UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

BLUE EARTH DIGITAL PRINTING, INC.,
Employer,

and **31-CA-133542**

GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 140-N,
Union.

Nicholas Gordon, Esq., for the General Counsel.

*Fernando Bonada***,** Pro Se for the Employer-Respondent.[1]

DECISION

Statement of the Case

ARIEL SOTOLONGO, Administrative Law Judge. At issue in this case is whether Blue Earth Digital Printing, Inc. (Respondent) unlawfully discharged employee Vivian Escalante (Escalante) because she was seeking to enforce a provision of the collective-bargaining agreement between Respondent and Graphic Communications Conference of the International Brotherhood of Teamsters, Local 140-N (Union), or because she was otherwise engaged in protected activity.

I. Procedural Background

The Union filed the underlying charge in case 31−CA−133542 on July 25, 2014. On October 31, 2014 the Acting Regional Director, at the request of the Union, determined that further action in the case should be deferred pursuant to the grievance-arbitration procedure in the collective bargaining agreement under the Board's *Collyer Insulated Wire*[2] doctrine. Thereafter, on October 20, 2016, after learning that the dispute was no longer being processed

[1] Fernando Bonada (Bonada), Respondent's president and owner, is not an attorney. He was duly advised of his right to counsel and provided with ample opportunity to obtain one, but he declined and chose to represent Respondent. As is the custom and practice in this situation, I sent Bonada (and the other parties) a "Pro Se" letter advising him of the proper procedure to be followed in NLRB hearings. (GC Exh. 1(o).)

[2] 192 NLRB 837 (1971)

under the grievance-arbitration procedure, the Regional Director reopened the investigation and processing of the charge. The complaint in the instant case, which alleges that Respondent discharged Escalante in violation of Section 8(a)(1) of the Act, was finally issued issued by the Region on July 9, 2018, and thereafter the Respondent filed an answer and later an amended answer.[3] I presided over this trial in Los Angeles, California, on September 18−19, 2018.

II. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that at all material times, it has been a corporation with an office and place of business in Culver City, California, where it has been engaged in the business of commercial digital printing and dye sublimation printing services. It further admits, and I find, that during the 12-month period preceding September 2018, a representative period, it has derived gross revenues in excess of $500,000 and purchased and received at its Culver City facility goods valued in excess of $5000 from enterprises located within the State of California, enterprises which in turn have received these goods directly from points outside the State of California.[4] Accordingly, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

III. Findings of Fact

A. Respondent's operations and other background facts

As briefly described above, Respondent operates a print shop in Culver City, California, which typically employs a total of 4−5 employees excluding Bonada, who is Respondent's president (and CEO), and sole supervisor. Respondent produces brochures, catalogs and sublimation products for its clients, to whom it delivers these products. Respondent's shop is

[3] There is no explanation in the record as to why this case took so long to process. Thus, it isn't clear why it took 2 years for the Region to learn that the Union's grievance about Escalante's discharge was "dead in the water" and no longer deferrable under *Collyer*, nor is it clear why it took the Region an additional 2 years to issue complaint in this matter. It appears that this case simply fell through the proverbial cracks and disappeared from the radar screens. Without pointing fingers, I would be remiss if I failed to point out that the old maxim "justice delayed is justice denied" is very much applicable in this case. Regardless of the ultimate outcome in this case, both Escalante and Respondent have been unfairly and unjustly impacted by this delay. Escalante, should I find her discharge to be unlawful, has too long been delayed being made whole, and Respondent unnecessarily been subjected to compounded interest charges on any backpay due. On the other hand, should Respondent prevail, it has been unduly delayed in being cleared from the cloud hanging over its head, and Escalante has been unduly delayed from receiving a final answer as to the merit of her case, thus allowing her to go on with her life. Simply put, this delay has been most unfortunate and regrettable.

[4] See Stipulation of Facts (Jt. Exh. 1). It should be noted, the record is not entirely clear as to what, exactly, is Respondent's true and valid legal name. Thus, although the pleadings and stipulations on record reflect Respondent's name as "Blue Earth Digital Printing, Inc.," its president and sole owner, Bonada, stated on the record that the entity's registered legal name was "Bonada Enterprises, Inc.," with no designation as it doing business as "Blue Earth Digital Printing, Inc." (Tr. 311; 315316). Thus, when referring to "Respondent," I make clear that I am referring to Bonada Enterprises, Inc. and/or Blue Earth Digital Printing, Inc., which are one and the same, according to Bonada (Tr.48).

located in a building where it shares space with another printing company, although the spaces are separate or compartmentalized. Its shop consists of a press room, a digital room (which is shares with another company), a binding department, and office space, all totaling about 4000 square feet. (Tr. 47−57.)

