

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

S&S ENTERPRISES, LLC D/B/A  
APPALACHIAN HEATING

and

SHEET METAL, AIR, RAIL AND  
TRANSPORTATION WORKERS,  
LOCAL UNION NO. 33

Cases 09-CA-235304  
09-CA-235307  
09-CA-235314  
09-CA-236905  
09-CA-237847  
09-CA-237851  
09-CA-237858  
09-CA-238621  
09-CA-238930  
09-CA-239148  
09-CA-239170

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

**I. INTRODUCTION**

This case is before Administrative Law Judge David Goldman upon the General Counsel's Order Further Consolidating Cases, Third Consolidated Complaint, and Notice of Hearing and motion to amend the complaint, collectively, alleging that S&S Enterprises, LLC, d/b/a Appalachian Heating (Respondent) engaged in numerous violations of Section 8(a)(1) and (3) of the Act. (G.C. Exs. 1(pp), 1(vv)) The record evidence strongly supports the arguments set forth by Counsel for the General Counsel.

**II. STATEMENT OF THE CASE**

The charges in Cases 09-CA-235304, 09-CA-235307, and 09-CA-235314 were filed on February 5, 2019 <sup>1/</sup>, and the charge in Case 09-CA-236905 was filed on March 1. <sup>2/</sup> (G.C. Exs. 1(a), (c), (e), (g)) Thereafter, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in Cases 09-CA-235304, 09-CA-235307, 09-CA-235314, and 09-CA-236905 on May 13. (G.C. Ex. 1(w)) The charges in Cases 09-CA-237847, 09-CA-237851, and 09-CA-237858 were filed on March 15; the charge in Case 09-CA-238621 was filed on March 27, the charge in Case 09-CA-238930 was filed on April 3; the charges in Cases 09-CA-239148 and 09-CA-239170 were filed on April 5. (G.C. Exs. 1(i), (k), (m), (o), (q), (s), (u)) Thereafter, an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing issued in Cases 09-CA-235304, 09-CA-235307, 09-CA-235314,

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<sup>1/</sup> All dates take place in 2019 hereinafter unless noted otherwise.

<sup>2/</sup> References to the transcript will be designated as (Tr. \_\_\_\_); references to General Counsel's Exhibits will be designated as (G.C. Ex. \_\_\_\_); references to Joint Exhibits will be designated as (Jt. Ex. \_\_\_\_); references to Respondent's Exhibits will be designated as (R. Ex. \_\_\_\_); and references to Union's Exhibits will be designated as (U. Ex. \_\_\_\_).

09-CA-236905, 09-CA-237847, 09-CA-237851, 09-CA-237858, 09-CA-238621,  
09-CA-238930, 09-CA-239148 and 09-CA-239170 issued on June 21. (G.C. Ex. 1(mm))

The charge in Case 09-CA-241292 was filed on May 10; the first amended charge in Case 09-CA-241292 was filed on July 2; the charges in Cases 09-CA-242230, 09-CA-242235, and 09-CA-242238 were filed on May 28. (G.C. Exs. 1(y), (ee), (gg), (ii)) Thereafter, an Order Further Consolidating Cases, Third Consolidated Complaint, and Notice of Hearing in Cases 09-CA-235304, 09-CA-235307, 09-CA-235314, 09-CA-236905, 09-CA-237847, 09-CA-237851, 09-CA-237858, 09-CA-238621, 09-CA-238930, 09-CA-239148, 09-CA-239170, 09-CA-241292, 09-CA-242230, 09-CA-242235, and 09-CA-242238 issued on July 5. (G.C. Ex. 1(qq))

During the trial in the instant matter, Judge Goldman granted Counsel for the General Counsel's motions to amend the complaint. (G.C. Ex. 1; Tr. 19) An unfair labor practice hearing was held in Charleston, West Virginia on August 12, 13, and 14. Counsel for the General Counsel maintains that Respondent violated the Act as alleged.

### **III. ISSUES**

Whether on about January 9 and January 10, Daniel R. Akers interrogated employees about their union activities in violation of Section 8(a)(1) of the Act.

1. Whether about January 10, Daniel R. Akers solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity in violation of Section 8(a)(1) of the Act.

2. Whether on about January 14, Daniel M. Akers interrogated employees about their union membership in violation of Section 8(a)(1) of the Act.

3. Whether about January 21, Respondent failed to promote Eric Faubel and isolated Faubel by transferring him to a jobsite that had only one other employee; whether about February 4, Respondent excluded Faubel from an employee meeting; and whether about May 28, Respondent discharged Faubel in violation of Section 8(a)(1) and (3) of the Act.

4. Whether about January 28, Respondent, by Daniel M. Akers, and about February 14, Respondent, by Jonathan Tierson, by giving employees documents emphasizing they were “at will” employees, threatened employees with discharge because they formed the Union in violation of Section 8(a)(1) of the Act.

5. Whether since about January 28, Respondent’s maintenance and distribution of the following in employee manuals violated Section 8(a)(1) of the Act: “Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.”

6. Whether since about January 28, Respondent’s maintenance and distribution of the following in employee manuals violated Section 8(a)(1) of the Act: “Solicitation and/or distribution, as well as gambling are prohibited on company property.”

7. Whether since about February 4, Respondent isolated its employees Brandon Armstrong, Paul Castle and Stephen Marolf by assigning them to work away from other employees and work only with each other in violation of Section 8(a)(1) and (3) of the Act.

8. Whether about February 25, by Jonathan Tierson telling employees they would be terminated if they spoke to employees who supported the Union, Respondent threatened employees with discharge if they engaged in union activity or supported the Union in violation of Section 8(a)(1) of the Act.

9. Whether about February 28, by taking pictures of striking employees, Respondent, by Jonathan Tierson, engaged in surveillance of employees participating in union activities in violation of Section 8(a)(1) of the Act.

10. Whether about February 28 and March 6, Respondent, by Jonathan Tierson, by holding a cell phone and directing it at striking employees, created an impression among employees that their union activities were under surveillance by Respondent in violation of Section 8(a)(1) of the Act.

11. Whether about March 1, Respondent, by Daniel R. Akers via text message, threatened to call the police on employees for engaging in a strike, asked its employees to disclose to Respondent the union activities of other employees, asked its employees to videotape and disclose to Respondent the union activities of other employees, and created an impression among its employees that their union activities were under surveillance by Respondent by asking employees to disclose and videotape the union activity of other employees in violation of Section 8(a)(1) of the Act.

12. Whether about March 8, Respondent's promulgation and distribution of the following insert included with employee paychecks violated Section 8(a)(1) of the Act: That anyone who violates the anti-harassment policy or is caught threatening our employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law.

13. Whether about March 13, by telling an employee he had been instructed to isolate union supporters, Respondent, by Jonathan Tierson, threatened to isolate employees if they engaged in union activity or supported the Union in violation of Section 8(a)(1) of the Act.

