wearing a harness. Tr. 671:7-8.

In January 2017, a week or two after Jamison complained to field supervisor Morales about the lack of safety harnesses, he had a conversation with Justin Hagedorn that led him to resign from Trade Off. Tr. 660-662. That morning, while Jamison was on the train on his way to his job site, field supervisor C.J. Erickson called to find out Jamison's location. Tr. 672. Jamison explained that he was on the train. Tr. 673: 1-4. In fact, prior to his call with C.J. Jamison had already informed the foreman at the job site that he would be late because his job site had been changed by C.J. on his way to work that morning. Tr. 661: 22-25; 662:1. After speaking to C.J., Jamison received a call from Hagedorn who accused him of lying to C.J. about his whereabouts. Tr. 661: 7-15; 672-673. Hagedorn informed Jamison that he had to return his foreman cell phone and that his pay would be cut by \$5 an hour. Tr. 660: 7-16; 673: 9-17.

In April 2017, the day after a concrete-form blowout spewed debris 35 stories down onto cars driving on East 59th Street, Jamison joined a number of other building-trades workers at a rally protesting the developer's use of nonunion contractor Gilbane. Tr. 643; G.C. Exh. 12; 645-646. Jamison spoke at the rally—attended by well over 150 people—regarding his terms and conditions of employment while employed by Trade Off. Tr. 643: 4-15. Jamison was nervous, understandably so, as this was his first time doing any public speaking. Tr. 643; 16-19. Jamison recalls that the statements he made at the rally were accurate, however at the hearing he noted

that the author of a Labor Press article about the rally had not accurately captured his statement. Tr. 660: 1-4; 662: 1-4. In the article, regarding Jamison the author wrote “[w]hen he complained about not having a harness, he says, the Tradeoff supervisor ‘pretty much cursed me out,’ threatened to cut his pay by \$5 an hour, and hung up on him.” G.C. Exh. 12. Although the way the author wrote the sentence makes it appear as if the two incidents—being cursed out by a manager and being threatened with a \$5/hour pay cut—happened in one event, Jamison clarified that they were two separate incidents. Tr. 660.

ii. Ricardo Pimentel

Ricardo Pimentel was employed by Trade Off LLC from November 2016 until February 2017. Tr. 612: 17-20. Pimentel spent his first few days with Trade Off as a laborer at the Charleton Street job and was reassigned to 56 Fulton Street as a Foreman until February 2017. Tr. 615: 18-25; 616:1-4, 15-19.

While assigned to the Charlton Street project, Pimentel asked, then field supervisor, Earl Williams about health benefits. Tr. 613: 1-7, 10-13. Williams told Pimentel that Trade Off had health coverage, and Pimentel requested that he be signed up. Tr. 613: 15-18. Williams told Pimentel that he would get someone to the job site to sign him up. Tr. 614: 1-2. In January or February 2017, having received no health benefit paperwork from Trade Off, Pimentel followed up with Justin Hagedorn regarding his desire for health insurance benefits. Tr. 614: 9-25. Hagedorn’s response was that the benefits were not worth it. Tr. 615: 2-4. When Pimentel insisted, Hagedorn, like Williams, made a vague promise to get someone to the job site to sign him up. Tr. 615: 5-8. Despite assurances from Williams and Hagedorn, Pimentel was never enrolled in a health plan during his employment with Trade Off. Tr. 612: 21-23. In addition, Pimentel did not receive paid vacation or retirement benefits during his employment with Trade Off. Tr. 615: 12-19.

While serving as a Foreman at the 56 Fulton Street job site, Pimentel did not receive any safety training. Tr. 617:19-21. Trade Off did not provide harnesses for laborers on the 56 Fulton St. jobsite, even when Pimentel requested them. Tr. 617: 22-25’ 618: 1-10. Pimentel was only able to secure a harness after speaking to the Superintendent of Bravo Builders, the General Contractor on the job site. Tr. 618: 13-25. The harness that the Bravo Superintendent gave to Pimentel was from Bravo, not Trade Off. Tr. 618: 11-18.

In April 2017, Local 79 representative Jeremy recorded Pimentel making a statement about the advantages of being a union member and his working conditions at Trade Off. Tr. 619: 6-12; 620: GC Exh. 14. At the time, Pimentel was working as a Journeyman for a company called Tishman. Tr. 619: 15-20. In the recording Pimentel discusses his working conditions as a Trade Off employee stating, among other things, that on a jobsite “you might only have one harness in a shanty which a whole bunch of guys that you gotta share. And you’re lucky to get that because you gotta fight for that, you gotta argue for that, you gotta push him for that, because you gotta do a lot of dangerous things being a laborer.”. GC Exh. 14. Pimentel also stated that “[t]here was no benefits” and explained that he had been told Trade Off had medical insurance but was also informed that the insurance was not worth it. G.C. Exh. 14. He goes on to explain that even when he insisted that he wanted the insurance the Company never provided it to them.

iii. Trade Off’s defamation lawsuit

On April 24, 2017, the Employer filed a lawsuit against Local 79, Darrell Jamison and Ricardo Pimentel. G.C. Exh. 22. The lawsuit, filed in the Supreme Court of the State of New York, County of Nassau, alleges defamation and libel causes of action, and requests compensatory and punitive damages. G.C. Exh. 22. More specifically, the lawsuit alleges that the defendants made three statements that contained defamatory and/or libelous content.

First, paragraph 7 of the lawsuit alleges that the following statement from G.C. Exh. 14, the video clip created by the Union and featuring Ricardo Pimentel was defamatory and libelous, quoting the following language in particular:

When I was working for Trade Off ... you might only have one harness in a shanty with a whole bunch of guys that you gotta share. And you're lucky to get that because you gotta fight for that, you gotta argue for that, you gotta push him for that, because you gotta do a lot of dangerous things just being a laborer[] ... [t]here was no benefits.

G.C. Exh. 22.

Second, paragraph 8 of the lawsuit attributes the statements in a March 30, 2017 news article to the Union and alleges the following statements as defamatory and libelous:

“Following last week's construction accident that left a hoist dangerously dangling hundreds of feet in the air above thousands of passersby, today construction workers, elected officials, and community activists gathered at 200 E59th Street to call attention to this unsafe ... job site and their subcontractor, Tradeoff, firing of a worker who requested a safety harness on the job[] ... Tradeoff should be doing everything in their power to promote and support safe job sites, not firing workers that demand such things.”

G.C. Exh. 12, 22.

Finally, paragraph 9 of the lawsuit alleges that Darrell Jamison made defamatory and libelous statements in an April 1, 2017, news article, quoting the following language in particular:

When [Darrell] complained about not having a harness, [Darrell] says, the Tradeoff [sic] supervisor 'pretty much cursed me out,' threatened to cut his pay by \$5 an hour, and hung up on him.

G.C. Exhs., 12, 22.

D. Riccie Haneiph engaged in union and protected activity and Respondent discharges him and/or refuses to hire/consider him for hire

Riccie Haneiph was hired by Trade Off LLC, in or around June 2016 and worked as a laborer for the Respondent until June 20, 2017. Tr. 138:3-5; 169-170. Haneiph obtained his job with Trade Off through the employment referral organization, the Center of Employment Opportunities (CEO). Tr. 138: 10-13. During Haneiph's employment with Trade Off, he reported to CEO regularly to update a representative regarding his employment. Tr. 210: 5-11.

Starting around the time he was hired by Trade Off and continuing, Haneiph made numerous complaints to Trade Off supervisors Justin Hagedorn and Jonathan Morales, and a number of foremen and coworkers regarding the insufficient personal protective equipment on the jobsite. Tr. 142-148. While at Trade Off, Haneiph also had complaints about the lack of safety harnesses. Tr. 150: 1-2. At the hearing, Haneiph described one incident in particular that stuck out in his mind. Tr. 150. While he was working for Respondent at a Pearl Street jobsite, the foreman Bruce asked him to clean the elevator shaft from the 35th floor down. Tr. 150. When Haneiph requested a harness, the foreman discovered that the only one on site was broken. Tr. 150-151. However, the foreman instructed Haneiph to complete the task despite the lack of a harness and made a joke about Haneiph possibly falling to his death. Tr. 152. Haneiph, fed up with being bounced from one job site to another, followed the foreman's directive, risking his own safety in the hopes of maintaining a stable job assignment. Tr. 153: 6-9. However, while

performing the unsafe task assigned to him, Haneiph was so fearful for his safety that he was only able to complete a few floors. Tr. 153: 13-15. The next workday, again, Haneiph was expected to clean the elevator shaft without a working harness. Tr. 156-157. However, this time, having found the confidence to exercise his rights, Haneiph refused to do the job and the foreman sent another employee to complete the task without a harness. Tr. 156-157; 217:13-15. After refusing to do the unsafe work, Haneiph received a text alerting him that he was no longer wanted at the job site. Tr. 217:21-22.

In around February or March 2017, field supervisor C.J. Erickson, called Haneiph, who was at the time laid off from work, around 10 a.m. to offer him a job assignment on 95th street in Manhattan. Tr. 164. Haneiph was on the train heading home, but having been out of work for some time, he jumped at the opportunity and agreed to head straight to the 95th street job site. Tr. 164-165. Upon arriving to the site, Haneiph realized he had showed up to work without work boots (he was wearing Adidas sneakers) and was sent home by the foreman Derrick. Tr. 163:13-23; 167. This was the first and only time that Haneiph reported to a Trade Off jobsite without proper footwear. Tr. 163: 13-17. Haneiph did not receive a write up or any other discipline for arriving to work without the proper footwear. Tr. 168: 12-14. After the sneaker incident Haneiph continued to receive work assignments from Trade Off. Tr. 168: 17-18. In fact, he testified that he was assigned to 50 Clinton Street, his best and longest job assignment while at Trade Off, after the sneaker incident. Tr. 168: 17-123. Haneiph's last scheduled day of work was on June 20, 2017. Tr. 169; G.C. Exh. 8. That day he worked at 118 Fulton street and the foreman on the job site was Anthony. Tr. 169; G.C. Exh. 8.

Around mid-July, 2017, Haneiph learned about Local 79's Facebook page from another Trade Off worker. Tr. 176. Haneiph has a Facebook account under the pseudonym Persevere

Styles. Tr. 183: 19-25. Using his Persevere Styles account, Haneiph went to the Local 79 facebook page and commented on a photo that was posted on July 13, 2017, that included Local 79 organizer Paris Simmons along with six men in construction clothing (one of which is wearing an orange tee with the Trade Off logo). Tr. 176-178; G.C. Exh. 10. Five of the men are holding signs that read “Trade Off is unfair to labor, ULP Strike.” G.C. Exh. 10. Haneiph’s comment (under the Persevere Styles account), which is time stamped with July 18, 2017, reads:

“I’m a Trade Off worker and I want to be a part of this movement as well because we are being treated unfair!”

G.C. Exh. 10. Haneiph “shared” the post on his Facebook wall. Tr. 220:13-17. Haneiph’s comment on the shared post, dated July 18, reads:

“I’m a Trade-Off worker as well and WE ARE BEING TREATED UNFAIR! I encourage all Trade Off workers to join us and be a part of this movement!

G.C. Exh. 16.

At some point after his July 18 Facebook posts, Haneiph called Hagedorn to ask for work. Tr. 182. Hagedorn replied that he had given Haneiph a fair shot, but that his Facebook post “was uncalled for.” Tr. 182: 10-13. During this period, around the time of Haneiph’s Facebook activity related to Trade Off, Haneiph, Paris Simmons, and a number of other Trade Off employees that had been referred to Trade Off by CEO, went to CEO to talk to a case worker named Terry Ellis about their terms and conditions of employment. Tr. 184-187. During their conversation with Ellis, Haneiph complained about several workplace issues, including that Trade Off did not treat its employees fairly and did not provide proper PPE, promised raises or training. Tr. 187: 4-20.