Prior to 2013, Respondent was a non-union company. In September 2013, the Union became the collective bargaining representative of Respondent's employees, and Respondent and the Union entered into a collective-bargaining agreement at that time, effective by its terms from September 16, 2013, to September 1, 2015 (GC Exh. 2; Tr. 61−63).[5] The agreement covered the positions of digital pressman, offset pressman, feeder, and general helper, which comprised all 5 of Respondent's employees, except for Bonada. Escalante began working for Respondent in March 2013. She testified that she was initially hired as a graphic web designer, although this is disputed by Respondent.[6] It is undisputed, however, that she worked primarily in the office and that she gradually took on different responsibilities, including that of bookkeeper, after the then bookkeeper resigned.

B. The events preceding and leading to Escalante's discharge

Escalante testified that her bookkeeping duties included processing payroll (after approval by Bonada), entering bills, and paying vendors ant taxes. As part of her duties in the office, which she shared with Bonada, Escalante scheduled jobs to be performed, the priority of which were determined by Bonada, and relayed instructions and directives form Bonada to the other employees. This including making sure that employees had proper instructions in the "job tickets" prepared by Bonada for job orders. These job tickets typically contained information such as the client's name and delivery address, order or invoice numbers, and the job "specs" detailing specific instructions for the pressmen to perform their duties.[7] Escalante testified that she had meetings with other employees and the union president at the time, Ronnie Pineda (Pineda), who explained the terms of the collective-bargaining agreement (CBA) that Respondent had signed with the Union. Escalante explained that her understanding of the CBA was based on these meetings with the Union, as well as her having looked at the agreement before it was actually signed. Sometime around December 2013, according to Escalante, Pineda

[5] How the Union became the employee's representative is a mystery, as no Board election or card (or other majority status) check appears to have been held. Rather, it appears that Bonada simply decided that being a union company would be beneficial to Respondent's business and informed his employees that he was going to enter into an agreement with the Union (Tr. 60−61). Needless to say, this would appear to be a classic "sweetheart" deal that would be unlawful under Sec. 8(a)(2) of the Act. This issue is not before me, however, since it has not been alleged—indeed such allegation might undermine the central premise of the General Counsel's case—so I will accordingly make no findings or each any conclusions in that regard.

[6] Both Bonada and his son, Sheldon Bonada ("Sheldon," in order to avoid confusing him with his father, a principal witness in this proceeding), testified that Respondent did not offer or used graphic web designs, and denied that Escalante was hired or used as such. Thus, Bonada testified that he hired Escalante as a "pre-press trainee." This issue is ultimately irrelevant to the resolution of the issues in this case, however, so I will not discuss it further.

[7] As will be discussed below, on occasion when a "rush order" came in, Bonada would issue verbal instructions to allow the pressman to begin working on a job, and would then follow-up with a printed "hardcopy" job ticket with more specific information shortly afterward.

told her that she would be the "union representative" at the shop, and as such would be the go-between or liaison between Adan Ramirez (Ramirez) who was the shop steward, and the Union.[8]

Escalante testified in her capacity as "union representative," one of her duties was to make sure the CBA was adhered to, and to report any violations to the Union. As the bookkeeper in the office, she began noticing Respondent was not following the CBA with regards to paying overtime or paying employees their correct wages, not paying payroll taxes in a timely fashion, and not giving employees "job tickets" in order to allow them to perform their duties in correct fashion.[9] For example, in January 2014 Escalante noticed that an employee named "Osberto" (last name unknown), who was (or should have been) classified as a "feeder" under the CBA was being paid $15 an hour, rather than $16 as required by the CBA. She brought this to Bonada's attention in the office, and Bonada responded that Osberto was a part-time probationary employee who was not going to stay, so he need not be paid $16 per hour. Escalante also testified that during this time period, in early 2014, she also brought to Bonada's attention the fact that Ramirez, Sheldon, and Guillermo (Fonseca), were not paid overtime for working more than 8 hours per day or 40 hours per week, as mandated by the CBA. On each of these occasions Bonada rebuffed her, in essence telling her to pay these employees what he directed—which was at the regular rate, not the overtime rate required by the CBA. Escalante testified she reported these violations to the Union, but did not know whether the Union had ever grieved these alleged violations or had taken any other action in this regard.