14. Whether Respondent, by Jonathan Tierson, on several occasions in March, by telling an employee that union supporters should be isolated from their co-workers, threatened to isolate

employees if they engaged in union activity or supported the Union in violation of Section 8(a)(1) of the Act.

15. Whether about March 15 and March 27, Respondent issued written warnings to Stephen Marolf in violation of Section 8(a)(1) and (3) of the Act.

16. Whether about March 27, Respondent permanently laid off Brandon Armstrong without a chance for recall in violation of Section 8(a)(1) and (3) of the Act.

17. Whether about May 28, by issuing a termination letter to an employee, Respondent threatened its employees with criminal prosecution and civil action because they supported the Union in violation of Section 8(a)(1) of the Act.

18. Whether since about May 28, Respondent failed and refused to reinstate Eric Faubel to his former position of employment in violation of Section 8(a)(1) and (3) of the Act.

#### **IV. THE FACTS**

##### **1. Background**

Respondent's main office is located in Bradley, West Virginia and it also maintains a warehouse in Charleston, West Virginia. (Tr. 42) Respondent performs heating, air conditioning, and ventilation system installation, and plumbing services. (Tr. 41-42) Its representatives are Owner Daniel M. Akers ("Dan"), General/Operations Manager Daniel R. Akers ("Daniel"), Installation Manager Tim McGuffin, and Foreman Jonathan Tierson. (G.C. Ex. 1; Tr. 40-41) About 48 rank-and-file employees work for Respondent. (Tr. 42) Respondent has been in business for approximately 70 years and has never been unionized. (Tr. 42) As of summer 2018, Respondent had numerous projects in and around the Charleston and Bradley locations, with its biggest project being a nursing home and assisted living village in Charleston named "The Crossings." (Tr. 44, 386) Jarrett Construction is the general contractor of The Crossings. (Tr. 44, 386) Respondent's contribution to The Crossings

has been the installation of ventilation fans, fresh air intakes, elevators, ducts, air handlers, and outside units. (Tr. 387) Respondent's foreman, Mike Doughton, oversaw this project when the job began in the summer of 2018 until his resignation in early January 2019. (Tr. 44, 45, 424) As of August 2019, this project was still ongoing. (Tr. 44) Employees assigned to work out of Respondent's Bradley office perform work in the Charleston area and vice versa. (Tr. 76, 77, 331, 389, 423, 556, 563) The Charleston employees often report directly to the jobsite rather than reporting first to the warehouse to sign in. (Tr. 76, 255)

In the summer of 2018, Sheet Metal, Air, Rail, and Transportation Workers, Local Union No. 33 (the Union) started organizing Respondent's employees. (Tr. 119, 457-458, 460) On November 19, 2018 and November 26, 2019, respectively, union salts and experienced HVAC installers, Brandon Armstrong and Eric Faubel, began working for Respondent as HVAC installers at The Crossings with intentions to organize the company. (Tr. 119-120, 121, 127, 419-420, 422, 458) Discriminatee Faubel has been employed by the Union as an organizer since January 2017. (Tr. 118) Discriminatee Armstrong has been a member of the Union for about 14 years. (Tr. 419) Discriminatee Stephen Marolf has worked for Respondent on and off and was most recently employed by Respondent from about December 11, 2017 until about May 11, 2019. (Tr. 312-313)

## **2. January Organizing Activity and Eric Faubel's Promotion**

When Faubel and Armstrong began in November 2018, Mike Doughton was still foreman, and about four other employees worked at The Crossings. (Tr. 127-128, 525-526) Employees usually worked in pairs, sometimes alone, and often multiple crews worked in the same area of the project. (Tr. 128, 307, 381, 415, 504, 552, 557, 563, 577) As of about January 2019, about eight employees were assigned to The Crossings, and during the course of the year, about four to 18 employees were on site at any given time. (G.C. Ex. 8; Tr. 149, 389, 423)

Respondent became aware of the Union's organizing efforts in early January 2019.

(Tr. 42) Around that same time, Union Organizer Steve Hancock submitted employment applications for himself and laid-off union members in person at Respondent's Bradley office.

(Tr. 462) About January 7, Respondent's foreman, Mike Doughton, left Respondent to work for a union contractor. (Tr. 45, 130) Faubel testified that before Doughton's resignation, Doughton advised Faubel that he could recommend him for a promotion to foreman because Faubel knew what to do on the job. (Tr. 305)

About January 8, Installation Manager Tim McGuffin called Faubel and, when Faubel did not answer, McGuffin called Jonathan Tierson, who was an HVAC installer at that time, and asked to speak to Faubel. (Tr. 130) McGuffin asked Faubel to attend a meeting with Jarrett Construction on behalf of Respondent. (Tr. 131, 132) Faubel testified that when he arrived at the meeting, Tierson, who was already present, was asked by John Jarrett to leave the meeting because he was not running the job. (Tr. 132, 277) Faubel was the only representative present for Respondent. (Tr. 133) At the meeting, Faubel advised the other trades about Respondent's work schedule for the next few weeks. (Tr. 132-33) After the 4-hour meeting concluded, Faubel took a photo of the weekly progress board and sent it to McGuffin. (Tr. 131, 133) McGuffin thanked Faubel for stepping up and helping last minute. (Tr. 133) Faubel then returned to the jobsite. (Tr. 131, 133)

Under the impression that he oversaw the jobsite, Faubel filled other employees in about the meeting, and advised them to focus on certain areas and where to start working. (Tr. 134, 277) No other supervisors or managers were present on the jobsite that day and employees believed Faubel was the new foreman. (Tr. 134, 389, 390, 424) Additionally, Stephen Marolf testified that former Foreman Doughton and Shop Manager Bob Baccus told him that Faubel was taking over The Crossings job. (Tr. 318-319)

On January 9, Faubel attended the second part of the meeting with Jarrett Construction, at which Jarrett scheduled the next two phases of The Crossings job. (Tr. 134) Again, Faubel was the only representative present for Respondent. (Tr. 134) Faubel worked the remainder of the day on the jobsite and moved guys around to areas or “hot spots” that he learned about during the meeting. (Tr. 166) No other supervisors or managers were present at The Crossings that day. (Tr. 166) Prior to the January 8-9 meetings, Faubel testified that he simply reported to where he was assigned to work; he did not direct employees. (Tr. 166)

i. Daniel’s January 9 Conversation with Faubel

After the January 9 meeting, Daniel Akers thanked Faubel on the phone for stepping up in a tight situation. (Tr. 134-135) Daniel told Faubel that he had only heard positive comments about Faubel, which was highly encouraging for the company, and that Faubel needed to be rewarded. (G.C. Ex. 8; Tr. 134-135, 141, 142) Daniel offered to put together a job description for the foreman position because Faubel had worked with Doughton and knew what it took to see the project through to completion. (G.C. Ex. 8; Tr. 142) Daniel asked Faubel if that was something he was interested in, stating he would then meet with owner Dan Akers to come up with an offer. (G.C. Ex. 8; Tr. 142) Daniel then told Faubel he was fully aware of the crap going on with the union guys coming to their job, and that the Union solicited Respondent’s employees. (G.C. Ex. 8; Tr. 143) Daniel said the same union guy came in the shop trying to get him to hire 15 guys. (G.C. Ex. 8; Tr. 143) Daniel told Faubel he had not met the union guy other than when he walked into the shop and threw resumes on the secretary’s desk and walked out. (G.C. Ex. 8; Tr. 143) Daniel told Faubel he was interested in promoting him to the project manager for The Crossings, and then the next job and next job, and that it would not be temporary. (G.C. Ex. 8; Tr. 143-144) Daniel then discussed Respondent’s intentions for growing the Charleston office. (G.C. Ex. 8; Tr. 144) Faubel told Daniel he was definitely

interested in the job and would like to sit down and come up with an agreement or package.