In around July 2017, Haneiph attempted to apply for unemployment with a representative at the Unemployment office who instructed Haneiph to obtain proof that he was no longer working for Respondent. Tr. 179: 24-25; 180: 2-13. In response to Haneiph's request for an employment status letter, Respondent sent him a letter dated July 19, 2017, stating that he was still an employee of Trade Off. G.C. Exh. 9. Tr. 180: 16-22. After receiving the employment status letter from Respondent, Haneiph reached out to Hagedorn in an attempt to obtain work assignments. Tr. 181: 20-24.

In or around July 2017, frustrated with being given the run around by Hagedorn, Haneiph went to Local 79 to meet with Union representatives. Tr. 222: 21-25; 223:1-2. During that meeting, Haneiph called Hagedorn, put the phone on speaker, and asked for work. Tr. 223: 8-9. Haneiph testified that Hagedorn said he did not appreciate what Haneiph had said at CEO. Tr. 223: 9-10. Hagedorn then indicated he had heard noise in the background and said Haneiph should call him back. Tr. 223: 10-12. Thereafter, Hagedorn stopped accepting Haneiph's phone calls. Tr. 223: 12-13.

E. David Robinson and Darrell Thomas Engage in Protected Activity and are Discharged by Respondent on the Same Day

David Robinson was hired as a general laborer for Respondent Trade Off in around June 2016 and Robinson was promoted to Trade Off Plus in July 2017. Tr. 40:22; 44: 1-8. Darrell Thomas was hired as a laborer for Trade Off in around May 2016 and was promoted to Trade Off Plus in August 2017. Tr. 249:2-6.

While working for Trade Off, as opposed to Trade Off Plus, Robinson never received documents from Respondent regarding health insurance. Tr. 100: 19-25; 101: 1-4. At the

hearing, Robinson had no knowledge of Trade Off, LLC offering Magna Care health insurance, despite having worked for Trade Off for over a year. Tr. 100: 19-23.

i. Events of September 15, 2017

On September 15, 2017, both Thomas and Robinson were working for Trade Off Plus at the 520 West 30th Street jobsite. Tr. 48:21-22; 266: 6-10. There were two foremen at the jobsite, Rich Cotrite and Daryl Green. Tr. 22-24. Thomas and Robinson were scheduled to begin work at 7:00 a.m., but Robinson arrived to work around 6:00a.m. on September 15 to distribute leaflets to his coworkers. Tr. 49:2-8. The leaflets, which criticized Respondents pay and benefits, specifically referenced “questionable retirement benefits” promised to employees but to which employees could not get access. G.C. Exh. 4. The leaflets also complain that the health insurance is awful and that employees do not receive fair raises. G.C. Exh. 4. Thomas arrived to work around 6:20a.m. and, along with Local 79 representative Paris Simmons and Robinson, distributed the leaflets to coworkers. Tr. 265: 12-24. That morning Robinson and Thomas distributed upwards of 30 leaflets to their coworkers entering the building. Tr. 50: 5-6; 267: 21-23; 268: 2-9. Prior to September 15, Robinson and Thomas had discussed the issue of the lack of a 401(k) plan with other employees. Tr. 47: 18-25; 48: 1-2.

At some point prior to the beginning of the shift, foreman Cotrite approached Robinson and Thomas while they were leafletting. Tr. 53; 269. Robinson handed Cotrite a flier which Cotrite reviewed before saying “whatever” and walking away. Tr. 53: 14-18. Moments later, before 7a.m., Cotrite returned and confronted Robinson and Thomas. Tr. 54-58. Local 79 representative Paris Simmons used his phone to record the conversation. G.C. Exh. 2. In the recording, Cotrite, identified by Robinson and Thomas as the gentleman in the suit, can be heard

telling the employees that they should not be “doing that” and that they can “get fired for this, okay.” G.C. Exh. 2., 00:18-00.24; Tr. 56: 24-25; 57: 1-2; 62:13-15; 100: 11-18.

After Cotrite finished the above-referenced conversation, he walked away and Thomas and Robinson continued to distribute leaflets. Tr. 61; 272: 16-24. Cotrite then returned and told Robinson that being that he was handing out leaflets for Local 79, he could sign out and go home. Tr. 61: 21-23. Robinson continued to hand out leaflets. Tr. 63: 3-6. A few moments later, Trade Off field supervisor Jose Bonilla appeared and had a brief conversation with Cotrite. Tr. 63: 8-11. Cotrite then approached Robinson and Thomas and told them they could return to work. Tr. 63: 8-11. After this exchange Robinson and Thomas entered the building and prepared to start work. Tr. 63: 20-21. While the two were in the shanty area Cotrite approached and directed them to go to the “retail area” to work because they were not wanted upstairs. Tr. 273: 20-25; 274: 1-3. Prior to that date, Thomas and Robinson had been working with the window guys, chopping wood and placing them in wood baskets, as the other workers were installing the windows. Tr. 134:1-16. Both employees protested this assignment to foreman Green because there was not much work to be done in that area, Green replied “come on, man, you know what’s happening.” Tr. 275: 1-12.

While Thomas and Robinson were cleaning the in the retail area, field supervisor Bonilla parked his work truck outside the retail area, about 30 feet away, and watched the two employees through the window. Tr. 64: 16-25; 1-11; Tr. 344: 12-18.

Around 12p.m., during their lunch break, Robinson and Thomas continued to distribute leaflets near the entrance of the building. Tr. 65: 18-25; 66:1;275: 17-25; 276:1-9. Paris

Simmons joined them in leafletting at lunch. Tr. 65: 2-4. This time, no Trade Off employees would accept the leaflets. Tr. 66: 9-12. Instead, they responded “I can’t take that”

On around September 18, Thomas and Robinson were cut from the 520 West 30th Street job and moved to the 264 West Street job. Tr. 66: 19-21; 276: 13-16. There is no evidence in the record that other employees were cut from 264 West Street.

ii. Events of October 4, 2017

Prior to work start time on October 4, 2017, between 6 and 6:30a.m., Robinson, Thomas, and Simmons solicited Trade Off Plus employees outside of the 264 West Street workplace to join a petition demanding that employees be paid for the days they worked. Tr. 67: 21-251 ; 68: 1-4.; 279; 282: 6-7; G.C. Exh. 5. The employees were gathered across the street from the building. Tr. 68: 5-8; 279: 3-10. Robinson and Thomas called their coworkers over and explained to them what the petition was and why they should sign. Tr. 68:11-14. This petition was in response to Trade Off Plus’s decision to switch over to a new payroll system, which caused employees to be paid for only three days out of a five-day period. Tr. 70: 6-18; 279:17-22; 280: 1-18.

Meanwhile, in accordance with Respondent’s surveillance system, Hagedorn sent an email at 6:46 a.m. that morning, to unidentified recipients, alerting them of Local 79 present near 264 West Street. R. Exh. 28, pg. 5; Tr. 895-899.⁶ Thus, Respondent was on high alert that morning.

While Robinson and Thomas were attempting to convince other Trade Off Plus employees to sign the petition, foreman Delbert Hall approached the group of employees outside.

⁶ The exhibit appears to be mislabeled in the R Exhibits pdf provided by the court reporter service, however the email chain was admitted by the Judge, with the acknowledgement that they were not admitted for the truth of incidents that occurred while Hagedorn was not present. Tr. 899. While Counsel for the G.C. sites this document for the purpose of showing that the email was sent, we object to the statements therein as hearsay.

Tr. 76: 12-18. At that point, aside from their own signatures, they had obtained only one signature from employee Wes Coote. Tr. 293: 1-6. Hall asked, Thomas and Robinson if they had gotten permission from the office to solicit signatures. Tr. 75: 20-21. Robinson responded that he did not believe they needed permission from anyone to solicit signatures for the petition. Tr. 76: 1-2. Hall asked all of the workers on the site if they wanted to sign the petitions and then directed the Respondent's employees to get across the street to the job site. Tr. 289: 7-15; G.C. Exh. 13("Exhibit E" therein, paragraph 8). Thomas told the employees that they had a right to listen to what he and Robinson were saying and to sign the petition. Tr. 290; 7-14. Robinson and Thomas showed Hall the petition and asked him to sign, at which point Hall, Robinson and Thomas got into a heated argument, some of which was captured in a recording taken by Local 79 representative Paris Simmons. Tr. 76: 19-25; 77: 1-11; 287:18-25; G.C. Exh. 3. In the recording, Hall can be heard stating "I asked the rest of the workers," at which point Thomas interjects and states that "every man can choose for himself or not." Tr, 287: 9-13; G.C. Exh. 3, 00:05-00:12. Hall replied "[w]ho run this camp here?" G.C. Exh. 3, 00:12-00:13. In the recording, when Simmons tells Hall that he can not direct employees not to be a part of this, Hall responds by admitting to asking the employees if they wanted to be a part of the petition. Tr: 80: 1-4; 288: 20-22; G.C. Exh. 3, 00:33-00:58. After some back and forth regarding his questioning of employees, Hall reiterates that he can ask any one of them anything. G.C. 3, 01:11-01:16. At a certain point, towards the end of the altercation, Hall put his hand in Robinson's face and became so enraged that a hoist operator Jerry Industrious had to intervene and push Hall away from Thomas and Robinson. Tr. 79: 12-15; 292:14-17. Neither Robinson nor Thomas put their hand in Hall's face at any point during the exchange, and no one had to step in front of Thomas and Robinson. Tr. 82:1-4; 292: 18-25. Aside from Thomas and Robinson, only one other Trade Off Plus employee,

Weston Coote, signed the Petition. Tr. 69: 7-21; 283: 4-8; 292:24-25. All the Trade Off employees at the site were present during the confrontation. Tr. 76:3-8.

After the incident with Hall, Thomas and Robinson went inside around 7a.m. to prepare for work. Tr. 84-85; 294: 12-14. Foreman Hall instructed them to work on the 9th floor. Tr. 85: 17-25. Moments later, Hall, Robinson and Thomas rode the hoist together to the 9th floor, where Hall had instructed them to work. Tr. 185:14-17; Tr. 295: 14-21. When the hoist arrived on the ninth floor, Thomas exited the hoist. Tr. 29. As Robinson proceeded to exit the hoist Hall tapped him on the shoulder and said “you gotta go to the basement.” Tr. 86: 20-22. Robinson asked Hall why, but Hall did not respond and did not explain why he was sending anyone to the basement what he expected done in the basement. Tr. 87: 2-3. This was not the first time Robinson had asked a Trade Off foreman why he was being given a particular directive. Tr. 88: 21-23. Robinson then walked off the hoist and Hall remained on the hoist. Tr. 87:5-7. Robinson told him that Hall wanted them to go to the basement. Tr. 296: 6-10. Thomas was confused because his understanding was that only a foreman could give him a directive to work. Tr. 296: 17-20. Delbert never told Thomas that he needed to go to the basement. Tr. 383: 12-18.

At some point after Thomas and Robinson entered the building in the morning, they spoke to site safety manager Al to let him know what was going on. Tr. 84:1-5; 12-19; Tr. 297: 4-10. They explained the earlier incident with Hall and the petition to Al and Al told them he would call Justin Hagedorn. Tr. 84:5-7.

Robinson and Thomas worked on the 9th floor until they were notified that Hagedorn had arrived and instructed by Hall to go and speak to Hagedorn. Tr. 89: 15-17; 382. They went to the ground floor and attempted to explain their payroll issue to Hagedorn. Tr. 91:2-4. However, Hagedorn responded that he was not the person to speak to about the situation and walked off.

Tr. 91: 4-5; Tr. 298: 19-24. Hagedorn did not say anything to Robinson or Thomas about Hall during this conversation. Tr. 91:6-9; Tr. 378: 18-25. Hall was not present during this conversation between Thomas, Robinson and Hagedorn. Tr. 378: 9-14.

After the conversation with Hagedorn, Thomas and Robinson returned to the hoist area with the intention to return to work but Robinson did not see either of the hoist operators at the time. Tr. 91: 10-13; 110; 18-19. A few minutes later, Hagedorn approached them at the hoist, along with Hall, and instructed them to collect their belongings and leave the job site. Tr. 91: 15-19; 92: 1-3; Tr. 299: 13-18; 303: 6-8. Hagedorn told them that they were being fired for insubordination and to get off the site before he called the police. Tr. 91: 18-25.