Escalante also testified, regarding the job tickets, that she would often remind Bonada that he needed to prepare job tickets for employees to do their jobs. Bonada would inform her that he would do this later. Instead, Bonada would give employees verbal instructions to allow them to begin their jobs, which according to Escalante, would be extremely upsetting to the employees. Escalante suggested that Bonada would do this a little too often, when he didn't feel

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[8] This arrangement of having Escalante as a "liaison" would be unusual, indeed odd, and the credibility of the testimony in this regard is difficult to ascertain, for many different reasons. First of all, it would be highly unusual for a shop with only 5 employees to have 2 union representatives. Most importantly, 3 other employees who testified (Ramirez, Sheldon, and Fonseca) denied ever being told by anyone in the Union, or by Escalante herself, that she was a union representative. Neither Pineda nor anyone other union representative or agent testified to corroborate Escalante's claim, which raises a reasonable inference that had they been called to testify, they would not have supported Escalante's testimony in this regard. After all, the Union, which is the charging party, would normally be expected to proffer testimony favorable to Escalante, and the failure to testify and thus corroborate her is notable. In an additional strange twist, Bonada testified that *he* (along with Pineda), appointed Ramirez as the shop steward, although that story makes some internal sense given Bonada's active role in making his shop unionized. Indeed, Escalante testified that Bonada himself had attended some of the Union meetings between Pineda and the employees. Adding a final bizarre twist, Ramirez testified that no one ever informed him he was the shop steward. In light of all of this, I do not find Escalante's claim of being a "union representative" to be credible. As will be discussed below, however, whether Escalante was a "union representative" or not is ultimately not material in determining whether she was engaged in protected activity at the time of her discharge.

[9] Escalante testified that it was her understanding that the CBA required the employer to provide employees with job tickets, based on what she had been told by Pineda during a Union meeting (Tr. 221). To be sure, there is nothing in the CBA (GC Exh. 2) that directly or indirectly refers to job tickets—or for that matter, payroll taxes. Nonetheless, as discussed below, the General Counsel asserts that under art. II of the CBA, which requires employees, inter alia, "to perform their duties in a professional manner focusing on quality, efficiency and safety. . . ," Respondent is obligated to provide employees with the proper equipment and information to perform their duties. Notably, Bonada admitted such was the case (Tr. 74).

like preparing job tickets, and simply told employees to "get it done" based on his verbal instructions.

On June 26, 2014, Escalante arrived at the office around 9 a.m., her usual starting time. She testified that shortly after she arrived, Bonada, who was out of the office, phoned her and instructed her to prepare a delivery receipt for the "Mexico job," a sublimation job involving sheets printed on an offset press, sheets which would later be transferred into fabric.[10] Escalante told Bonada that she would prepare the delivery receipt, which involved instructions of where to deliver the order for the client. Escalante then looked for the job ticket, which would have the pertinent information needed to prepare the delivery receipt, but could not find one. She looked for the job ticket in the rack where they are normally kept, as well as on the computer where they are created, to no avail. She went to see Osberto, the offset pressman, and asked him if he had the job ticket. Osberto, who according to Escalante looked "pretty upset," replied that he didn't have one, that Bonada had given him verbal instructions instead. Escalante then approached Ramirez and asked him if he had the job ticket, and Ramirez—who Escalante also said looked upset—said he did not have one, and did not have instructions on how to do the job. Escalante replied that she would call Bonada on the phone. She then phoned Bonada and told him she couldn't find the job ticket and therefore could not prepare a delivery receipt. According to Escalante, Bonada replied, "Don't worry about it, I'll be there (shortly), I am coming." Bonada further instructed her (to inform Ramirez) to leave "2 inches of white space" all around, and to tell Sheldon he wanted him to deliver the Mexico job to the client. After they hung up, Escalante proceeded to give Ramirez the instructions regarding the 2 inches of white space, and then went to see Sheldon regarding the delivery. Sheldon told Escalante he was too busy, so she went back to Ramirez to tell him he would have to deliver the job. He asked her where, and she said she did not have that information yet, and went back to the office. (Tr. 226−238.)