(G.C. Ex. 8; Tr. 144)

Daniel then asked Faubel if he had been solicited by the Union. (G.C. Ex. 8; Tr. 145)

Faubel replied that he had not. (G.C. Ex. 8; Tr. 145) After Faubel expressed concern with the lack of employees and the amount of work they had, Daniel told Faubel to communicate with him if he is low on manpower, and that he would hire employees to fill in for lack of labor.

(G.C. Ex. 8; Tr. 148-149) Daniel reiterated Respondent's confidence that Faubel could handle the job and offered training he might need. (G.C. Ex. 8; Tr. 150) Faubel agreed with how that sounded. (G.C. Ex. 8; Tr. 150) Daniel advised he would call Dan to discuss more and then would talk to Faubel again the next day. (G.C. Ex. 8; Tr. 150-151)

On January 10, Daniel conducted a safety meeting with all employees who were working at The Crossings, which included Faubel, Brandon Armstrong, Jonathan Tierson, Jason Shirkey, Paul Castle, Roger Hight, Jimmy and Chris Kilgore. (G.C. Exs. 9(a), 9(b); Tr. 167, 168)

Respondent holds mandatory safety meetings once a month during the first week of the month; these meetings are not optional. (Tr. 57, 97-98; Tr. 172, 287, 307, 427) Employees from each location attend the meetings at which Respondent informs employees of various practices and procedures that Respondent expects employees to follow so that they may work in a safe manner. (Tr. 57, 98; Jt. Ex. 2, pp. 3, 25, 48) Respondent can discipline employees for failing to follow proper safety procedures. (Tr. 58, 98)

At this meeting, Daniel told employees that the Union was coming around to leave business cards and calling everybody. (G.C. Exs. 9(a), 9(b), p. 19) Daniel asked employees if that was true, and whether they had gotten a call from the union guy. (G.C. Exs. 9(a), 9(b), p. 19) Daniel then went on to say that Respondent enjoyed working with every employee and if they have a problem, to call him any time, and he is there to help. (G.C. Exs. 9(a), 9(b), p. 19) Daniel told

employees that if anyone needs anything or wants him to try to remedy any issues or fix anything at all, to let him know. (G.C. Exs. 9(a), 9(b), p. 19) Daniel said he will do whatever it takes, every day, and he is willing to take on more. (G.C. Exs. 9(a), 9(b), p. 19) He then asked employees if they had anything they wanted to talk about. (G.C. Exs. 9(a), 9(b), p. 19) That same morning, organizer Hancock distributed handbills on car windshields at the jobsite.

(G.C. Ex. 2; Tr. 463)

ii. Daniel's January 10 Conversation with Faubel

After the safety meeting, Daniel and Faubel met privately. (G.C. Exs. 9(a), 9(b), p. 27; Tr. 172) At the beginning of their conversation, an employee brought Daniel the Union's flyer that Hancock had distributed. (G.C. Exs. 2, 9(a), 9(b), p. 27; Tr. 43, 77-78, 175-176) Daniel commented the flyer was bullshit, it was unethical, and that made his blood boil. (G.C. Exs. 9(a), 9(b), pp. 27-28) During their conversation, Faubel denied telling Tim McGuffin that he was not interested in the foreman position. (G.C. Exs. 9(a), 9(b), p. 28) Daniel told Faubel that he and his dad agreed that Faubel would be a good candidate to hire from within, to promote, and wanted to talk to him about it more. (G.C. Exs. 9(a), 9(b), p. 28) Daniel stated that if Faubel was up for the task, they could look at upping his wage significantly for the short term and if he is rocking and rolling, making good progress and they receive good reports, they would up his pay again. (G.C. Exs. 9(a), 9(b), pp. 28-29) That is what Dan wanted Daniel to present to Faubel. (G.C. Exs. 9(a), 9(b), p. 29) Daniel told Faubel they would like him to become project manager, working foreman, and said he would be perfect for that position. (G.C. Exs. 9(a), 9(b), p. 29) Daniel asked if that is something Faubel wanted to do and to renegotiate. (G.C. Exs. 9(a), 9(b), p. 29) Faubel agreed that an hourly rate was fine, and Daniel replied that Dan wanted to offer him a 25 percent raise, but Daniel thought it was worth more, like \$22 an hour. (G.C. Exs. 9(a), 9(b), p. 29) Daniel stated their ultimate goal would be \$25 an hour with a company vehicle

and asked what Faubel thought. (G.C. Exs. 9(a), 9(b), pp. 29, 30) Faubel indicated he was definitely interested and without insurance, he would do \$25 an hour and then renegotiate down the line. (G.C. Exs. 9(a), 9(b), p. 30) Daniel replied he would talk to Dan and McGuffin again. (G.C. Exs. 9(a), 9(b), p. 30) They discussed hiring more employees to keep up with the demands of the job. (G.C. Exs. 9(a), 9(b), p. 30) At the conclusion of their conversation, Daniel asked Faubel to call him with anything, stating he would continue to talk to his dad and McGuffin, and they would put together a formal job description and compensation package on Monday, January 14. (G.C. Exs. 9(a), 9(b), p. 30) At the conclusion of their conversation, Faubel believed he had received the promotion. (G.C. Ex. 19; Tr. 273, 275-276)

After Daniel received the Union's flyer, he called organizer Hancock to ask why he posted false statements in the flyer. (G.C. 2; Tr. 78, 464) Daniel also told Hancock that the Union was spreading lies and deceitful information in the flyer. (Tr. 78, 464) He was admittedly upset about the content of the flyer. (Tr. 79)

On or about January 11, Union Representative Steve Vermille called Daniel wanting to schedule a meeting, but Daniel did not want to meet with him. (Tr. 79) At The Crossings that day, Faubel instructed employees where to go to do their work. (Tr. 179) No other managers or supervisors were present for Respondent that day. (Tr. 179)