After Hagedorn fired Thomas and Robinson he began recording their conversation. Tr. 301-303:5; G.C. Exh. 26(A)(B) and (C). In G.C. Exh.26(A), at the very beginning of the recording, Hall is heard saying “you pussy.” Tr. 366: 22-15; 376:1-4; G.C. Exh. 26(A), 00:01-00:03.⁷ Thomas is seen and heard complaining to Hagedorn about terms and conditions of employment. G.C. Exh. 26(A), 00:01-00:45. In that video Thomas is also seen and heard insisting that they had been on the 9th floor as instructed. G.C. Ex. 26(A), 01:14-01:17. Hall can be heard stating “10th floor” and “I know they didn’t go to the 9th floor.” Tr. 305: 5-6; G.C. Exh. 26(A), 01:17-01:22. In G.C. Exh. 26(B), Thomas can be heard saying “you was up on 9 with us though, the 9th floor right?” 01:05-01-07. At the hearing, Thomas explained that by the time G.C. 26 was recorded he was extremely agitated because he felt he had worked hard for the company and had done nothing wrong to deserve the treatment he was receiving. Tr. 305: 18-25. Thomas

⁷ Although during cross-examination, Respondent’s counsel attempted to attribute the voice stating “pussy” in the recording, not only is it clear from the recording that it was not Thomas’s voice, but Thomas reiterated that Hall called him a pussy. Tr. 367: 10. Further, without ever seeing G.C. 26, Robinson testified that Hall was behind Hagedorn, screaming at him and Thomas that they were “pussies.” Tr. 92: 10-15.

was particularly perplexed and upset because based on his understanding, the Company had tolerated misconduct by Hall and other employees. Tr. 307: 14-21. Thomas and Robinson exited the facility as instructed. G.C. Exh. 26 (C). Although he was upset, Thomas never lunged at Hall at any point during the interaction. Tr: 371: 7-10.

On October 6, 2017, first thing in the morning, at 6:19 a.m., Hagedorn sent an e-mail to Respondent's upper management regarding 264 West Street. G.C. Exh. 47. In the e-mail Hagedorn writes that "Local 79 Peon Paris Simmons was outside with disgruntled Trade Off Plus worker David Robinson" and notifies the recipients that he had identified Simmons and Robinson as "people of interest" to his private hired security. G.C. Exh. 47.

A few days after they were discharge, Hagedorn gave Thomas and Robinson termination letters. Tr. 93: 1-8; G.C. Exh. 6 and 7. The termination letters state that their discharges were based on the result of an investigation into the events of October 4, however, neither Robinson nor Thomas were contacted for their version of events. Tr. 93: 9-21; 312: 8-21. Prior to their termination neither Robinson nor Thomas had been disciplined by the Respondent. Tr. 93: 22-25; 312: 15-17; 313: 13-19.

F. Larry Kerr and Willie Zimmerman are discharged after PCA

Larry Kerr began his employment as a Trade Off laborer in November 2013 and Willie Zimmerman began his employment as Trade Off laborer in August 2015. Tr. 391:21; 392:16; 442: 16. Both employees were terminated on January 9, 2018. Tr. 398:22; 442: 17-19.

In April/May 2017 and July 2017, Larry Kerr attended meetings at Local 79's union hall. Tr. 763; 764. Around the same time, Respondent was heavily tracking Local 79's activity and the

activity of Respondents' employees seen communicating with Local 79 representatives. G.C. Exhs. 21, 29 -35. Hagedorn admitted to sending Trade Off employees to Union meetings to obtain information and report back to management. Tr. 1013. In Respondent's October 2018 state court lawsuit, there is reference to alleged statements made at a Local 79 union meeting. Tr. G.C. Exh. 44.

In December 2017, Zimmerman and Kerr both worked as general laborers at the 200 95th Street jobsite. Tr. 395:14-16; 444: 15-23. The General Contactor on the 95th Street site was Gilbane. The safety manager on the site was Michelle DePew, who was subcontracted by general contractor Menotti.

Around late December 2017, Zimmerman and other laborers were removed from the 95th Street job as a result of routine manpower cuts. Tr. 399-400. Kerr, however, remained on the job site. Tr. 445:1-4.

On December 8, 2017, Local 79's Facebook page Administrator Robert Tiburzi, posted a notice on Local 79's Facebook page, alerting potential applicants of the upcoming Local 79 apprenticeship program. Tr. 752-753; GC Exh. 48. On January 4, 2018 Tiburzi posted a second notice on Local 79's Facebook page reminding potential applicants of the apprenticeship program deadlines. Tr. 752-753; GC Exh. 49. The January 4 Facebook post contained a link to the DOL website, which also contained a notice regarding the Local 79 Apprenticeship program. GC. Exhs. 49 and 51; Tr. 799-800, 802:13-15. On Friday January 5, 2018, at 9:00am, the Local 79 apprenticeship program, which is well known for its higher wages and better benefits in the NYC construction industry, opened for applications. GC Exh. 49. The program is very

competitive and the applicants applicants fortunate enough to secure one of the 2000 slots were required to submit a hard-copy application at the Mason-Tenders location in Long Island City. Hard-copies were accepted beginning Monday, January 8, 2018.

On Wednesday January 3, 2018, Larry Kerr requested and obtained approval from his 95th Street Foreman Cesar Ordonez to arrive to work late that upcoming Friday. Thereafter, on Friday January 5, Kerr went to 32BJ to submit his application for the Local 79 apprenticeship program.Tr. 429.

On Saturday, January 6, 2018, the 95th Street jobsite was very busy. Tr. 524:19-25. The Site Safety Manager Michelle DePew felt that more help was needed, given the level activity. Tr. 524:19-25. Kerr, who had served as a Trade Off Foreman in the past, also felt there were not enough laborers on site that day. Tr. 442; 24-25; 455: 5-9. That morning, Kerr and DePew had a discussion about the manpower needs, during which DePew expressed an interest in having Willie Zimmerman return to the jobsite. Tr. 513: 19-24. Tr. 514:1-3. DePew suggested to Kerr that he try to talk to his Foreman to get Zimmerman staffed on the job. Tr. 519:1-6; 524:12-15. DePew had a positive impression of Kerr and Zimmerman which, she indicated to Kerr, was based, in part, on the fact the Gilbane superintendents thought highly of them. Tr. 514:1-3. Indeed, Zimmerman made such an impression on DePew that she was able to recall him personally despite having working with many employees of various employers at the site. Tr. 524: 4-6. After Kerr's conversation with DePew, around 9 a.m. he texted Trade Off Superintendent Justin Hagedorn and alerted him of DePew's interest in having Zimmerman back on the job. Tr. 459. Kerr waited for Hagedorn to call or text him back but he did not. Tr. 460: 12-14. A while later, Kerr told Ordonez that DePew wanted Zimmerman back on the job and Cesar told Kerr to contact Hagedorn. Tr. 461. When Kerr replied that he had already texted

Hagedorn, Cesar said okay. Tr. 461. After this conversation, Kerr called Zimmerman and informed him of DePew's request, and Zimmerman then came on the job to work. Tr. 400-401; Tr. 462. When Zimmerman reported to work he did not sneak onto the job site. Rather, he reported directly to the Foreman who gave him a job assignment and permitted him to work the entire day. Tr. 462-463.

On Saturday January 6, 2018, Hagedorn emailed his supervisor Abadie, notifying him that Zimmerman had returned to the 95th street jobsite. G.C. Exh. 45. Although Hagedorn wrote "I *suggest* that both Larry Kerr and Willie Zimmerman be terminated," his boss Abadie responded "[g]ive Larry his last warning that this is not how we act." G.C. Exh. 45. Although Hagedorn testified that he makes the discharge decisions, and that Abadie essentially has no say in the matter, G.C. 45 paints quite a different picture. To the contrary, in that email, Hagedorn "suggests" to Abadie that Kerr and Zimmerman be discharged and Abadie responds unequivocally regarding his final determination. G.C. Exh. 45. Thus, as of January 6, 2018, the Respondent had decided to discharge.

On Monday, January 8, Kerr and Zimmerman left the worksite around 8/8:15 A.M. to go submit their applications to the Mason-Tenders facility. Tr. 402:22-24; 464:9-10. When Kerr and Zimmerman got to the Mason-Tenders facility they joined a long line outside the building. Tr. 466. As the two men were near the front door, around 9:30 or 9:45 A.M., Zimmerman and Kerr noticed a forest green Hyundai hatchback that they had seen around Trade Off jobsites in the past, moving much slower than the speed of traffic. Tr. 467. They observed two men in the car, although neither could be identified because they were shielding their faces. Tr. 468-469. The green car made a U-turn at the end of the street, and drove back down the street in the opposite direction. Tr. 472. After the car passed by, Zimmerman and Kerr went inside the building to

submit their applications. When they emerged from the building some time later, they again saw the green Hyundai briefly, and then it drove away. TR. 474. Kerr and Zimmerman returned to work and completed the work day with no comment from the Foreman or any other Trade Off supervisors. Tr. 475.

The following day, January 9, 2018, Zimmerman and Kerr were terminated for “failure to follow policy and procedure and not following orders from supervisors on January 6, 2018.” Tr. 475-477; G.C. Exh. 24. Hagedorn testified that on January 8, 2018 he spoke to Michelle DePew, the Menotti representative regarding Zimmerman’s rehire, and she denied having authorized his return. At the Hearing, though, DePew recalled talking to Kerr about Zimmerman, she had no recollection of a conversation with Hagedorn about Kerr or Zimmerman. Tr. 515.

IV. ARGUMENT

A. Respondents Trade Off LLC and Trade Off Plus LLC are Single Employers, Jointly Liable for the Unfair Labor Practices in this Matter

The question of whether two nominally separate employing entities in fact constitute single employer is a highly fact intensive and fact specific inquiry. *Dow Chemical Co.*, 326 NLRB 288, 288 (1998). The Board examines four factors in making the single employer determination: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) common control of labor relations. *RDM Concrete & Masonry, LLC*, 366 NLRB No. 34, slip op. at 7 (March 18, 2018). No single factor is controlling, and all four factors need not be present to establish single employer status. *Id.* However, the Board has given special attention to the last factor because of its tendency to demonstrate “operational integration.” *Id.* As discussed

below, consideration of the factors cited above makes clear that Trade Off and Trade Off Plus constitute a single employer.

First, Trade Off and Trade Off Plus, LLC, are commonly owned and managed. Ronald Lottanzio is the sole owner of the two entities.

Second, the two entities share common management. As stated above, it is undisputed that Lottanzio is the owner of both Trade Off and Trade Off Plus. Lottanzio's direct report, Jason Abadie, is the VP of Operations for Trade Off and Trade Off Plus. During the relevant period, Abadie has been the direct supervisor of Justin Hagedorn who serves as General Superintendent of Trade Off and Trade Off Plus. Hagedorn also testified that he is employed by Luca Holdings.

There appears to be substantial interrelation of operations, particularly with respect to assignment of employees and common supervision by Hagedorn, Abadie and field supervisors. During the relevant period, field supervisors Jonathan Morales, Jose Bonilla, CJ Erickson, and Earl Williams oversaw the day to day operations of both Trade Off and Trade Off plus jobsites. Hagedorn, Erickson, and Jonathan assign employees to jobsites. Further, Trade Off, LLC and Trade Off Plus, LLC, share the same business address.

Fourth, Trade Off, LLC and Trade Off Plus, LLC, share centralized control of labor relations. Specifically, Justin Hagedorn exercises direct control over the day to day terms and conditions of both sets of employees, including hiring, firing, disciplining, and assigning those employees.

In short, all four of the factors bearing on the single employer analysis support the conclusion that Trade Off and Trade Off Plus are in fact a single employer.