When Bonada arrived in the office, sometime between 11:30 a.m. and 12, Escalante told him she could not get the delivery receipt prepared. Bonada asked why, and Escalante said "I am still waiting for you to give me the info, there is no job ticket, nobody knows what is going on." Bonada replied that he knew where the job was going to be delivered and wanted Sheldon to do it. Escalante replied that Sheldon told her he was too busy, so that she had asked Ramirez to do it. Bonada said that he did not want Ramirez to deliver it, that Sheldon knew where and that he wanted him to do it. Escalante, who stated that by this point she and Bonada were beginning to raise their voices, then said to Bonada that it would be nice if they would all have that information, because no one knew what was going on, there were no job tickets and that she and the others has been unable to fulfill their jobs or duties because of the lack of information. Bonada replied that there was a job ticket, not to worry about it—that he would take care of it. Escalante then said "I don't think that you really care about our jobs or what we are doing because you are not allowing us to do our jobs." At this point, according to Escalante, Bonada said, "well, if you don't like the way I manage my company, you can get the fuck out of here." Escalante interpreted Bonada's statement to mean that he was firing her, and then she said hoped he would not deny her unemployment (benefits), and that she was going to inform the Union of what had just occurred. Escalante then gathered her belongings, and Bonada wrote her a check

[10] The "Mexico job" involved making a print for tee-shirts for (or in celebration of) the Mexico soccer team, which at the time—I take judicial notice—was about to play in the round of 16 at the FIFA World Cup event in Brazil.

for a few hours she had worked that day—not for the entire week. She then left Respondent's facility. According to Escalante, this exchange between her and Bonada occurred inside the office, with no one else present, while she was sitting in her desk and Bonada was standing a few feet away. Bonada texted her later that day requesting that she return the (office) keys, to which she responded that she would do so when she received the rest of her paycheck. (Tr. 240−251.)

Bonada, called as an adverse witness by the General Counsel, did not contradict or rebut Escalante's testimony on many material facts, although their version of events differed at times.[11] I will therefore summarize his testimony only to the extent that it differs in any significant way from Escalante's in those facts that I consider material or relevant. For example, contrary to Escalante, Bonada testified that she never informed him at any time that she was the shop's "union representative," nor did the Union inform him of this.[12] He also testified that Escalante never complained to him about job tickets or brought any other complaints to him regarding other employees. Bonada, however, admitted that Escalante had complained to him that Osberto was not being paid the correct wages under the CBA, and confirmed her testimony that he explained that Orberto was only a probationary or temporary employee. Bonada did not "recall" a conversation with Escalante regarding overtime issues with regard to any employees, including Escalante herself, Ramirez or Sheldon, his son. Likewise, Bonada did not initially recall Escalante, prior to the incident that led to her termination, discussing problems with job tickets or lack of job tickets (Tr. 90−91; 95−98; 100−103). [13]

Regarding the events of June 26, 2014, the day Escalante was discharged, Bonada's testimony differs somewhat from Escalante's, although he confirmed many of the salient points. According to Bonada, he initially created a ticket on the computer for the "Mexico job" at 6:21 that morning, as reflected by a ticket introduced in evidence as Respondent's Exhibit 1 (R. Exh. 1). According to Bonada, the ticket contained sufficient information to get the job started, and he gave the ticket to the "guys," although he did not say exactly to whom. He then left the

[11] Because Bonada represented himself, and was called as a witness initially before Escalante testified, he could not easily rebut Escalante's testimony regarding their one-on-one conversations without offering testimony in the narrative, which I allowed him to do to some extent, over the General Counsel's objections. Throughout the record, I often had to instruct or "coach" Bonada in the fine art of asking questions in a proper fashion, as his questions consistently drew objections from the General Counsel. This training effort on my part unfortunately fell short on many occasions, and I had to resort to asking many questions that would normally have been asked by counsel, illustrating the difficulty—and inherent imbalance—--of conducting hearings were parties are not represented by counsel. While perhaps my frequent interventions might be considered unfair in an adversarial proceeding, I believe my ultimate duty as an adjudicator is to make sure that as complete a record as possible exists under the circumstances, in order to permit me—or ultimately the Board or a court—to make accurate factual findings and reach proper legal conclusions.

[12] Indeed, as mentioned above, Bonada testified that he—along with then Union President Pineda—chose Adan Ramirez as shop steward.