### iii. Dan's January 14 Conversations with Faubel

On Monday, January 14, Owner Dan stopped by The Crossings to talk to Faubel about running the job. (G.C. Exs. 10(a), 10(b); Tr. 179-180) Dan asked Faubel to complete an application so he could check references, and Faubel advised he had already completed one, but would do it again. (G.C. Exs. 10(a), 10(b), pp. 1, 2, 11; G.C. Exs. 15, 25) Dan relayed to Faubel that Daniel said he was a rock star when he interviewed Faubel. (G.C. 10(a), 10(b), p. 2) Dan then asked Faubel for his work experience. (G.C. Exs. 10(a), 10(b), p. 2) They discussed the

work needed to be performed at The Crossings, and Dan told Faubel he wanted him to look at the job and to accomplish as much as he can with what he has. (G.C. Exs. 10(a), 10(b), p. 3) Dan also mentioned the necessity of having a good relationship with the inspector, and reiterated he needed a man who will make the right decisions. (G.C. Exs. 10(a), 10(b), pp. 4, 5) Dan requested that Faubel continue to attend job meetings, and Faubel indicated he knew how to make good relations with the different trades and general contractors. (G.C. Exs. 10(a), 10(b), p. 5) Faubel also told Dan that only he (Faubel) maintained a fire license to install dampers, and Dan indicated other representatives had licenses as well. (G.C. Exs. 10(a), 10(b), pp. 5, 6) Faubel then mentioned how fire dampers had to be modified because they were too big and Dan indicated he was unaware this was an issue. (G.C. Exs. 10(a), 10(b), p. 6) Dan asked Faubel to get him an exact number for the fire dampers by the end of the day. (G.C. Exs. 10(a), 10(b), p. 9) Dan and Faubel also discussed the correct dampers to order, how to fix the problem, and how to increase efficiency. (G.C. Exs. 10(a), 10(b), p. 6)

During the foregoing conversation, Faubel asked if he was officially in charge and who to contact with questions. (G.C. Exs. 10(a), 10(b), p. 7) Dan told Faubel to contact him directly and he, Dan, would handle it. (G.C. Exs. 10(a), 10(b), p. 7) Dan told Faubel that what they just did, in discussing issues and remedies for the job site, is what he wants Faubel to do. (G.C. Exs. 10(a), 10(b), p. 10) Dan then asked Faubel if he was cool with running the job, and Faubel said absolutely. (G.C. Exs. 10(a), 10(b), p. 11) Dan told Faubel he would pay him \$22 an hour and after he talks to his references, they would increase his pay to \$25. (G.C. Exs. 10(a), 10(b), p. 11) Dan said he was going to tell McGuffin that Faubel was in charge, running the job, and repeated that Faubel should talk directly to him, Dan. (G.C. Exs. 10(a), 10(b), p. 11) Faubel then gave Dan contact information for his last two jobs, one of which was John McDougal, and

Dan repeated that Faubel was the man, that he would back his decisions and would be his guy in the office making phone calls. (G.C. Ex. 10(a), 10(b), pp. 12, 13)

McGuffin subsequently joined the conversation to discuss ways of working the job. (G.C. Exs. 10(a), 10(b), pp. 13, 14-15) Dan told McGuffin he wants Faubel to be in charge, to run the job, and for the first week to 10 days, for Faubel to talk directly to Dan. (G.C. Exs. 10(a), 10(b), pp. 15, 16) Dan explained that Faubel has run jobs like that, that he can run the job, and Faubel is to attend the pull meetings. (G.C. Exs. 10(a), 10(b), p. 16) Dan told McGuffin that when he has people like Doughton and Faubel, he wants to let them run it. (G.C. Exs. 10(a), 10(b), p. 16) McGuffin commented that he wanted to meet with Faubel that day to go over things that would come up. (G.C. Exs. 10(a), 10(b), pp. 16, 17) Dan stated he wanted to give Faubel a chance to run the job and additional jobs because they have stuff going on all over the place, and they would start the transition that day, and repeated that Faubel was in charge. (G.C. Exs. 10(a), 10(b), pp. 16, 17) Dan advised he wanted the men to start talking to Faubel when calling off work. (G.C. Exs. 10(a), 10(b), p. 19) McGuffin then left the conversation. (G.C. Exs. 10(a), 10(b), p. 23)

Dan continued to discuss the specifics of the foreman position with Faubel, stating he was officially earning \$22 an hour, but once he called John McDougal for a reference and received a good report, he would pay Faubel \$25 an hour. (G.C. Exs. 10(a), 10(b), p. 23) Faubel agreed. (G.C. Exs. 10(a), 10(b), p. 24) Dan repeated they all were on board, that Faubel was the man and to talk directly to him (Dan). (G.C. Exs. 10(a), 10(b), p. 24) Faubel asked if he could sit in during interviews and Dan agreed. (G.C. Exs. 10(a), 10(b), p. 25) Faubel then resumed work as he had done that week directing guys where to go. (Tr. 189-190)

That same day, organizer Hancock distributed his business card to Respondent's jobsites in Raleigh County, West Virginia. (Tr. 79) Hancock also called Daniel that day but Daniel did not answer his call. (Tr. 80)

On the afternoon of January 14, Dan called John McDougal who told Dan that Faubel was a great guy, that he wished he was still working there, and that Faubel had supervised 20-25 guys. (Tr. 47) During their conversation, Dan asked McDougal if his company was a union operation and McDougal replied it was a union shop and a split shop. (Tr. 47) Dan testified that he then inquired if Faubel worked on the union side or the non-union side, and McDougal replied that Faubel had worked on the non-union side. (Tr. 47, 48)

In the evening of January 14, Dan called Faubel to follow up. (G.C. Ex. 11) Dan told Faubel he just spoke to McDougal who gave Faubel a good recommendation, but McDougal mentioned one thing that concerned him. (G.C. 11; Tr. 191) Dan said he asked McDougal whether he had a union shop and McDougal replied they ran a split shop and that Faubel was working on the non-union side. (G.C. 11; Tr. 191-192) After speaking to his reference, Dan asked Faubel if he was a union member since the operation in question was a union and non-union contractor. (Tr. 49, 268) Faubel replied he was not a union member. (G.C. 11; Tr. 52, 192) Dan replied, ". . . then I don't know where all this union stuff's coming from. We've never had any problem with the union and I was—but that just bothered---well, I'm just curious about that." (G.C. 11; Tr. 192) Dan asked Faubel this question because he wanted to make sure Faubel was interested in the foreman position and that Faubel wanted to do the work. (G.C. 11; Tr. 50, 52)

Dan then told Faubel they would be a good team and to carry on as their crew leader but asked Faubel to wait until the end of the week to see if he really accepts the job. (G.C. Ex. 11; Tr. 192) Dan told Faubel he was a \$22 an hour man, but at the end of the week if Faubel wants

the job, they would pay him \$25 an hour, and that may not be the end of it. (G.C. Ex. 11; Tr. 192-193) Dan advised that as they get to know him and he can bring different things to the table to help them save money, what he makes that day does not mean that is what he will make in 6 months. (G.C. 11; Tr. 193) Dan told Faubel to give it a week to feel it out and he is willing to up his pay to \$25 an hour on Friday if Faubel wants to continue what he is doing. (Tr. 193) Dan stated that McDougal' advised that Faubel had as many as 25 people working for him and as few as 10 and that is what Respondent needs: superintendents, leaders, men that can make decisions. (G.C. Ex. 11; Tr. 193) Dan told Faubel, "and you're my man." (G.C. Ex. 11; Tr. 193)