B. Respondent violated Section 8(a)(1) of the Act by filing a baseless and retaliatory lawsuit against employees Darrell Jamison and Ricardo Pimentel

It is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of” their rights under the Act. 29 U.S.C. 158(a)(1). Because “[a] lawsuit may be used by an employer as a powerful instrument of coercion or retaliation,” an employer violates Section 8(a)(1) under certain circumstances by filing and maintaining a lawsuit against its employees. *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 740 (1983). An employee subjected to litigation costs and the possibility of an adverse judgment against him as a result of engaging in protected activity is unlikely to engage in such activity.

To ensure protection for legitimate petitioning under the First Amendment, however, not every suit by an employer against its employees is unlawful. *Id.* at 742-43. Rather, the Board may find an employer’s lawsuit to be an unfair labor practice, and may order it enjoined, only if the suit is objectively baseless and was brought to retaliate against employees for engaging in protected activity. *Id.* at 744; *BE&K Constr. Co.*, 351 NLRB 451, 456-57 (2007). Trade Off’s lawsuit against employees Darrell Jamison and Ricardo Pimentel satisfies both prongs.

i. Employees Darrell Jamison and Ricardo Pimentel were engaged in protected activity when they made the allegedly defamatory statements

Section 7 of the Act protects the right of employees to engage in concerted activities for their mutual aid or protection. “The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252–53 (2007) (nurse’s critical statements about hospital’s staffing ratios and their effect on patient care at a press conference and on a union website were protected Section 7 activity), *enforced sub nom. Nevada Service Employees Union Local 1107 v.*

NLRB, 358 Fed.Appx. 783 (2009). *See also, e.g., Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 5 (2018) (union and its members engaged in protected concerted activity by notifying potential hotel customers of the union’s labor dispute with the hotel and leading a consumer boycott of a hotel in connection thereof). Specifically, “the Board has found employees’ communications about their working conditions to be protected when directed to advertisers, its parent company, a news reporter, and the public in general,” so long as the communications are “related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue as to constitute, for example, a disparagement or vilification of the employer’s product or reputation.” *Kinder-Care*, 299 NLRB at 1171 (internal citations omitted).

In the instant case, Jamison and Pimentel were engaged in protected concerted activity when they made or recorded the allegedly defamatory statements complaining about terms and conditions of employment at the Trade Off’s worksites. Both of their statements were made in furtherance of the Local 79’s campaign to improve safety conditions and dissuade a general contractor from using nonunion subcontractors, and neither was “so disloyal, reckless, or maliciously untrue” as to fall outside the protections of the Act. *Emarco, Inc.*, 284 NLRB 832, 833 (1987). Jamison’s statements, as quoted in the April 1 news article, were protected concerted activity made in furtherance of a Union campaign aimed at improving worker safety and increasing union representation in the building trades. He and other building-trades workers were protesting a general contractor’s use of nonunion sub-contractors—including the Employer—at a Union rally sparked by two high-profile safety incidents at that particular worksite. His statements were restricted to his experience working for the Employer and detailed the unsafe conditions he experienced while working for the Employer on a similar project. The article that quoted Jamison’s statements at the rally also quoted another former

employee of the Employer, who reported similar safety concerns, and a city councilmember, who had proposed new construction-safety legislation and spoke of the improved safety practices on union worksites. And Jamison’s statements were not so disloyal, reckless, or maliciously untrue, within the meaning of *Jefferson Standard*, as to fall outside the Act’s protection because they did not disparage the Employer’s product or service but only criticized its labor relations and worker safety practices. *See, e.g., MasTec Advanced Technologies*, 357 NLRB 103, 108 (2011) (finding that employees’ participation in newscast accusing employer of deceptive business practices did not lose Act’s protection because they were publicizing dispute over pay practices and there was no evidence they intended to inflict economic harm on employer), *enforced sub nom. DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016). *Cf. Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240–41 (2000) (finding phone call to employer’s competitor that referred to “union problems” was not so disloyal as to lose protection of the Act while flyer that sharply criticized employer’s product and services with no reference to labor dispute unprotected). Nor, as discussed below, were the statements “maliciously untrue.”

Likewise, Pimentel’s recorded statement on behalf of the Union constituted protected concerted activity and did not fall outside the protection of the Act. Section 7 “defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities. *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). *See also C.S. Telecom, Inc.*, 336 NLRB 1193, 1193–94 (2001) (finding that employee who gave employer’s jobsite locations to union so it could target employer’s customers was concerted activity even though employee was acting alone; assisting a union is, “by definition,” acting concertedly). Here, the Union was engaged in an ongoing labor dispute over a general contractor’s practice of using both union and nonunion sub-contractors on construction jobs, and Trade Off was one of

the nonunion sub-contractors that the general contractor used. Pimentel's statement was recorded by the Union in furtherance of this labor dispute and addressed the actual issue that the labor dispute involved. Thus, he spoke about how he viewed his job to be dangerous while working for the nonunion Employer because of the lack of safety equipment or training, and contrasted that with the advanced safety training he received once he joined the Union. Pimentel's statement simply reflected his personal opinion, as a former employee of Trade Off, regarding the benefits of working for a union employer, and his comments were restricted to a comparison of terms and conditions of employment. As with Jamison's statements at the rally, Pimentel's statements criticized Trade Off's labor policies and safety practices without disparaging the Company's products or services and, as discussed below, they were not "maliciously untrue." Accordingly, his statements were not so disloyal, reckless, or maliciously untrue as to fall outside the Act's protection.

ii. The lawsuit is objectively baseless

A lawsuit is objectively baseless when its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits." *BE&K Constr. Co.*, 351 NLRB at 457 (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)). A suit that raises no "genuine issue of material fact" or is premised on "plainly unsupported inferences from the undisputed facts" meets that standard. *Bill Johnson's*, 461 U.S. at 745-47 & n.11. In determining whether a suit is baseless, the Board "may draw guidance from the summary judgment and directed verdict jurisprudence." *Id.* at 745 n.11. It need not look only at the complaint, but may consider the employer's testimony or evidence, or lack thereof, in support of the suit at the unfair-labor-practice hearing. *Id.* at 744-46 & n.12.

The burden rests on the state court plaintiff to present the Board with evidence showing genuine issues of material fact and that there is prima facie evidence of each cause of action alleged. *Bill Johnson's*, 461 U.S. at 746 n.12. An employer's failure to present evidence as to an essential element of its claim is grounds for finding that its suit is baseless. *Milum Textile Servs. Co.*, 357 NLRB No. 169, 2011 WL 7080653, at *8-9 (2011); *see also Diamond Walnut Growers, Inc.*, 312 NLRB 61, 69 (1993) (finding employer's libel suit against a union "entirely baseless" because "there was no evidence that the Union engaged in any conduct which would constitute publication"—an element of its claim), *enforced*, 53 F.3d 1085 (9th Cir. 1995). Moreover, an employer that has not produced such evidence cannot simply "assert[] that he has additional, undisclosed evidence that renders his suit well-founded," *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), but must provide "an acceptable explanation why he cannot present [it]," *Bill Johnson's*, 461 U.S. at 746 n.12.⁸ If discovery has not yet commenced, the employer must "describe what evidence [it] expects to obtain through discovery" and "explain why it c[an] not yet produce that evidence." *Geske & Sons*, 103 F.3d at 1376; *see also Milum Textile Servs.*, 2011 WL 7080653, at *8 (finding a lawsuit baseless at the complaint stage if the employer "did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action"). Accordingly, the court in *Geske & Sons* found that a pre-discovery lawsuit was baseless when the employer stated at the unfair-labor-practice hearing that it had "lots of other evidence" in addition to what was

⁸ Likewise, in the summary-judgment context, "[t]he non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts or defeat the motion through mere speculation or conjecture." *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (internal quotations omitted). And if the party opposing summary judgment claims that necessary facts are unavailable, it must "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d).

presented to the state court, but refused to produce any such evidence and “never made any attempt” to explain why. 103 F.3d at 1370, 1376.

In order to successfully prosecute a state defamation lawsuit that is connected to a labor dispute, a complainant—in addition to satisfying the state defamation requirements—must demonstrate that the allegedly defamatory remarks were made with actual malice and that the plaintiff was injured by them. *Linn v. Plant Guard Workers*, 383 U.S. 53, 65–66 (1966).⁹ A statement is malicious if it is made with knowledge of its falsity or with reckless disregard of whether it is true. *See Linn*, 383 U.S. at 65–66. Before the test of reckless or knowing falsity can be met, there must be in the first instance a false statement of fact. *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 963 (2000) (citing *Dunn v. Air Line Pilots Assn*, 193 F.3d 1185, 1192 (11th Cir. 1999), *certiorari denied* 120 S.Ct. 2197 (2000)). And, demonstrating the federal overlay of actual malice is a “heavy burden” that must be shown by “clear and convincing proof.” *Id.* Additionally, a court plaintiff that alleges harm to its reputation must show evidence of actual loss due to reputational harm. *See Linn*, 383 U.S. at 65; *Intercity Maint. Co. v. Local 254, SEIU*, 241 F.3d 82, 89–90 (1st Cir. 2001) (despite evidence of malice, plaintiff alleging defamation in labor dispute “could not rest on the common law presumption of damages” and failed to show “evidence of actual loss due to reputational harm and consequent lost profits”).

At the ULP hearing Respondent failed to produce evidence satisfying essential elements of its claim, an explanation for why it had not done so, or an accounting of the evidence that it

⁹ New York also follows the *Linn* standard, such that a New York State court claim of unlawful defamation stemming out of a "labor dispute" must also demonstrate that the allegedly defamatory remarks were made with actual malice and that the plaintiff was injured. *See generally, Richards v. Local 79*, 25 Misc.3d 1212(a), 901 N.Y.S.2d 910 (Sup. Ct. 2009) (unreported disposition reiterating that "it is also necessary to allege actual or special damages" in New York state defamation cases arising in the context of a labor dispute).

believed it could obtain in the future.¹⁰ For instance, Trade Off failed to present the ALJ with any evidence demonstrating that the Jamison and Pimentel's statements were made with malice and caused it actual harm, or that it will be able to demonstrate malice and damages before the state court. Indeed, Trade Off offered no proof that the allegedly defamatory statements were actually untrue. First, Jamison's statement that the supervisor Jonathan Morales cursed him out and hung up on him when he asked for a safety harness is un rebutted by the Respondent. Moreover, employees Riccie Haneiph, Darrell Thomas and Ricardo Pimentel all corroborated Jamison's claim about the lack of safety equipment at the Employer's worksites. Further, Trade Off's lawsuit allegation relies on a newspaper story about a union rally, which summarized Jamison's statement rather than presenting it as a direct quote.

Nor has Respondent offered any evidence that Pimentel's statement about only having one safety harness available for all of the workers on site was untrue. Indeed, that Haneiph and Thomas described virtually identical working conditions at other Trade Off and Trade Off Plus worksites buttresses its veracity. As for Pimentel's allegedly defamatory claim that "there was no benefits," in the recording he immediately clarified that he did not receive the only benefit offered, health coverage, because Trade Off failed to sign-him up despite his requests. Thus, the statement was clearing an opinion based on his experience at Trade Off. Finally, even had Trade Off offered any proof that these statements were untrue, it would still need to demonstrate that the Jamison and Pimentel made the statements with knowledge of their falsity or a reckless disregard for their truth. The Employer has presented no such evidence. Thus, the Employer has failed to demonstrate that the statements were made with malice. *See Ashford TRS Nickel, LLC,*

¹⁰ Trade Off's only witness Hagedorn had no direct knowledge regarding the elements of the lawsuit. Aside from providing general assertions the Respondent provides healthcare or benefits, he could not rebut Jamison and Pimentel's claims regarding conversations with other supervisors about the lack of PPE or benefits.

366 NLRB No. 6, slip op. at 6 (“[N]ot only did the Respondent fail to adequately plead actual malice, the Respondent did not assert any facts that, if proven, would have established actual malice Thus, from the beginning, an essential element of the lawsuit was lacking, preordaining the lawsuit’s failure.”).