[13] Bonada frequently appeared to be evasive in his testimony, often answering questions with questions of his own. Whether this was due to fear that he was being "tricked" by an attorney (in this case, the General Counsel), or simply part of his persona, or lack of candor, it is difficult to tell. Nonetheless, because of his lack of certainty or recall on many issues, I credit the testimony of Escalante over his regarding her complaints to him that he was not complying with the CBA on several different fronts, including complaining to him about job tickets not being prepared prior to the start of jobs. In this regard, I note that Bonada admitted that at least once a week, he would issue verbal instructions before he created a ticket with more detailed specifications, because certain jobs were "rush jobs." Accordingly, I believe that it is more likely that Escalante had previously complained to Bonada about lacking sufficient information for her or others to perform their jobs.

office, long before Escalante arrived. He denied that Escalante (or any other employee) called or talked to him while he was gone, and then he arrived back at the office between 11 a.m. and 11:30 a.m. At that time, he testified, Escalante started "insulting" him. Initially, Bonada denied that Escalante had said anything to him about her or other employees not having a job ticket or job number that day. He was then read a portion of the affidavit he had given the Board (in 2014) where he admitted that Escalante had complained to him that she lacked a job number in order for her to complete her job—but nevertheless testified that he could not recall Escalante saying that.[14] What Bonada recalled was that Escalante was raising her voice (actually yelling), and saying that he did not care about what was happening to the operation of his business. According to Bonada, ". . . that's what started it right there. She was yelling at me—and saying those things." He took it as "an insult big time," and got upset. At that point Bonada, who had also raised his voice, told Escalante to "get the fuck out of here." Escalante then left the office (Tr. 101−104; 138−147).[15]

Bonada testified that he meant to discharge Escalante when he told her to get "the fuck out of here," and said there were no further communications between them until he had a termination letter hand-delivered to her on July 3, 2014, by Ramirez. Bonada also testified that although the principal reason for Escalante's termination was her "abusive and offensive" comments on June 26, 2014, he also indicated it was the result of a cumulative effect of other arguments they had had, culminating with their June 26 confrontation. Bonada additionally testified that Respondent did not have a progressive disciplinary policy, no written discipline policy, and no employee handbook or written guidelines regarding discipline. He added that he had never disciplined an employee for "insubordination" before, because it had never occurred previously (Tr. 157−158; 160−162; 168-170; GC Exh. 3).[16]

Respondent additionally called 4 other individuals as witnesses, whose testimony I will briefly summarize because in the final analysis their testimony is ultimately not crucial or necessary to the analytical framework I need to employ in reaching a decision as to the merits of the allegations in this case. These witnesses are: Julio Guerrero (Guerrero) an employee of Britannica Press, a neighbor company that Respondent shares the premises with; Guillermo Fonseca (Fonseca) employed as a pressman by Respondent; Sheldon Bonada ("Sheldon," to avoid confusion with Bonada), who is Bonada's son and is employed by Respondent as a digital press operator; and Adan Ramirez (Ramirez), employed by Respondent as a driver and general helper. Guerrero testified that sometime in March or April 2014 he heard Bonada and Escalante arguing (with raised voices), and although he could not hear much of what was said, he saw

[14] In these circumstances, I cannot credit Bonada's testimony that Escalante did not say anything to her about a job ticket when he arrived at the office. I credit Escalante's testimony that she told Bonada that she—and the others—could not do their jobs without the proper ticket information.

[15] Bonada also claimed that at the time Escalante was saying the things described above, she was also "gesturing," which he took as a curse. In his Board affidavit, however, Bonada had stated that Escalante made no gestures on that occasion, but rather on other occasions in the past when they had argued. Additionally, Bonada claimed that Escalante was "verbally violent," and "yelling in (his) face," yet did not rebut Escalante's testimony that she was sitting in her desk while he was standing a few feet away when this encounter occurred. In light of the above, I credit Escalante's version of events.

[16] Escalante's termination letter states the following as the reason for the termination: "Insubordination, making abusive and offensive comments to an officer of the company." (GC Exh. 3.)

Escalante make a gesture with her hand, opening and closing her fingers and hand, as she said, "you talk too much." (Tr. 336; 341−346; 355−356)

Fonseca testified that he was never told by Escalante or anyone else that she was a union representative or shop steward, and also testified that he never discussed any problems related to wages, overtime or any other such matters with Escalante. Like Guerrero, he also testified that he had heard Escalante arguing (raised voices) with Bonada sometime in March-April 2014, although he could not hear what was being said. Finally, Fonseca helped clarify Respondent's practices regarding job tickets. He thus testified that he normally has job tickets at hand before he starts a job, although not always explaining that he sometimes receives verbal instructions (from Bonada) to start a job, but that he needs a ticket before he can complete the work. On those occasions when he receives verbal instructions, he receives a job ticket shortly afterward—usually within minutes, at most 30 minutes.[17] He recognized a job ticket for the "Mexico job" created early in the morning of June 26, 2014, and recognized a handwritten entry he made on that ticket regarding the number of prints to be made that day. He did not recall having a conversation with Escalante—or complaining to her—about a not having job ticket that morning (Tr. 372−377; 382−383; 386−387; 389−391; 393−397; 405−410; 413; 422−424; 426−428; 433−434; 438−439). [18]