Faubel replied that he appreciated that. (G.C. Ex. 11; Tr. 193) Dan stated that he needed Faubel as badly as Faubel needs him. (G.C. Ex. 11; Tr. 194) Dan repeated they are a team and to let him know if employees are slacking off, and that he can hire and fire, but to talk to him about it. (G.C. Ex. 11; Tr. 194) Dan reiterated that he was pleased with their discussion and what McDougal had said. (G.C. Ex. 11; Tr. 194-95) Faubel replied he was aware Respondent needs to make money or he does not have a job and he is on board with that. (Tr. 195) Dan replied, "Partner, we're in business together then. And so I'll—I'll talk to you throughout the week then and see how things are going." (G.C. Ex. 11; Tr. 195) Faubel thanked him for the opportunity and they hung up. (Tr. 195)

About that same time, after Dan offered Faubel the job, Dan ran a background check on Faubel. (Tr. 55) Just days later, Dan received the report which noted Faubel had worked for Groggs Heating and Air Conditioning, owned by Tim Hannon. (Tr. 53, 55) Dan called Hannon to ask about Faubel and Hannon advised that Faubel tried to organize a union when he was employed for Groggs. (Tr. 53)

On January 15, Faubel attended another foreman job meeting at The Crossings job trailer on behalf of Respondent. (Tr. 196) Faubel testified that he performed work as he did the week before; no other supervisors or managers were present for Respondent at The Crossings. (Tr. 196) Faubel also testified that he spoke to Daniel about hiring new employees. (Tr. 196-197) When Faubel received a paycheck that day, he noticed his hourly rate had not changed; he was paid at \$18/hour, the rate he began with. (Tr. 198) However, Faubel did not think anything of this, assuming the pay increase would show up on his next pay check. (Tr. 198)

Also on January 15, Daniel watched a YouTube video posted by the Union which mentioned both Dan and Daniel's names and, in Daniel's opinion, defamed Respondent. (Tr. 81) On January 15 and 16, Daniel filed complaints with YouTube requesting the video be taken down. (Tr. 81) The video was ultimately removed about January 17. (Tr. 81-82) About January 18, Daniel observed another YouTube video posted by the Union on about the same date which included Union General Counsel Eli Baccus and altered Respondent's logo. (Tr. 82)

iv. Dan, McGuffin and Faubel's January 18 Meeting

On January 18, Dan and McGuffin came to The Crossings. (Tr. 281, 649) They met with Faubel that morning to discuss the blueprints and work at the site. (C.P. Exs. 1(a), 1(b); Tr. 281, 649) Dan then handed Faubel a written warning for allegedly not clocking in and out properly.<sup>3/</sup> (C.P. Exs. 1(a), 1(b); Tr. 199, 656, 671) They spoke for 1 to 2 minutes before Faubel began to record the meeting on his phone. (C.P. Exs. 1(a), 1(b); Tr. 671, 672) Dan and Faubel discussed the application on his phone, which he had been using to clock in and out and then called Daniel to try to resolve the issue. (C.P. Exs. 1(a), 1(b), p. 4; Tr. 199-200, 283) Faubel uninstalled and then reinstalled the app which then allowed it to work. (C.P. Exs. 1(a), 1(b), pp. 6-7; Tr. 200)

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<sup>3/</sup> Charleston employees report to work directly at the job site where they use an application on their phone to log in and out of work. (Tr. 255)

Dan then told Faubel not to worry about the discipline, that it was a misunderstanding, and it was not anything he did wrong. (C.P. Exs. 1(a), 1(b), p. 7; Tr. 200) Faubel testified this was the first time Respondent attempted to discipline Faubel even though Respondent never gave instructions to Faubel about using the app prior to that time. (Tr. 202, 677)

During the hearing, McGuffin attempted to claim that Faubel became angry and raised his voice during their conversation with Faubel that morning. (Tr. 649-650) McGuffin also testified that Faubel cursed and was out of control, and that Dan told Faubel they were done, they were not getting anywhere, and then Faubel stormed out of the trailer. (Tr. 650, 651) Faubel, however, recorded this conversation and it does not corroborate McGuffin's recollection of what took place concerning Faubel's demeanor. (C.P. 1) Further, Faubel was never disciplined for his alleged insubordination or conduct during their meeting that day, even though that is something Respondent considers disciplinary in nature. (Tr. 654)

Faubel then walked the jobsite with Dan and McGuffin to update them on the job, and Dan agreed that everything looked good. (Tr. 202, 283, 652) Faubel testified that Dan then told him that he needed to talk to Jonathan Tierson. (Tr. 202) <sup>4/</sup> Faubel testified that about 20 minutes later, Tierson approached Faubel advising he was the new foreman in charge. (Tr. 202, 283, 652) Respondent never told Faubel it was promoting Tierson, nor had Faubel told Respondent that he was not interested in the position or that he had declined the promotion. (Tr. 209, 284) Wanting to know why Tierson was promoted, Faubel called Dan, left a voice mail, and sent Dan

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<sup>4/</sup> Dan then met with Tierson to ask if he would like the promotion to foreman. (Tr. 574-575) Dan did not tell Tierson he was under consideration for the promotion until he decided not to promote Faubel. (Tr. 45) Presumably, this was the first time that Tierson was apprised of the opportunity, because he then called his wife to discuss the offer. (Tr. 575)

a text message, but did not receive an answer. (Tr. 202, 204, 284) Faubel also called McGuffin and received no response. (Tr. 202, 204) <sup>5/</sup>

v. Faubel is transferred to the vet clinic jobsite

On Sunday, January 20, Dan sent Faubel a text message directing him to report to Respondent's vet clinic jobsite on Monday morning rather than The Crossings. (G.C. Ex. 21; Tr. 207) Faubel replied that his tools were still at The Crossings and asked if he did something wrong. (G.C. Ex. 21; Tr. 208) Contrary to their conversations on January 14, Dan responded that he had told Faubel that he would decide on Friday (January 18) about the foreman position, that he was concerned with Faubel's attitude about simple questions involving correct procedures in recording working hours from Faubel's phone and that Faubel only worked a half day on Friday. (G.C. Exs. 11, 21; Tr. 192, 193, 208) Dan told Faubel these were not leadership qualities and that he needed his help at the vet clinic. (G.C. Ex. 21) Faubel apologized for overreacting, stating he knows better and should have handled things differently, and hoped they could try again soon. (G.C. Ex. 21) Faubel apologized because he had questioned the disciplinary notice rather than accepting it without contest. (G.C. Ex. 21; C.P. Ex. 1(b); Tr. 205-206, 675)