The allegedly defamatory statement attributed to the Union about the Employer firing an employee for requesting a harness was actually made by the director of organizing from another union. The Employer has failed to present any evidence that the person was an agent of the Union at the time that the statement was made or that the Union had anything to do with the organizing director’s decision to make the statement. Under common-law principles, an agency relationship is established by evidence indicating that the putative agent had “actual” or “apparent” authority to act on a principal’s behalf. *See Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 n.4 (1991). The Employer has presented no evidence to establish such a relationship between the Union and the director of organizing for the Mason Tenders District Council of Greater New York. Therefore, regardless of the truthfulness of the statement, it cannot be attributed to the Union.

Additionally, the Respondent failed to demonstrate that the allegedly defamatory statements caused it actual harm. *See, e.g., Milum Textile*, 357 NLRB at 2053 (under *Linn*, plaintiff must plead and prove actual damages, in contrast to those jurisdictions where damages are presumed under state defamation law). In its complaint, the Employer claims that Jamison and Pimentel allegedly defamatory statements tended to subject it “to public contempt, ridicule, aversion, disgrace, and induce an evil opinion of it in the minds of right-thinking persons,” and

to “injure [the Employer] in their business and trade.”¹¹ However, relying on such general and vague assertions without identifying some specific impact that the allegedly defamatory statements have had on the Employer’s business fails the *Linn* actual damage requirement.¹² A plaintiff that alleges reputational harm must show some evidence of actual damages that resulted from the alleged defamation. *Linn*, 383 U.S. at 65. Here, the Employer has failed to provide the Region with any evidence that connects the allegedly defamatory statements to a specific harm, and thus has failed to satisfy an essential element under *Linn*. See *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6 (General Counsel may demonstrate baselessness by showing that there is an absence of evidence to support an element in the plaintiff’s case).

Because the Respondent has not shown that it possesses or reasonably believes it can obtain evidence to support essential elements of its cause of action—that Jamison and Pimentel’s statements were maliciously false and that the Employer experienced actual harm as a result of Jamison and Pimentel’s statements—the Employer’s lawsuit is baseless under *Bill Johnson’s*.

iii. The lawsuit is retaliatory

An objectively baseless lawsuit is unlawful if it was filed with a motive to retaliate against employees for engaging in protected activity. As in other contexts, the Board’s motive findings regarding employer lawsuits are worthy of “special deference.” *Petrochem Insulation*,

¹¹ We note that even assuming the Employer were being viewed in this light, it is as likely that any harm to the Employer’s reputation resulted from its work on the 200 E. 59th Street site, where there were two highly-publicized construction accidents within a week during this time-frame: one on March 22 that involved a hoist left “dangerously dangling above thousands of passerby” and one on March 29 that involved a concrete blowout.

¹² See, e.g., *Intercity Maint. Co.*, 241 F.3d at 86, 90 (although plaintiff presented evidence of pecuniary loss from losing clients, plaintiff failed to show how the loss actually resulted from the union’s maliciously false statements). Cf. *Linn*, 383 U.S. at 64 (noting in dicta that economic loss often accompanies labor disputes); *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at n.17 (2018) (ALJ found that lawsuit was baseless because, where hotel led in regional sales during boycott, it failed to show actual damages; Board did not rely on this rationale, noting that sales might have been even higher but for the boycott, but still held lawsuit was baseless).

Inc. v. NLRB, 240 F.3d 26, 34 (D.C. Cir. 2001); *see also NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82, 90 (2d Cir. 1987) (noting that the Court “ordinarily will defer” to the Board’s motive determinations). Evidence of an employer’s retaliatory motive can be direct or circumstantial.

An employer’s animus towards unions or protected activity, as well as other contemporaneous unfair labor practices, serves as circumstantial evidence of a retaliatory motive. *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990); *Machinists Lodge 91*, 298 NLRB 325, 326 (1990), *enforced*, 934 F.2d 1288 (2d Cir. 1991). In addition, a suit’s demand for punitive damages provides further evidence of a retaliatory motive, as does a request for compensatory damages for unspecified harm. *Diamond Walnut Growers*, 53 F.3d at 1089; *Summitville Tiles*, 300 NLRB at 66; *Machinists Lodge 91*, 298 NLRB at 326. Without any connection to actual harm suffered by the employer, a large damages demand suggests an intent to frighten or harm the employee who would be on the hook for such an amount if the suit were successful. Indeed, such a demand heightens the coercive effect of the lawsuit. *See Bill Johnson’s*, 461 U.S. at 741 (“[T]he chilling effect of a state lawsuit upon an employee’s willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.”).

A lawsuit’s baselessness likewise indicates that it was filed in retaliation for protected activity. *Petrochem Insulation*, 240 F.3d at 32-33; *Milum Textile Servs.*, 2011 WL 7080653, at *7 n.22. If the suit has no legitimate purpose, it is reasonable to infer an illegitimate one; a finding that “no reasonable litigant could realistically expect success on the merits,” *BE&K Constr. Co.*, 351 NLRB at 457, undermines any pretense that the employer sincerely sought legal relief in bringing the suit. The baseless allegations against employees were simply pretext and the true motivation for the suit was retaliation. *Cf. Limestone Apparel Corp.*, 255 NLRB 722,

722 (1981) (explaining that the Board can infer unlawful retaliatory motive when the stated reason for an employer's action is false), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Trade Off's lawsuit was simply another installment in a pattern of harassment and retaliation against employees who support the Local 79.

The Employer's lawsuit is also retaliatory under *Bill Johnson's* and *BE & K*. Factors for discerning a retaliatory motive include whether the lawsuit was filed in response to protected concerted activity; evidence of the respondent's prior animus toward protected rights; whether the lawsuit is baseless; and any claim for punitive damages. *See, e.g., Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6–7 (2018); *Atelier Condominium & Cooper Square Realty*, 361 NLRB at 970; *Milum Textile Services Co.*, 357 NLRB at 2051–52. Here, the Employer's lawsuit explicitly targeted the Employees' Section 7 activity of supporting the Union in its labor dispute and concertedly complaining about workplace safety.

Additionally, the Employer's request for compensatory and punitive damages for unspecified reputational injuries, with no attempt to justify or quantify any amount of alleged damages, also evidences retaliatory motive. *See, e.g., Atelier Condominium & Cooper Square Realty*, 361 NLRB at 971 (employer's request for punitive damages was additional evidence of retaliatory motive behind lawsuit against former employee, particularly where employer made no attempt to justify the amount of damages alleged).

Trade Off's demand for special damages, without detailing how, if at all, it had been financially harmed by the alleged defamatory statements, further indicates a retaliatory motive. *Cf. Diamond Walnut Growers*, 53 F.3d at 1089 (demand for \$500,000 in punitive damages was evidence of retaliatory intent); *Summitville Tiles*, 300 NLRB at 65-66 (\$100,000).

Finally, the lawsuit's objective baselessness corroborates the other circumstantial evidence of retaliatory motive. Trade Off's failure to produce evidence in support of its claims against the Jamison and Pimentel indicates that it did not bring the suit because it sincerely believed that they was responsible for the libelous statements but for some other purpose. And given Employer's history of unfair labor practices and union animus, it is reasonable to infer that the other purpose was unlawful retaliation for employee's protected activity. *Petrochem Insulation*, 240 F.3d at 32-33; *Limestone Apparel*, 255 NLRB at 722. Because the lack of evidence supporting Trade Off's claims reveals both that no reasonable litigant could have realistically expected success and that Trade Off's subjective motive in suing Jamison and Pimentel was not to seek relief, it is relevant to, and serves a distinct purpose under, both the baselessness and retaliation prongs of the *Bill Johnson's* analysis.

C. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging employees Darrell Thomas, David Robinson, Larry Kerr, Willie Zimmerman and Riccie Haneiph because of their union and concerted activities and by discharging and/or refusing to rehire employee Riccie Haneiph

Based on an analysis of the Board's decisions, in order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983);

Wright Line, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).¹³

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain*

¹³ The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

Foods, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer’s asserted reason for the employee’s discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014) ; *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)) .

Once the General Counsel has established that the employee’s protected activity was a motivating factor in the employer’s decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 (“the Board’s construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation”). The employer has the burden of establishing that affirmative defense. *Id.*

In the instant case, the credible evidence establishes that Respondent discharged employees Darrell Thomas, David Robinson, Larry Kerr and Willie Zimmerman because of their concerted and/or union activities in violation of the Act.

- i. Respondent discharged Darrell Thomas and David Robinson in retaliation for their union and protected activity

a) *Thomas and Robinson engaged in protected activity of which the Respondent clearly had knowledge*

Regarding the first element of the test set forth in *Wright Line*, there is no dispute that Thomas and Robinson engaged in extensive protected activity immediately before their discharge. On September 15, 2017, the two engaged in classic concerted activity when they distributed leaflets to coworkers, that articulated their frustration regarding Respondents' pay and questionable benefits. Prior to their leafletting on September 15, Thomas and Robinson had discussed their complaints over wages and benefits with other employees. The two obtained Local 79's support in preparing the leaflets, and were joined by Local 79 Organizer Parris Simmons—who, by that point had been identified by Respondent as a person with whom “loyal” and “core” employees should not be affiliated. See G.C. Exhs. 34 and 43.¹⁴ The Respondent's knowledge of Thomas and Robinson's September 15 activity is unrefuted. Respondent's 2(11) supervisor Rich Cotrite was captured on video confronting the employees in the midst of their activity and threatening them with discharge for such conduct. Almost immediately, Thomas and Robinson were transferred to another job site. There is no evidence that any other employees were transferred from the site at the same time as Thomas and Robinson.

Days later, on October 4, 2017, Thomas and Robinson, again, engaged in open protected concerted activity when they solicited signatures from coworkers for a petition seeking to persuade Respondent to reconsider a payroll decision regarding their wages that it had announced just days earlier. Thomas and Robinson engaged in this conduct across the street from the Respondent's 264 West Street jobsite outside of working hours. It is undisputed that the

¹⁴ At trial, Hagedorn testified that he considers “core” guys to be employees who “really aren't interested in working with Local 79.” Tr. 1015: 1-5. He also explained that, to him, “core guys are guys that actually want to work for the company. I think the guys that were flipped are the ones maybe told to take pictures of unsafe work acts.” Tr. 1015: 11-17.

Respondent was aware of their October 4 activity. Indeed, another 2(11) supervisor, Delbert Hall is captured on video confronting the employees regarding their protected activity and Respondent's General Superintendent Justin Hagedorn admitted knowledge. Hall showed significant hostility towards Thomas and Robinson's concerted and Union activity. Indeed, Hall went so far as to intimidate other workers by interrogating them regarding whether they wanted to sign the petition immediately before ordering them to enter the job site.

b) Respondents' animus towards Thomas and Robinson's concerted activity and their connection to Local 79 served as the basis for its decision to terminate their employment

As an initial matter, the record is abounding with direct and irrefutable evidence of Respondent's animus towards Local 79 and employees affiliated with the Union. By April 19, 2017, several months before Thomas and Robinson's activity, the Respondent had developed an internal system dedicated to the surveillance of Local 79 activity and the union activity of any of Respondent's employees. G.C. Exhs. 29, 30-35,44. The evidence shows that field supervisors and even foremen were instructed by upper management to monitor and notify Hagedorn when any union representatives were spotted at or near job sites. Respondent's management appears to have taken particular interest in identifying members of its labor force who might be affiliated with the union or who it felt were "flipped". The goal being, of course, to maintain a non-union labor force by any means necessary.

Thus, by September 15 and October 4, 2017, when Respondent discovered that Thomas and Robinson were not only openly challenging terms and conditions of employment, but doing so with the assistance of Local 79 no less, Respondent had had months to formulate a strategy as to how to rid itself of such employees. Respondent's hostility toward Thomas and Robinson's activity is clearly demonstrated by the aggressive response of its foremen and managers. In line

with Respondent's anti-union system, on September 15 and October 4, Respondent's supervisors identified the two employees leafleting and circulating a petition with a known Local 79 representative, took steps to prevent the employees from engaging in the protected activity and immediately notified upper management of the activity.