Sheldon testified that he never discussed wage issues or overtime pay with Escalante or any other employees, and was not aware or ever informed that Escalante was a union representative at any time. He also testified that he had observed interactions or arguments between Escalante and Bonada (his father), and opined that Escalante was argumentative, unprofessional and disrespectful, without providing any specific information examples or specific instances of these occurrences (Tr. 448−451; 454−456; 46; 458).[19]

Finally, Adan Ramirez (Ramirez) testified that he had no knowledge that Escalante was a union representative; indeed, he testified that he had no knowledge that *he* was the union shop steward, as both Escalante and Bonada asserted. Ramirez also testified that Escalante never discussed wages or anything related to the CBA with him, which he was unfamiliar with, and that she never discussed job tickets with him (Tr. 495−496; 498−501; 505).

[17] Fonseca did relate, however, that not having a job ticket at hand is uncomfortable and made things difficult, because it's easier to "mess up" a job without the written specifications contained in a job ticket. (Tr.409−410; 413.)

[18] Both during the hearing and in his brief, the General Counsel insinuated that this document (R. Exh. 1) had been fraudently fabricated or created recently, apparently because its existence would appear to undermine Escalante's testimony that there was no job ticket for the "Mexico job" that morning—which lead to her fateful confrontation with Bonada. Fonseca's handwritten entry on the ticket, however, fatally undermines this argument, unless I conclude that Fonseca was also part of a well-orchestrated conspiracy—which I find completely unpersuasive. As discussed below, however, whether there was actually a ticket in existence that morning ultimately does not impact the conclusion of whether Escalante was engaged in protected activity.

[19] For example, asked what he meant by "unprofessional" he said: "Just the way she talked to him. So if you were my boss, I would not argue with you and say that you were wrong or insult you in certain kinds of, like, backhanded compliments that way." (Tr. 544.)

The General Counsel argues that I should discredit Guerrero, Fonseca, Sheldon, and Ramirez for various reasons.[20] While the testimony of Sheldon may be questionable because he is Bonada's son and possibly biased, I see no reason to discredit the testimony of Fonseca and Ramirez, the two other employees of Respondent to testify. There was nothing in the demeanor that would reveal lack of candor, and there were no contradictions or inherently unbelievable assertions on their part. While their recollections were sketchy at times—these events occurred almost 5 years ago, in 2014—I see no basis for discrediting their testimony. In that regard, I credit their testimony that they were never informed that Escalante was a Union representative, and that they did not discuss wages, hours, or anything related to the CBA with Escalante, including job tickets.[21]

In sum, I do not credit Escalante's testimony that she was the appointed "union representative" at the shop, something apparently not known to anyone else in the shop, as credibly testified by the other witnesses—including Bonada.[22] I also do not credit Escalante's testimony that she discussed wage and overtime issues with other employees, something that was also denied by the credited testimony of other witnesses. On the other hand, I credit Escalante's testimony that she brought up and discussed with Bonada wage, overtime and job ticket issues that affected her and other employees, on multiple occasions, as admitted by Bonada—albeit reluctantly, after having his memory refreshed time and again with his Board affidavit—an affidavit provided in 2014, soon after these events occurred. In particular, I credit Escalante's testimony that on June 26, 2014, she told Bonada that she and the other employees could not fulfill their job duties because they did not have the proper (or sufficient) information, and that accordingly no one knew what was going on. After Bonada told her not to worry about it, I credit her testimony that she said "I don't think you really care about our jobs or what we are doing because you are not allowing us to do our jobs." This is the what I find led Bonada to then say "well, if you don't like the way I manage my company, then get the fuck out of here," in essence discharging her.[23]

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[20] The General Counsel also requests that I dismiss the testimony of Guerrero as largely irrelevant, and I concur in that assessment.

[21] The General Counsel asserts that I should make an adverse inference regarding Ramirez' failure to address Escalante's testimony that on June 26, 2014, she asked him if he had the (Mexico job) ticket and that he said he did not, and that he did not have instructions on how to do the job. Ramirez, however, denied ever speaking to Escalante about job tickets in general, which in my view is sufficient to preclude a negative inference, particularly taking into account Bonada's lack of formal training in conducting examinations. More importantly, it isn't clear why Ramirez would even have to have a ticket, since Ramirez was the driver and general helper—and delivery instructions could easily be given verbally. It was Fonseca, the pressman, who needed the ticket most of all in order to fulfill the customer's order-and he testified he had one that day, testimony that I credited. Accordingly, I reject the General Counsel's suggested credibility findings in this regard.