On January 21, Respondent officially promoted Tierson to the foreman position at The Crossings. (Tr. 103, 104) However, Faubel testified that prior to foreman Mike Doughton's resignation, he had told Faubel that Tierson did not have enough experience to run a job like The Crossings; he added that Tierson was more of a residential guy who had not earned the other employees' respect. (Tr. 205, 305) Faubel has more HVAC experience than Tierson and was Respondent's first choice for foreman. (G.C. Exs. 7, 15, 20; Tr. 53, 55) Further, prior to his

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<sup>5/</sup> Having advised Respondent that morning, Faubel then left work around lunch time because of a family emergency. (Tr. 202, 203, 204, 283)

promotion, Tierson was earning \$14/hour whereas Faubel had been earning \$18/hour. (Tr. 127, 596) Once Tierson began as foreman, McGuffin assisted Tierson in his new role at the jobsite about every day. (Tr. 134, 166, 179, 189, 190, 196, 277, 576, 624) Faubel, however, did not require any assistance while acting in that capacity. (Tr. 134, 166, 179, 189, 190, 196, 277, 576, 624) Further, Tierson did not have his fire damper installation license at the time of his promotion, and did not receive one until February 28, more than a month after being promoted. (Tr. 592, 593)

Up until January 21, Faubel had only worked at The Crossings, Respondent's biggest project. (Tr. 208, 209, 210, 211) There was no difference in the kind of work Respondent performed at The Crossings and the vet clinic; the only difference was the amount of work – the vet clinic was a much smaller job with only one regular employee, Tim McClung, who is anti-union, a long-term, tenured employee hoping to retire from Respondent. (Tr. 57, 210, 320, 390, 391, 503, 504, 509, 518) About eight employees, including Faubel, were working at The Crossings as of that time. (Tr. 167-168)

About that same day that Faubel was transferred, January 21, Daniel saw a third YouTube video posted by the Union in which Union General Counsel Eli Baccus discussed how Respondent was underpaying its employees. (Tr. 82) On January 25, Daniel observed a fourth YouTube video where Mr. Baccus discussed how bad of a company Respondent was and how good the Union is. (Tr. 82)

### **3. Respondent Distributes its Employee Manual and At-Will Acknowledgment Form**

Although Respondent has about 49 rank-and-file employees, beginning on about January 24, it provided Employee Manuals to a select handful of employees. (Jt. Exs. 1, 3; Tr. 42, 211-212, 213, 302) About January 24, Dan stopped by the vet clinic to give Faubel an

Employee Manual, and to have him sign and return the acknowledgement form receipt. (Jt. Ex. 3, p. 3; Tr. 211-212, 213, 302) Dan only gave a manual to Faubel that day even though other employees were present, including Marolf, who had never received a manual. (Tr. 214, 302, 314) About January 25, at The Crossings, Tierson gave copies of the manual to Paul Castle and Brandon Armstrong, asking them to sign and return the receipt. (Jt. Ex. 3; Tr. 392, 427) Although employee Kevin Keith was hired after Armstrong and Faubel, Respondent never provided him with a copy of the Manual. (Jt. Exs. 3, 14)

The Employee Manual reiterates Respondent's at-will policy for employees and contains the following provisions:

...Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination...

Solicitation and/or distribution, as well as gambling are prohibited on company property...

(Jt. Ex. 1, pp. 23, 27) The acknowledgment form that employees were asked to sign provides, in bold, **“Accordingly, either I or Appalachian Heating can terminate the relationship at will, with or without cause, at any time, so long as there is not violation of applicable federal or state law.”** (Jt. Ex. 3) The second to last paragraph of the document, also in bold, provides,

**I understand and agree that nothing in the Employee Handbook creates, or is intended to create, a promise or representation of continued employment and that employment at Appalachian Heating is employment at will, which may be terminated at the will of either Appalachian Heating or myself. Furthermore, I acknowledge that this handbook is neither a contract of employment nor a legal document.** (Jt. Ex. 3)

#### **4. Faubel's YouTube Video**

On January 29, Faubel created a video in which he identified himself as Union Organizer Eric and talked about ways the Union can help Respondent's employees. (G.C. Ex. 13(a);

Tr. 214, 465) On January 30, the Union posted this video to YouTube and both Faubel and Hancock sent links of the video to Respondent's employees and to management. (G.C. Ex. 13(a); Tr. 57, 82, 215, 218, 321, 393-394, 465)

In early February, Faubel also sent a text message to all of Respondent's employees mentioning their pay rates and stating they needed to stand together. (R. Ex. 5; Tr. 298, 299, 304) Faubel testified that he did so with the intention of getting employees "fired up," but he never refused to perform work nor was there a work slowdown by Respondent's employees. (R. Ex. 5; Tr. 298, 299, 304, 309)

#### **5. February 4 Meeting and Armstrong's, Marolf's and Castle's Union Activity**

On February 4, Respondent held two separate mandatory safety and union informational meetings in the morning with employees at the Bradley and Charleston facilities. (G.C. Exs. 5, 24; Tr. 58; 219, 321, 323, 428) Respondent posted a notice by its Bradley office time clock providing details of meeting. (Tr. 322, 323) Present at both meetings for Respondent were Dan, Daniel, Tim McGuffin, and Respondent attorneys Jim Allen and Nathan Sweet. (Tr. 105, 321-322) At the Bradley meeting, employees Jason Akers, Bobby Rucker, Stephen Marolf, Tim Rhodes, Jared Smith, Tim McClung, Earl Lehman, Jeff and Tyler Ratliff, Jason Fain, Ross Herron, Allen and Bruce Willis attended. (Jt. Ex. 14; Tr. 324) Present at the Charleston meeting was Brandon Armstrong, Kevin Keith, Jason, Roger Hight, Chris Kilgore, and Howard Backus. (Jt. Ex. 14; Tr. 428) Faubel was not invited to these meetings. (Tr. 59, 60, 83, 219, 220, 221-222, 287)

Daniel began the meetings by discussing safety procedures and showed a slide show, Dan discussed Respondent's history and showed family photos, and the attorneys then talked about the Union. (Tr. 324, 325, 326, 428-429) During the Charleston meeting, Dan mentioned that

Respondent had never laid anyone off, and they hired people to retire from the company.