In addition to this demonstrated animus, the timing of Thomas and Robinson's termination in relation to their protected concerted activity supports an inference of discriminatory motive. See *McClendon Electrical Services*, 340 NLRB 613, 613, at n. 6 (2003) ("where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised"); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir. 1999) (court noted that timing is a telling consideration in determining whether employer action is motivated by animus). Put simply, the timeline of events leading to Thomas and Robinson's termination is striking. It is undisputed that prior to engaging in protected activity neither employee had ever been disciplined by the Respondent. Indeed, the Respondent had been so pleased with their work performance that it had promoted them from Trade Off to its Trade Off Plus operation. Thus, that these employees were discharged—their only discipline in two years of employment with Respondent—on the same day as their second time engaging in concerted activity with the Local 79 representative is telling. This evidence alone supports that Respondent discharged Thomas and Robinson because they engaged in protected activity and sought the assistance of Local 79.

Further proof of discriminatory motive is found in the fact that the threat made by supervisor Cotrite—that the employees could be fired for leafleting— is consistent with the actions taken against them—discharge the next time they engaged in similar conduct. Moreover, Respondent's treatment of other employees engaged in PCA and perceived to be affiliated with

Local 79 supports a finding of discriminatory motive as to its discharge of Thomas and Robinson.

Based on the foregoing, General Counsel has met its burden under *Write Line* and presented a *prima facie* case.

c) Respondent's proffered reasons for discharging Thomas and Robinson are pretextual

Respondent's proffered reasons for terminating Thomas and Robinson, alleged insubordination and threatening behavior, should not be credited.

First, in Respondent's position statement dated November 16, 2017, Respondent lied about the events that took place on October 4 while Thomas and Robinson were petitioning. Respondent claimed therein, that after Hall directed employees to go to the building, Thomas and Robinson "threatened Tradeoff Plus Foreman Delbert Hall, surrounding him and attempting to assault him." G.C. Exhibit 13, pg 5. In a sworn affidavit attached to the position statement Hagedorn claimed that Thomas and Robinson "attempted to force physical violence." Those assertions are patently false. As the video recording of the exchange between the employees and Hall demonstrates, neither Thomas nor Robinson engaged in any physically threatening behavior. G.C. Exh. 2. In fact, Hall was the one who put his hand in Robinson's face and became so enraged that he had to be pulled away by another individual.

Further, although Respondent claimed at the hearing that Thomas and Robinson were terminated for allegedly engaging in aggressive and inappropriate language and behavior, *and* refusing to follow direct orders, Respondent's position statement focuses solely on the former as the basis for the discharge. G.C. Exh. 13, pg. 6. There, Respondent states that "Mr. Thomas and Mr. Robinson were terminated due to their violent and threatening actions at the workplace." G.C. Exh. 13, pg. 6. Respondent also claims therein, that Robinson engaged in such conduct

during work hours. G.C. Exh. 13, pg. 6. As set forth above, the evidence, does not support Respondent's assertions. There is simply no evidence that Thomas and Robinson engaged in any physically violent conduct causing them to lose protection of the Act. Further, the exchange captured in G.C. Exh. 26, depicts Thomas and Robinson *after* having been accosted by Hall for engaging in PCA, ignored by Hagedorn when they tried to speak to him regarding their issues, and *after* being discharged for something they did not do. While, admittedly, Thomas is visibly agitated in G.C. Exh. 26, Hall can be heard in the background using profane language--calling him and Robinson "pussy" and egging them on. In any event, the conduct in G.C. Exh. 26 could not have served as the basis for the discharge as the employees had already been fired before the recording cannot serve was taken and the conduct in G.C. Exh. 3, wholly contradicts Respondent's claim that the employees engaged in violent, physically threatening behavior. Additionally, Respondent's evidence regarding discipline of other employees, further supports that Respondents claim to have discharged Thomas and Robinson for violent behavior is pretextual. In almost all of those instances, the employees were alleged to have actually engaged in physical violence.¹⁵ The evidence is clear that Robinson and Thomas did not, at any point, physically threaten or actually physically assault a single individual, nor did they damage company property or argue with the site safety manager. Like Hall, Thomas and Robinson raised their voices and use the same type of language regularly tolerated at the Respondents' jobsite.

To the extent Respondents contends that Robinson and Thomas engaged in any insubordination warranting discharge, the evidence shows that this is another thinly veiled attempt to conceal its true motive—to rid itself of two employees it believed had been "flipped"

¹⁵ See R Exh. 32 (the employee allegedly damaged the foreman's cellphone); R Exh. 33 (the employee allegedly threw a portable heater outside of the shanty); R Exh. 34 (the employee allegedly argued aggressively with site safety manager after being removed from site for not having proper credentials); R Exh. 35 (employee alleged to have threatened physical harm to another laborer); R Exh. 36 (employee alleged to have choked a carpenter from another company); R Exh. 37 (employee alleged to have thrown tools at the foreman).

by Local 79. The credible evidence establishes that after Hall's outburst, Thomas and Robinson entered the building to work. The Respondent contends that Thomas was directed to go to the ninth floor and refused. However, both Thomas and Robinson credibly testified that after gathering their belongings they followed the directive to return to the ninth floor, which they had been assigned to clean the prior day. Further, Robinson, who after going to the ninth floor as directed, was told to go to the basement without any directive regarding what work he was expected to perform there, was understandably confused. Shortly after beginning their work on the ninth floor the employees were told to go to the ground floor and speak to Hagedorn, which they did. Before having an opportunity to return to work, they were discharged. Finally, the sequence of events in R Exh. 28 shows that by 7:50 a.m., less than an hour after the workday began, Respondent was looking for a reason to discharge Thomas and Robinson who had been, by then had been identified by Respondent as being connected to the Local 79 activity Hagedorn was monitoring earlier that morning.

Finally, Respondents conduct after terminating Thomas and Robinson further undermines their defense. Although the termination letters issued to Thomas and Robinson claim that their discharges were a result of an investigation, it is telling that the Respondent did not contact either of them for their account of events. Moreover, on October 4, after Robinson and Thomas left the jobsite, Hagen engaged in an email exchange with Mulligan Security, during which he focused heavily on Thomas and Robinson's union activity. G.C. Exh. 41. In one email, Hagedorn wrote regarding Thomas and Robinson, "[w]e had two disgruntled employees walk off our site today and joined up with Local 79." G.C. Exh. 41, pg. 1. In another e-mail, Hagedorn identified the two employees as "disgruntled employees who Local 79 had gotten to and essentially "flipped" to join the union and attempt to destroy our company." G.C. Exh. 41, pg. 1. This evidence

supports that Respondents' focus was the employees' protected activity, not the reasons proffered for their discharge.

Thus, based on the foregoing, Respondent has failed to establish that it would have discharged Thomas and Robinson even if they had not engaged in union and concerted activity.

ii. Respondent unlawfully discharged Larry Kerr and Willie Zimmerman

a) *Respondent discharged Kerr and Zimmerman because it knew or suspected that they applied for the Local 79' apprenticeship program*

In January 2018, both Kerr and Zimmerman applied to the Local 79 apprenticeship program. On January 5, 2018, when the application process opened, Kerr, with prior permission from his foreman Cesar Ordonez to arrive to work late that day, went to a union facility to complete the first step of the application process. On January 8, 2018, Kerr and Zimmerman engaged in protected concerted activity when, together, they went to the Mason Tender's facility in Long Island City, to submit hard copies of their applications to the Local 79 program. See *Src Painting, LLC, Pbn, LLC, & Liquid Sys.*, 346 NLRB 707, 724 (2006) (Board adopted ALJ's finding that employer discriminatorily discharged employee who requested permission to complete union's apprenticeship program and failed to recall him due to that protected union activity in violation of Section 8(a)(3) and (1) of the Act.) Kerr had obtained permission from foreman Ordonez, to leave the facility. It is undisputed that the Respondent discharged Kerr and Zimmerman on January 9, 2018, the day after their concerted activity.

Although Respondent contends it had no knowledge of protected activity, the evidence supports an inference that Respondent knew, or at least suspected, that Kerr and Zimmerman engaged in protected activity related to Local 79. First, given its constant surveillance of Local 79 activity, Respondent was likely aware of Local 79's apprenticeship program. Information

about the program was easily discoverable, as it was posted on the Union's Facebook page, which Hagedorn admittedly checked frequently. G.C. Exhs. 48-51. Second, the evidence shows that when Respondent's representatives became aware of the date of any Local 79 activities—such as rallies—other 2(11) supervisors were notified. The evidence also shows that the Respondent kept tabs on employees it felt were possibly linked to Local 79. G.C. Exhs. 29, 3. Thus, it is conceivable that Respondent was on alert on January 5 and January 8, 2018—the advertised apprenticeship application dates. It is undisputed that by January 2018, Respondent had enlisted its foremen to assist in tracking Local 79 activity, thus, that Kerr notified the foreman on both apprenticeship dates that he would be absent from work for personal reasons is significant.

Additional support that Respondent likely knew of Kerr and Zimmerman's protected activity is garnered from the fact that on January 8, 2018, while in line to submit their applications, Kerr and Zimmerman observed a green Hyundai that they recognized from Respondent's job sites, driving slowly. The two men in the vehicle behaved in a suspect manner, shielding their faces while driving past the Mason Tender school entrance. These facts taken together, support that, in line with its established surveillance system, by January 8, 2018 the Respondent was aware of Kerr and Zimmerman's attempt to become members of Local 79.

Moreover, Respondent's field supervisor Jose Bonilla admitted to reporting to Hagedorn that he had seen Kerr talking to a Local 79 representative. Tr. 556: 12-16. Further, it is undisputed that Larry Kerr engaged in protected activity when he attended Local 79 meetings in May and July 2017. Coincidentally, in May and July 2017, Respondent was closely tracking Local 79 and its employees' union activity. Also, around that time, the Respondent admittedly sent employees to Local 79 meetings to report back to the Respondent. Indeed, the Respondent

alleges facts in an October 2018 state court lawsuit, that it contends were obtained at a July 2017 union meeting. Thus, it is likely that Respondent suspected Kerr would apply to the apprenticeship program before obtaining confirmation on January 8.

In the instant case, the timing of Kerr and Zimmerman’s discharge—the day after their June 8, 2018, union activity—is strong evidence that Respondent terminated their employment because they engaged in protected concerted activity. Indeed, under extant Board precedent, timing alone may suggest animus as a motivating factor in an employer’s decision. *See, e.g., NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (“Timing alone may suggest anti-union animus as a motivating factor in an employer’s action”); *Masland Industries*, 311 NLRB 184, 197 (1993) (same). *See also Herman Bros., Inc. v. NLRB*, 658 F.2d 201, 210 (3d Cir. 1981) (timing of discharge immediately after protected activity supports inference of unlawful motive); *Toll Manufacturing Co.*, 341 NLRB 832, 833 (2004) (timing of a discharge shortly after an employee had engaged in union activities supported an inference that the discharge was discriminatorily motivated).

Moreover, the Respondent’s demonstrated union animus, and its treatment of other employees it determined were affiliated with Local 79, further support an inference that Kerr and Zimmerman’s Union activity was the reason for their discharge.

Finally, the pretextual nature of Respondent’s proffered reasons for the discharge independently serve as a basis to find that animus towards their protected activity was the reason for the discharged.¹⁶

b) Respondent’s proffered reasons for discharging Kerr and Zimmerman are pretextual

¹⁶ *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (“[I]mplicit in the finding of pretext is the 40 judgment of the court that the employer has not marshaled any convincing evidence to support its position.”).

In the termination letter issued to Kerr and Zimmerman, Respondent states that their discharge was based on their alleged “failure to follow policy and procedure and not following orders from supervisors on January 6, 2018.” G.C. Exhs. 18 and 24. As set forth below, Respondent has failed to prove that their asserted reasons are true.