[22] As discussed earlier, the failure of anyone from the Union—which was the Charging Party—to testify and corroborate Escalante's claim of being the appointed union representative, raises a negative inference in these circumstances

[23] In Bonada's version of this conversation, Escalante told him that he "did not care about what was happening to the operation of his business." Although the two versions are fairly similar, I credit Escalante's version as being more specific and consistent in the context of what was occurring. Thus, I find that Escalante made reference to how Bonada's actions were impacting her and the other employees.

IV. Discussion and Analysis

The General Counsel contends that Escalante was discharged while engaged in raising groups concerns under the CBA when she complained about the lack of information that would permit her and other employees to do their jobs. Accordingly, the General Counsel asserts, Escalante's conduct while engaged in protected activity was the direct and immediate cause of her termination, and thus the analytical framework applicable is that employed by the Board in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), ant its progeny. Respondent, who did not file a brief, nonetheless admits that Escalante was discharged as a result of what transpired during the June 26, 2014 encounter between Escalante and Bonada. As discussed above in the Facts section, I concluded that on that date Escalante complained to Bonada that she and other employees could not properly perform their jobs because Bonada had failed to provide them with sufficient information. She then told Bonada that she did not believe that he cared about their jobs or what they were doing, since he wasn't allowing them to do their jobs. Bonada found this last statement disrespectful, offensive and insubordinate, and discharged her, telling Escalante to "get the fuck out of here."

The initial issue to be decided, in determining whether the *Atlantic Steel* analysis is applicable, is whether Escalante was engaged in protected activity at the time she was discharged. I conclude that she was. Although I have found that she had not been designated as the "union representative," nor discussed wages, overtime or job tickets (or lack thereof) with other employees, in bringing up the issue of the lack of information on June 26 she was arguably bringing up an issue covered under the collective-bargaining agreement (CBA). Although there is no explicit provision in the CBA covering job tickets, or for that matter specifically addressing the employer's duty to provide information, the duty to provide employees with the proper equipment *and information* to perform their jobs is implicit under article II of the CBA, which obligates employees, inter alia, to "perform their work in a professional manner. . . ," as was admitted by Bonada. Moreover, I credited Escalante's testimony that her belief that the CBA required employers to provide employees with job tickets (and related information) was based on a meeting with Union President Pineda, who informed her and other employees that employers had that obligation. The Board has long held that employees who raise an issue which they in good faith believe involves a contractually-bargained right are engaged in protected activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd., 388 F.2d 495 (2d Cir. 1967). This doctrine was later affirmed by the Supreme Court in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). It matters not if the employee is correct in his/her good-faith assertion of a contractual right, or whether the claim is legally valid, or whether the employee makes an explicit reference to the collective-bargaining agreement; such conduct is protected nonetheless. Id. at 839−840. I find, under these circumstances, that Escalante, in confronting Bonada about the lack of a job ticket—or the lack of information about the job—was invoking a right which she believed in good faith to be governed by the provisions of the CBA.[24] Accordingly, I conclude that Escalante was engaged in protected activity at the time she was discharged, and

[24] Although it appears that a job ticket had been created by Bonada earlier in the day, before he left the premises, Escalante could not find it, and could therefore not perform her assigned duty—which was to prepare a delivery receipt. Moreover, as Fonseca admitted, and as reflected by the job ticket in evidence (R. Exh 1), much of the information needed to prepare a delivery receipt, such as an order or customer number, and a delivery address, was missing from the ticket.

because Respondent's defense is that Escalante engaged in misconduct at the time, the *Atlantic Steel* analysis is the appropriate framework.[25]