(Tr. 106, 429) Brandon Armstrong recalled that during the meeting, Dan also commented that in the olden days if Respondent did lay somebody off, they would take them back to the family farm and work them there. (Tr. 429) Armstrong testified that attorney James Allen then advised employees that Dan would not go union over his cold dead body. (Tr. 429) Daniel also mentioned during both meetings what it believed to be lies in the Union's YouTube videos. (Tr. 83) After the meetings concluded, Respondent provided donuts to those who attended the Bradley meeting and lunch for those who attended the Charleston meeting. (Tr. 106, 326)

These meetings, like other safety meetings, were mandatory. (Tr. 172, 287, 321, 380) In fact, Shop Manager Bob Baccus specifically told employees Stephen Marolf and Tim Rhodes that they had to attend the meeting in Bradley. (Tr. 323) However, Faubel did not attend either meeting; he was not notified, nor was he invited. (Tr. 59, 60, 83; 219; 220; 221-222, 287) Respondent did not invite him because he had recently published the YouTube video announcing his support for the Union. (Tr. 59-60)

During the Charleston meeting, Daniel observed Employee Organizer Brandon Armstrong recording the meeting with his phone. (Tr. 83, 429) After the meeting concluded, Daniel researched Armstrong online and discovered a public Facebook post by Armstrong about the Union. (Tr. 84) Daniel also came across a Facebook post by Armstrong about a Union t-shirt. (Tr. 84) These publications led Daniel to believe that Armstrong worked for the Union; this is when Respondent first became aware of Armstrong's union activity. (Tr. 84, 421, 430)

About February 5, Daniel received a text message from employees about a message that they received from organizer Hancock, which Daniel believed reflected negatively on Respondent. (Tr. 84-85) Sometime between February 6-10, Daniel also received a text message from HVAC installer Roger Hight telling him that they had another union guy, like Faubel,

working in Beckley. (G.C. Ex. 5; Tr. 86-87) Daniel asked Hight who it was and Hight replied it was a new guy recently hired. (G.C. Ex. 5) Hight also told Daniel that someone had recorded the safety meeting in Beckley, that Tierson knew who it was, and the Union posted a new video about the meeting. (G.C. Ex. 5) Daniel told Hight he watched a guy [Armstrong] record the meeting in Charleston, and asked Hight to keep him posted. (G.C. Ex. 5) Ironically, although a participant in this conversation, Hight allegedly could not remember 6 months later at the hearing who he was talking about in the messages with Daniel. (G.C. Ex. 5; Tr. 539, 540)

On February 19, Stephen Marolf signed the Union's Authorization for Representation card. (G.C. Ex. 22; Tr. 327) On February 20, Paul Castle signed an Authorization for Representation card. (G.C. Ex. 23; Tr. 394) About the same date, Daniel sent a few text messages to HVAC installer Roger Hight about Brandon Armstrong. (G.C. Ex. 25; Tr. 430) In one message, Daniel highlighted portions of Armstrong's Facebook page where Armstrong discussed the Union, and Daniel mentioned it was funny that "our very own salts" post on Facebook that they hate their job and then all their buddies told them, "I told you so." (G.C. 25) Daniel noted he (Daniel) blacked out their names so "these guys don't get fined for posting their true feelings about the union." (G.C. Ex. 25) This came from a post that was about 3 to 4 years old. (Tr. 432) Hight forwarded Daniel's text message to Armstrong. (G.C. Ex. 25; Tr. 430) It was at this time that Armstrong realized Respondent knew he supported the Union, so on February 21, Armstrong wore a union sweatshirt to work declaring his support for the Union. (Tr. 437, 449, 467-468) Armstrong also took a photo wearing his sweatshirt with a newspaper to document the date. (Tr. 468)

## **6. Respondent Isolates Union Employees at The Crossings**

About February 25, the vet clinic project ended and Faubel returned to work at The Crossings. (Tr. 211; 222-223) Faubel testified that about 8 to 12 employees were working at

The Crossings at that time. (Tr. 211) In the morning, Tierson told Faubel where to work, advising that he was to work away from everyone. (Tr. 223) Faubel worked by himself that day, although he normally worked in a pair or with two other employees. (Tr. 223, 256, 257) After Stephen Marolf asked Faubel a question that morning, Tierson told them that anyone talking to Faubel will get fired. (Tr. 223, 224, 332) Around this time, Tierson also made a similar comment to Armstrong: Tierson told Armstrong that he had been instructed to put Armstrong, Faubel, Steve Marolf and Jared Smith away from everyone. (Tr. 438, 441) Normally, four to six people worked in the same room or floor together and never had Tierson indicated someone other than himself was deciding where employees should work. (Tr. 438, 442)

In early March, on a couple of occasions, Castle testified that Tierson also told him that pro-union employees needed to be isolated from the rest of the employees. (Tr. 399, 401) Castle also heard Tierson tell McGuffin that they were to isolate union guys from the rest so they would not spread union propaganda. (Tr. 399-400) Castle recalled that McGuffin remarked as if he agreed. (Tr. 400)

## **7. Union's First Unfair Labor Practice Strike**

On February 26, the Union notified Respondent that beginning February 27, Eric Faubel, Jarod Smith, and Stephen Marolf would be on an unfair labor practice strike in response to the conduct of Respondent towards its employees, specifically Respondent not promoting Faubel and disciplining him for his union affiliation. (Jt. Ex. 4; Tr. 224, 225) Union representatives and these three employees participated in the strike from February 27 to March 13, 2019 at Respondent's Bradley office and The Crossings jobsite. (G.C. Ex. 1; Jt. Ex. 6; Tr. 468, 469, 470)

On February 28, union representatives Faubel, Smith, and Marolf picketed at The Crossings jobsite. (Tr. 227, 337) That day, foreman Tierson held up a cell phone, directed it at striking employees, and took photographs of those on strike. (G.C. Ex. 14; Tr. 106, 228, 337-

338, 471, 472, 474, 587) Tierson then sent the photos to either Daniel or McGuffin. (Tr. 106) Employee Tim McClung also told Daniel that, per his daughter's advice, he should get a dash cam to record the picketing. (Tr. 88, 560, 627) Contrary to Respondent's claim that Tierson took photos to document the picketers' allegedly aggressive conduct, there is no probative evidence that those on strike did anything unlawful or aggressive. (Tr. 226-227, 335, 336, 337, 470, 471, 591, 592, 593)

About March 1, Daniel sent two text messages to select employees not engaged in the strike. (G.C. 12; Tr. 88, 90, 231, 339, 340, 397, 440, 625) The message notified employees what the picketers could not do, told employees to use a smart phone to record the picketers' activity, offered to provide them with a dash cam, and asked employees to report all events to him and he would call the police. (G.C. 12; Tr. 88) He then provided contact information for the NLRB and police. (G.C. Ex. 12) Respondent did not send the message to Faubel, Marolf, Smith or Armstrong. (G.C. 12; Tr. 90, 92-93, 231, 339, 340, 440) Although Brandon Armstrong was not engaged in the strike, Daniel did not send him the message because he believed Armstrong supported the Union, based upon what he had observed on Armstrong's Facebook page. (Tr. 92-93) On March 6, Tierson held up a cell phone again and directed it at those picketing The Crossings. (Tr. 229, 231, 338, 339, 469, 472-473, 474)

#### **8. Respondent Distributes "Tired of Union Threats?" Flyer**

On about March 8, Respondent included a document titled "Tired of Union Threats?" in certain employees' paychecks. (G.C. Ex. 26, p. 3; Jt. Ex. 5; Tr. 94, 398) This document provides, in part,

Appalachian Heating is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits unlawful discriminatory practices, including harassment...Anyone caught threatening our employees or otherwise

violating their rights will be subject to criminal prosecution to the fullest extent of the law. (Jt. Ex. 5)