First, Respondent’s claim that it discharged Kerr and Zimmerman for violating company policy is incredulous. There is no dispute that on January 6, 2018, Kerr and site safety manager DePew discussed the need for additional laborers and that DePew recommended that Kerr reach out to Respondent’s management about getting Zimmerman staffed at the 95th Street jobsite. Kerr did not then sneak Zimmerman onto the jobsite. Rather, he notified Hagedorn and foreman Ordonez of his conversation with DePew before telling Zimmerman to come to the site. A close review of the evidence related to the events of January 6th highlights the glaringly suspect nature of Respondent’s defense. First, Zimmerman did not sign in to work until 11:00am that day. R. Exh. 12. Hagedorn’s 12:30 p.m. email to Jason Abadie that day, confirms that Hagedorn received Kerr’s text message regarding Zimmerman and had spoken the foreman Ordonez about the matter earlier that morning. G.C. Exh. 45. However, Ordonez permitted Zimmerman to work that day and not one of Respondent’s managers contacted him or Kerr regarding the issue. Moreover, based on Abadie’s e-mail response to Hagedorn that evening, it is clear that on September 6, 2018, the Respondent decided against discharge. G.C. Exh. 45. Thus, it was not until after Kerr and Zimmerman engaged in protected activity, that the Respondent made the decision to fire them.¹⁷ Although Hagedorn attempting to explain away the unfavorable timeline by claiming he had a conversation with DePew about the incident, DePew had no recollection of ever discussing Kerr or Zimmerman with Hagedorn. Significantly, DePew testified that Kerr and Zimmerman stood out to her during her time at the job site and she was able to recall her January

¹⁷ At the hearing, Hagedorn admitted that he made the decision to terminate their employment on January 8, 2018.

6 conversation with Kerr about Zimmerman. Thus, had a January 8 conversation with Hagedorn regarding the employees actually occurred, she would have remembered. Thus, the only logical explanation for Kerr and Zimmerman’s discharge the day after their union activity--after Respondent had decided against termination-- is that the Hagedorn became aware of their efforts to join the Local 79 apprenticeship program.

Finally, Respondent’s claim that Kerr and Zimmerman did not follow orders from supervisors on January 6 is plainly false. For example, despite Hagedorn’s admission that he had made the decision to discharge Kerr and Zimmerman, when asked on cross-examination to identify the three supervisors whose directions Zimmerman had failed follow, Hagedorn could not. Instead, Hagedorn responded vaguely “I would probably say all of them.” Thus, it is clear Respondent included the claim as a means to further deflect from its true motive —particularly given that Hagedorn and other managers had been advised just months before that employees who refused to follow orders from supervisors could be legally discharged. R Exh. 28. Hagedorn’s January 11, 2018, email to Abadie, Lattanzio and other upper level managers further supports that Respondent’s reasons for the discharge are pretextual. In that email, Hagedorn claims that Kerr and Zimmerman were discharged both been “insubordinate” and had both “undermined 3 different foremen from Tradeoff. G.C. Exh. 46. Yet, at the hearing, Respondent failed to identify any directives that Kerr and Zimmerman allegedly failed to follow or any foremen who they allegedly undermined. Thus, the record is clear that Respondent’s proffered reasons for discharging the two employees are false.

iii. Respondent unlawfully discharged Reccie Haneiph

a) *Riccie Haneiph engaged in protected activity of which the Respondent had knowledge*

As to the first prong of the *Wright Line* analysis, Haneiph engaged in protected activity on July 18, 2018, when he posted on Local 79's Facebook page. It is well-settled that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at p. 2 (2011), quoting *Meyers Industries*, 281 NLRB 882, 887 (1986), enfd. sub nom. *Prill v NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action"). Here, Local 79 posted a picture of six Trade Off workers who held signs stating that "Trade Off is unfair to Labor ... ULP Strike" and included a caption to assert they had been retaliated against because they exercised their right to demand fair pay and working conditions. The caption also included a plea for the audience to "share this post so everyone knows that construction workers are standing up and calling for fair pay and a safe workplace." Haneiph shared that post and commented that he was a Trade Off employee and wanted to "be part of this movement because we are being treating unfair!" G.C. Exh. 16. Thus, the original Local 79 post involves multiple Trade Off employees commenting on the poor wages and working conditions of Trade Off, which is protected concerted activity. Further, Haneiph's post is an extension of the theme of the original post. Haneiph makes clear he agrees with the other employees' assertion that Trade Off is not treating its employees fairly. As a result, his comment is at least a statement of support for the group action and is protected concerted activity, as well. It is undisputed that Respondent had knowledge of Haneiph's Facebook activity.

Further, in July 2017, after his Facebook post, Haneiph made complaints to the CEO representative about unsafe working conditions at Trade Off while accompanied by other Trade

Off workers and Local 79 Organizer Paris Simmons. These complaints were made subsequent to, and in furtherance of, many discussions Haneiph had with Trade Off laborers about the lack of certain PPE. Thus, this activity is protected concerted activity. Although respondent denies having knowledge of Haneiph's July 2017 complaints, Haneiph testified credibly, that during a summer 2017 call with Hagedorn noted Haneiph's complaints to CEO as being "uncalled for." Moreover, the shows that Respondent representatives and CEO representatives maintained regular contact during that time regarding the union and concerted activities of employees referred to Respondent by CEO.

b) Respondents' animus towards Haneiph's concerted activity and connection to Local 79 served as the basis for its decision to terminate his employment

Respondent contends that Haneiph was discharged for wearing Adidas sneakers to a jobsite. There is a dispute of fact as to what date the sneaker incident took place. However, a review of the evidence clearly shows that Haneiph did not appear to work in sneakers on the date that Respondent asserts he did and that Haneiph worked for Respondent after the incident.

As an initial matter, Haneiph's testimony that the last assignment he received from Respondent the 118 Fulton Street jobsite, where he worked on June 20, 2017, should be credited. At the hearing Haneiph testified consistently, during both direct and cross-examination, that he worked at a number of jobsites for Respondent after the sneaker incident at 95th street. Although Hagedorn testified, conveniently, that the sneaker incident occurred on June 21, 2017, that self-serving testimony should not be credited over Haneiph's. Notably, Respondent's evidence regarding the incident is inconsistent. In Hagedorn's sworn affidavit dated November 14, 2017 (only months after Haneiph's last date of employment), he attests that on June 20, 2017, Haneiph

presented to work in sneakers. G.C. Exh. 13 (Exhibit I therein).¹⁸ Yet, a year later, having had the benefit of hearing Haneiph's testimony, Hagedorn contends the incident occurred after Haneiph's last record work date. When questioned on cross-examination regarding the basis for his claim that the incident took place on June 21, Hagedorn responded "[b]ecause that's the date that it happened," and admitted that there is no email or documentary evidence that the sneaker incident took place on June 21st. Tr. 930: 3-4, 17-20.

Respondent's claim in its position statement that the termination was necessitated by Respondent's concern for Haneiph's safety is undermined by the wealth of testimony and evidence in the record highlighting Respondent's supervisors' disregard for employee safety. G.C. Exh. 13.

The evidence shows that Hagedorn has a practice of emailing members of the management team when an employee is discharged. However, in Haneiph's case, there are no records of a decision to terminate Haneiph's employment in June 2017. Indeed, the only written records related Haneiph's discharge are dated late July 2017, *after* Hagedorn discovered his Facebook posts. G.C. Exhs. 16, 20 and 42. The overwhelming evidence established that Respondents did not decide to terminate Haneiph's employment until after discovering his Facebook posts.

Based on the foregoing, the General Counsel has established a *prima facie* case under *Write Line*.

c) Respondent's proffered reason for discharging Haneiph is pretextual

As set forth above, the evidence overwhelmingly supports that Respondents' proffered reason for discharging Haneiph is false. The evidence demonstrates that as of July 19, 2017,

¹⁸ At the hearing Hagedorn admitted that he reviewed the affidavit for accuracy before he signed it. Tr. 932-933.

Respondent considered Haneiph an employee, as demonstrated by the letter they provided to him confirming his employment status. G.C. Exh. 9. Moreover, in response to Haneiph's unemployment application, Respondent stated that his last date of employment was July 26, 2018. G.C. Exh. 38. This evidence, combined with the lack of any documents, predating Haneiph's Facebook post, referencing a discharge or the sneaker incident corroborate Haneiph's testimony that the sneaker incident was never a preclusion to him receiving job assignments from Respondent.

Based on the foregoing, Respondent has failed to show that it would have discharged employee Riccie Haneiph, but for his protected activity.

- iv. In the alternative, Respondents' animus towards Haneiph's concerted activity and connection to Local 79 served as the basis for its refusal to rehire or consider him for rehire

The Board has long established that an employer violates Section 8(a)(3) when it refuses to hire applicants because of their union status or activities. *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). Refusal to hire allegations are evaluated under the test the Board set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.2d 83 (3rd Cir. 2002). Under *FES*, in refusal to hire cases, the General Counsel has the initial burden of showing that: (1) Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) 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 had 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.

To prove a refusal-to-consider violation, “the General Counsel must show that the Respondent excluded the applicants from a hiring process, and that the Respondent was motivated by antiunion animus.” *Dynasteel Corp*, 346 NLRB 86, 89 (2005) (citing *FES*, supra)

It is Counsel for the General Counsel’s position the evidence overwhelmingly supports that Respondent terminated Haneiph’s employment after learning of his Facebook posts. However, at least one exhibit shows that Respondent at one point alleged that Haneiph resigned from his employment. G.C. Exh. 37. Thus, to the extent Respondent argues in the alternative, that Haneiph was not discharged but rather was not called to work for some other reason, under each of these above analyses Respondent’s conduct regarding Riccie Haneiph was unlawful.

First, the evidence established that Respondent regularly hires laborers through the Center of Employment Opportunity and other referral organizations. Moreover, it is clear from the record that due to the nature of Respondent’s business, its laborers may often find themselves out of work for long periods of time while maintaining an expectation of recall once positions are available. Indeed, Haneiph testified that prior to his last day of work he had not received an assignment for three weeks. Thus, in July and August 2017, Respondent was hiring. Haneiph, who had already worked for the Respondent for a year, clearly had the requisite skill to perform the job. There is an abundance of evidence—Respondent’s July 2017 emails regarding Haneiph in particular—to support that Respondent’s decision was based on Haneiph union activity.

D. Respondent Violated Section 8(a)(1) of the Act by threatening employees with discharge, interrogating employees about, and surveilling, their union activity

An employer violates Section 8(a)(1) by statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. If an employee would reasonably interpret a remark as a threat at the time it is made, then it violates Section 8(a)(1) regardless of the speaker’s actual intent, its actual effect, or whether that is the only reasonable

construction. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 589 (1969); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 541 (2003); *Concepts & Designs*, 318 NLRB 948, 954 (1995) (regardless of speaker’s actual intent); *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006) (“motivation behind the remark or its actual effect”); *Double D Construction Group*, 339 NLRB 303, 303-04 (2003) (whether or not the only reasonable construction). The Board considers the totality of relevant circumstances in making that determination, including the context in which the statement is made. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994), quoting *NLRB v. Gissel Packing*, 395 U.S. at 617. See also *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 n.4 (1989) (background of other unlawful conduct or union animus represents significant context for evaluating lawfulness of employer’s statements). Thus, even where words would otherwise be innocent in and of themselves, they violate the Act if they are “uttered in ‘circumstances [where] employees could reasonably conclude that the employer was threatening them’” with reprisal. *Concepts & Designs*, 318 NLRB at 954 (quoting *NLRB v. Sanders Leasing Systems*, 497 F.2d 453, 457 (8th Cir. 1974). Additionally, any misleading ambiguities as to whether the statement could reasonably be understood as an unlawful threat are resolved against the employer. See *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000), enforced 282 F.3d 972 (7th Cir. 2002). See also *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (employer “ran the risk that his statement—or any ambiguity in his statement—could be construed by an employee as containing an unlawful threat”); *Blue Bird Body Co.*, 251 NLRB 1481, 1488 (1980) (“employer must bear responsibility for any misleading ambiguity on his part”), enforced 677 F.2d 112 (11th Cir. 1982).