In considering the lawfulness of the discipline under *Atlantic Steel*, the Board looks at four factors, which are considered in the aggregate: (1) the place of the discussion; (2) the subject matter; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. For the following reasons, I conclude that all 4 factors, in the aggregate, favor a finding that Escalante was discharged unlawfully: First, the encounter between Escalante and Bonada took place in the office, away from the production area, and only the two of them were present. Even though other individuals or employees may have been in the immediate vicinity of the office at the time, there is no evidence that anyone heard or saw what transpired between Escalante and Bonada. This factor thus favors Escalante, as no other employee witnessed her alleged transgression or "disrespectful" behavior, if such was the case. Second, the subject matter was job tickets and the lack of information Escalante and her fellow employees needed in order to perform their duties correctly. The evidence strongly suggests not only that this was an issue or theme that Escalante had a right to raise under the CBA and demand corrective action by the employer, but also that it was a recurring problem that was frustrating Escalante and others. Third, Escalante's "outburst" consisted of her accusing Bonada of not caring about his employees or their work. Arguably, this statement could reasonably be considered disrespectful of Bonada, but that is not the end of the inquiry, however. The Board, in examining the employee's alleged misconduct, inquires whether the conduct is "sufficiently egregious or opprobrious" to remove it from the protection of the Act. *Atlantic Steel,* supra*; Meyer Tool, Inc.*, 366 NLRB No. 32, slip op at 1 fn. 2, (2018); *Postal Service*, 360 NLRB 677, 683 (2014). In that regard, the Board has long distinguished remarks considered "intemperate" but simple, brief and spontaneous, from more deliberate, premeditated, abusive or threatening remarks, finding the former protected, but not the latter. See, e.g., *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F. 3d 22 (D.C. Cir 2011), citing *Prescott Industrial Products Co.*, 205 NLRB 51, 51−52 (1973). Likewise, the Board distinguishes conduct which is "true insubordination," which is beyond the Act's protection, from that which is only "disrespectful, rude and defiant." See, e.g., *Goya Foods, Inc.*, 356 NLRB 476, 479 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F. 2d 1384 (6th Cir. 1992). I find that Escalante's remarks, while arguably disrespectful, were intemperate but not truly insubordinate, and her conduct was thus not egregious or opprobrious. Finally, I note, with regard to possible provocation for Escalante's conduct, that while Bonada's failure to provide Escalante and others with sufficient information to enable them to perform their work appropriately was not an "unfair labor practice," in was arguably in violation of the CBA, and a repeated source of frustration for Escalante and the others. In the circumstances presented here, Escalante's choice of words, although intemperate, could reasonably be seen as having been provoked, at least to some extent.

[25] Par. 6(b) of the complaint alleges Escalante's alleged protected activity in January and April 2014 as part of the reason for her eventual discharge. In my view, this allegation is unnecessary under the *Atlantic Steel* framework, since it is her conduct at the time immediately preceding the discharge that brings it under *Atlantic Steel's* fold. Indeed, it could be argued that by raising other protected activity in the past, the General Counsel risks forcing a *Wright Line* analysis instead, which the General Counsel correctly argues is not the proper framework in this instance—and might in fact be detrimental to its theory of a violation, since animus is not clear.

Considering the above 4 factors in the aggregate, I conclude that they favor Escalante, since her alleged misconduct was not was not of the type or nature to deprive her of the Act's protection. Accordingly, and for these reasons, I conclude that Respondent violated Section 8(a)(1) of the Act, as alleged, for terminating Escalante on June 26, 2014.

CONCLUSIONS OF LAW

1. Blue Earth Digital Printing, Inc., also known as Bonada Enterprises, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphic Communications Conference of the International Brotherhood of Teamsters, Local 140-N (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1)of the Act by discharging its employee Vivian Escalante on or about June 26, 2014.

4. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the 8(a)(1) violation I have found is an Order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from discharging employees because they are engaged in concerted protected activity.

Respondent shall also cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent unlawfully discharged Escalante, Respondent must offer Escalante reinstatement to her former job or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed. The Respondent shall make Escalante whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate her for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. *In* accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Escalante for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21

days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 31 a report allocating backpay to the appropriate calendar year for Escalante. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful termination of Escalante and to notify her in writing that this has been done and that her terminations will not be used against her in any way.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2014. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 31 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[26]

ORDER

Respondent Blue Earth Digital Printing, Inc., also known as Bonada Enterprises, Inc., Culver City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Engaging in any of the conduct described immediately above in the remedy section of this decision;

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

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

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, if it has not already done so, offer Escalante full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Escalante whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all its facility in Culver City, California where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2014.

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

(e) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. April 9, 2019

Ariel L. Sotolongo
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT discharge you or otherwise discriminate against you because you have engaged in protected concerted activity such as trying to enforce your rights under the collective-bargaining agreement.

WE WILL within 14 days of the date of the Board's Order, offer Vivian Escalante full reinstatement to her former job, of that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Escalante whole for any loss of earnings and other benefits resulting from her termination, less any interim earnings, plus interest.

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

Blue Earth Digital Printing, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak

confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 600
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-133542 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-307-7342.