The Board’s test for determining whether an employee interrogation violated Section 8(a)(1) is whether, under all the circumstances, the interrogation reasonably tended to restrain or

interfere with the questioned employee's exercise of Section 7 rights. *Fresh and Easy Neighborhood Market*, 356 NLRB No. 85, slip op. 11 (2011) (concluding that the totality of the circumstances weighed in favor of finding that the store manager's conversation with two employees was coercive in nature and therefore constituted unlawful interrogation), enforced mem. 468 Fed.Appx 1 (D.C. Cir. 2012); *Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984) (the Board considers the nature of the information sought, the identity of the questioner, the place and method of interrogation, and other relevant employer actions around the time of the interrogation), enforced sub nom. *HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Further, the Board has long held that it is unlawful for an employer to place its employees' Section 7 activities under surveillance or create the impression of surveillance. See, e.g., *Flexsteel Industries*, 311 NLRB 257, 257 (1993) ("employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities"). "As the Board observed many years ago, '[i]nherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or even knowledge.'" *Aladdin Gaming, LLC*, 345 NLRB 585, 588 (2005) (dissenting opinion) (quoting *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358, 1360 (1949)), petition for rev. denied 515 F.3d 942 (9th Cir. 2008). The Board uses an objective test to determine when such observation crosses the line into unlawful surveillance. See *Martech MDI*, 331 NLRB 487, 500 (2000), enfd. 6 F. App'x 14 (D.C. Cir. 2001).

Generally, an employer engages in unlawful surveillance when it conducts "out of the ordinary" observation, that is, observation that, because of its unusual or intrusive nature, interferes with, restrains, or coerces employees engaged in protected activity.¹⁹ In determining

¹⁹ See *Aladdin Gaming, LLC*, 345 NLRB at 586.

whether employer observation is “out of the ordinary,” the Board is alert for any indicia of coerciveness, including the duration of the observation, the employer’s distance from the employees, and whether the employer is simultaneously engaged in other conduct that tends to restrain Section 7 activities.²⁰

- i. On about July 25, 2017, Respondent, by field supervisor Jose Bonilla, (a) Interrogated employees about their union activities and sympathies at the worksite at 30-02 Queens Blvd, Queens, NY; (b) Interrogated employees about their union activities at or near the worksite located at Purves Street, Queens, NY; and (c) Engaged in surveillance of employees at or near the worksite located at Purves Street, Queens, NY to discover their union and concerted activities

a) Bonilla’s unlawful interrogation of employees at or near the Respondent’s 30-02 Queens Blvd job site

The factors the Board reviews to determine whether an unlawful interrogation occurred include: (1) the background, i.e. whether there is a history of employer hostility and/or discrimination against employee protected conduct; (2) the nature of the information sought, e.g. whether the interrogator appeared to be seeking information on which to base taking action against an employee; (3) the identity of the questioner – and their place in the management hierarchy; (4) the place and method of the interrogation, e.g. whether there was an atmosphere of unnatural formality, or if the employee was called from work into the bosses’ office; and (5) the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d at 48). These and other factors are not applied mechanically. Id. “Instead, [t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the ‘totality of the circumstances.’” Id. (citing *Perdue*

²⁰ *Ibid.*

Farms, Inc. v. NLRB, 144 F.3d 830, 835 (D.C. Cir. 1998). In the end, the “task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Ctr.*, 330 NLRB at 940.

Applying these factors to the instant case, it is clear that on July 25, 2017, Field Supervisor Bonilla unlawfully interrogated employees about their union sympathies. G.C. Exh. 21. Here, it is undisputed that on July 25, 2017, Bonilla went to the Respondent’s 30-02 Queens Blv. Jobsite at which time he gave two employees a flyer regarding Local 79. G.C. Exh. 21. Bonilla admits in the email to questioning the employees about Local 79 and obtaining responses from them regarding their loyalty to Respondent.²¹ Bonilla engaged in this conduct at a time when the Respondent had implemented a system of interrogating employees to identify those who were “loyal” and those who had been “flipped” by the Union. The fact that Bonilla, a second line supervisor met with employees at the jobsite to discuss the union are all factors that weigh heavily towards a finding of unlawful interrogation.²²

b) Jose Bonilla’s unlawful surveillance and interrogation of employee Shawn Person

The undisputed evidence shows that on July 25, 2017, Union representative Paris Simmons spoke to Respondent’s employee Shawn Person near Respondent’s Purves street jobsite. G.C. Exh. 21. At the hearing, Bonilla admitted to questioning Person about his conversation with Simmons. Again, the fact that Bonilla, a second line supervisor, approached

²¹ At the hearing Bonilla admitted that the employees told him they were loyal to Respondent. Tr. 544.

²² The Board places significant on “the nature of the information sought,” – as “the Board has expressed particular concern regarding interrogations that appear designed to obtain ‘information upon which to take action against individual employees.’” *Salon/Spa at Boro, Inc.*, 356 NLRB 444, 458 (2010) (citing *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002)).

Parson to question him about his conversation with a union representative weight towards a finding of unlawful interrogation.

At the hearing, Bonilla also admitted that once he saw Person speaking to Simmons he recording him in an effort to identify the employee for Hagedorn. TR. 560. The ALJ should conclude that Bonilla's surveillance of Person was unlawful. The undisputed evidence shows that Simmons and Person were communicating away from the Respondent's job site. Upon spotting Simmons, Bonilla deliberately approached them and began recording and photographing the employee. Such conduct was more than a "mere observation of open and public union activity." *California Acrylic Industries, Inc.*, 322 NLRB No. 10 (1996). Bonilla's observation of the employee's protected activity in this deliberate manner was out of the ordinary. *Durham School Services, LP*, 361 NLRB No. 44 (2014). The act of video- taping employees' Union activities is more than a "mere" observation. Rather, it is an intimidating and coercive way of monitoring protected activity. Thus, the ALJ should conclude that Bonilla's conduct constitutes an unlawful surveillance in violation of Section 8(a)(1) of the Act.

- ii. On or about September 15, 2017, Respondent, by Rich Cotrite, violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they maintained contact with Local 79 and threatened employees with discharge for Engaging in protected leafletting.

The Board has long held that it is a violation of Section 8(a)(1) of the Act for an employer, including its supervisors and agents, to threaten employees with discharge or loss of work if they support a union and engage in protected activity. *Hospital Shared Services Inc. & International Guards Union of America*, 330 NLRB No. 40 (1999). As set forth below, the unrefuted evidence clearly shows that on September 15, 2017, Respondent's 2(11) supervisor, Rich Cotrite threatened employees Darrell Thomas and David Robinson with discharge and loss of work because they supported the Union. On September 15, 2017, when Cotrite confronted

Thomas and Robinson while they were handing out leaflets to coworkers, he threatened that they could be fired for such conduct. G.C. Exh. 2. Later he told Robinson that since he was leafleting for Local 79 he could go home. Tr. 61.

Here, there is no question that Rich Cotrite, a Section 2(11) supervisor, committed in a coercive threat on the morning of September 15 when he told Robinson and Thomas that they could be fired for leafleting. The statement, captured on video, was made in the midst of the employees' protected activity and was uttered right outside of the jobsite where other employees could hear. Similarly, Cotrite's statement to Robinson that he could go home since he was leafleting with Local 79, though not a direct threat of discharge, certainly implied that connection to Local 79 could lead to reprisals. Because the actual effect of Cotrite's statement's does not negate a finding of coerciveness, the fact that Thomas and Robinson continued to leaflet after the threats is of no consequence. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006). Thus, the ALJ should conclude that Cotrite's September 15, 2017 statements constitute unlawful threats in violation of Section 8(a)(1) of the Act.

- iii. On about October 4, 2017, Respondent, by foreman Delbert Hall, interrogated employees about their union activities and sympathies and prohibited employees from engaging in protected activity.

As in the case of Cotrite, Hall's aggressive questioning of employees on October 4, 2017 regarding whether they wanted to sign the petition was coercive in nature and thus also unlawful interrogation. In its position statement to the Region, Respondent admits that Hall asked employees if they wanted to sign the petition. G.C. Exh. 13. Likewise, Hall is heard admitted to the same in the video recording of his argument with Thomas and Robinson. G.C. Exh. 3.

- iv. On or about January 8, 2018, Respondent, by an agent whose name is unknown to the General Counsel, violated Section 8(a)(1) of the Act by engaging in surveillance of employees to discover their union activities.

An Employer engages in surveillance or creates an impression of surveillance by engaging in conduct indicating that it is closely monitoring the degree of an employees' union involvement. *Id.*, citing *Flexsteel Industries*, 311 NLRB 257 (1993). General Counsel acknowledges that the Board has long held that “an employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. *California Acrylic Industries, Inc.*, 322 NLRB No. 10 (1996) citing *Roadway Package System*, 302 NLRB 961 (1991); *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992 and *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). However, the observance of open union activity will be unlawful if the employer observes employees in a way that was out of the ordinary. *Durham School Services, LP, supra*.

In the instant matter, there is persuasive circumstantial evidence that Respondent crossed the line of “mere observation” and engaged in the unlawful surveillance of Larry Kerr and Willie Zimmerman’ Union activities on January 8, 2018. Kerr and Zimmerman credibly testified that while they were outside in Long Island City, Queens, waiting to submit applications to the Local 79 apprentice program, a vehicle that they recognized from Trade Off job drove by slower than the speed of traffic. Bases on that testimony, along with evidence of the suspect behavior of the drivers—that they shielded their faces while driving by slowly enough to observe the line—, that Kerr and Zimmeran saw the same vehicle near the Respondent’s 95th street jobsite the next day, and the abundance of evidence showing that the Respondent had a system of tracking union activity throughout Queens the ALJ should conclude that the Respondent engaged in surveillance of Kerr and Zimmerman on January 8, 2018.

V. CONCLUSON AND REMEDY

In conclusion, the preponderance of the evidence clearly establishes that Trade Off and Trade Off Plus constitute a single employer. Moreover, the evidence establishes that

Respondents violated Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities, by threatening employees with discharge because of their support for and activities on behalf of the Union; by interrogating employees about their support for the Union; and by maintaining a baseless lawsuit against employees Darrell Jamison and Ricardo Pimentel in retaliation for their Section 7 activity. The evidence also establishes that Respondents violated Sections 8(a)(3) and (1) of the Act by discharging employees David Robinson, Darrell Thomas, Larry Kerr, Willie Zimmerman, and Riccie Haneiph.

As such, the General Counsel seeks a make-whole remedy, including full backpay with daily compound interest owed to the discriminatees,²³ along with a notice posting at the facility informing employees of their rights under the Act.

As part of the remedy in this case, the General Counsel seeks an Order requiring Respondent Trade Off to withdraw its state court lawsuit against Darrell Jamison and Ricardo Pimentel, reimburse them for any costs associated with the lawsuits and refrain from instituting or pursuing any state court lawsuit against employees that lacks a reasonable basis and is motivated by an intent to retaliate against activities protected by Section 7 of the National Labor Relations Act.

The General Counsel further seeks an Order requiring Respondent Trade Off, LLC to copy and mail, at its own expense, a copy of the Notice to all current and former employees employed by Trade Off, LLC in New York City at any time from April 20, 2017 through February 1, 2018.

²³ Regarding backpay, the discriminatees are entitled to reimbursement for all search-for-work and work-related expenses. See *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). To the extent some discriminatees received severance, that, in and of itself, should not prevent them from obtaining a the Board's full remedy. See *A.S.V., Inc.*, 366 NLRB No. 162 (2018).

Dated: New York, New York
February 2, 2019

Respectfully Submitted,

s/ Jacqueline Tekyi

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**COUNSEL FOR THE GENERAL COUNSEL'S POST-TRIAL BRIEF
TO ADMINISTRATIVE LAW JUDGE HONORABLE BENJAMIN W. GREEN**

I, the undersigned employee of the National Labor Relations Board, hereby certifies that I electronically filed a true and correct copy of the above-entitled document with the National Labor Relations Board and served the above-entitled document upon counsel for the parties by electronic mail at the following addresses:

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