The document did not quote verbatim from Respondent's handbook as the Employee Manual fails to mention police involvement. (G.C. Ex. 26, pp. 3, 15; Jt. Exs. 1, 5) Rather, the Employee Manual provides "Misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately." (Jt. Ex. 1, p. 8) The Manual's Progressive Discipline policy provides that Very Serious Conduct includes, "Threatening, intimidating, coercing or interfering with any person on company premises at any time." (Jt. Ex. 1, p. 12) The Manual notes that disciplinary action for a Very Serious Misconduct second offense results in a final written notice. (Jt. Ex. 1, p. 12) Further occurrences of Very Serious Misconduct may then result in the employee's suspension for 1 to 5 days with or without pay, or termination. (Jt. Ex. 1, p. 12)

Daniel distributed this document to employees by including it with their paychecks. (Jt. Ex. 5; Tr. 94, 398) Respondent did not provide the document to Faubel, Marolf or Armstrong. (Tr. 94; 231, 252, 340, 341, 440, 441) On March 11, Daniel received an email from Facebook asking him to authenticate a company page created by Faubel, which Daniel requested be removed. (Tr. 94-95)

### **9. Employees Return to Work from Strike**

On March 12, the Union notified Respondent that beginning March 13, Faubel, Jarod Smith and Stephen Marolf were willing to unconditionally return to work. (Jt. Ex. 6) On March 13, the three returned from strike and reported to The Crossings. (Tr. 231, 232, 289) Before the strike, several employees worked on the same floor together. (Tr. 289, 442, 443) However, after the strike, Faubel, Armstrong, Marolf, and Smith were assigned to work on the same floor by themselves; Faubel and Armstrong worked across the hall from Marolf and Smith. (Tr. 289, 342, 442, 443) Marolf testified that the remainder of Respondent's employees worked

in separate areas. (Tr. 342) Since September 2018, Marolf had always worked in a pair with Tim Rhodes; he had never been paired with Smith. (Tr. 316, 318, 341) Further, Marolf testified that Smith had never worked at The Crossings before but had only worked in the office and warehouse with Shop Manager Bob Baccus and had only delivered materials to the site. (Tr. 342, 343)

About March 13, Marolf passed Roger Hight a couple of times on the job, asking how he was, but Hight did not respond. (Tr. 343) On March 14, Marolf worked with Smith again. (Tr. 344) When Marolf walked past Hight that day asking how he was, Hight yelled at Marolf, accusing him of calling him a rat and throwing screws at him. (Tr. 344) Marolf replied that he had not been near him, but was in the bathroom, and then returned to work. (Tr. 344, 527) Marolf never called Hight a rat or threw screws at him. (Tr. 344, 527) Even Hight admitted that although he told Tierson that someone had thrown screws at him, he did not know who it was. (Tr. 540)

Also on March 13, Dan and Daniel met with Faubel for his 90-day employment review. (Tr. 95, 234) They told Faubel that he exceeded expectations and everything was good. (Tr. 234) Faubel also reminded Respondent that the wrong fire dampers were installed when he first began working at The Crossings, and that he tried to help them fix the problem. (Tr. 235) Dan agreed, and neither mentioned any issue with his work or how Faubel had installed dampers. (Tr. 235, 660)

On Friday, March 15, the Union notified Respondent by letter that beginning March 18, employees Eric Faubel and Paul Castle would be on an unfair labor practice strike in response to the Respondent's conduct towards its employees. (Jt. Ex. 9) This was the first time Respondent was put on notice of Paul Castle's union activity. (Tr. 401) March 15 was also the last day that Faubel performed work for Respondent. (Tr. 234, 239)

## 10. Stephen Marolf's Discipline

Marolf testified that on March 15, Tierson assigned him to work by himself organizing and cleaning The Crossings jobsite. (Tr. 345, 382) This was the first time that Marolf had performed this kind of work for Respondent as an HVAC installer; he had never been assigned to clean for the day. (Tr. 345, 346)

Around lunch time, while on his way to the bathroom, Marolf walked into a room to pick up trash and spoke to Tim McClung and Jared Smith. (Tr. 346, 381, 512) Marolf started joking with McClung, who was working inside a closet hanging duct, and asked McClung if he wanted a union sticker because Marolf had just put one on his hat. (Tr. 346, 347, 348, 512-513, 519) McClung declined and suggested Marolf offer one to Hight, who had just walked into the room. (Tr. 346, 512, 513, 519) McClung then climbed the ladder into the closet ceiling. (Tr. 522, 523, 530) Marolf offered Hight a sticker and Hight, clearly upset about what he believed Marolf had done a few days earlier, yelled at Marolf calling him a punk. (Tr. 347, 527, 529-530, 540) Marolf testified that Hight turned, walked away, called Marolf a punk again, and then said he would beat the crap out of him. (Tr. 347) Marolf testified that he tried to end the conversation, but Hight threw his things on the floor and came running with his hard hat in hand at Marolf, yelling, "I'm going to rip your fucking head off." (Tr. 347) Marolf did not move when Tim McClung stepped in between them and Tierson grabbed Hight by the shoulder and took him out of the room. (Tr. 347, 348, 513, 530, 578) Hight continued to argue with Tierson in the hallway, and Tierson sent him home. (Tr. 514, 531, 578, 579) Hight testified that he had asked Tierson to be assigned to work away from Marolf that morning. (Tr. 527)

Per instructions from Respondent, Marolf drove to Bradley to meet with Daniel after the above incident. (Tr. 349) In Daniel's office, Marolf wrote down a statement about what happened, and Daniel read Marolf's disciplinary write up, which Daniel had already completed.

(Jt. Exs. 7, 8; Tr. 350) Marolf testified that he explained that after he offered Hight a sticker, Hight blew up. (Tr. 354) Contrary to the write-up which indicated Marolf was out of his work area, Marolf told Daniel that he was assigned to work the whole building, not a specific floor. (Jt. Ex. 7; Tr. 354) Marolf also told Daniel that he hardly spoke to Hight and explained what happened in the hallway when he tried to say hello to Hight. (Jt. Ex. 7; Tr. 355) The disciplinary notice also indicated that Hight moved towards Marolf. (Jt. Ex. 7) Daniel sent Marolf home early for the day, stating he would be in contact about where to report for work on Monday. (Tr. 352)

In its defense, Respondent noted in its position statement that Marolf and Hight were treated similarly for their alleged involvement in the altercation. (G.C. 26, p. 2) However, the evidence shows that Marolf did not instigate nor participate in any on-site altercation, but was rather the target. (G.C. 26, p. 2; Tr. 347, 527, 529-530, 531, 540, 578, 579) Further, Marolf's March 27 discipline notes that he was disciplined on March 15 for "[b]adgering employees with union propaganda. . . .," which Marolf clearly disputed during his March 15 meeting with Daniel. (Jt. Ex. 7; Tr. 355)

Marolf testified that on Sunday, March 17, Shop Manager Bob Baccus called him and directed him to travel to Martinsburg, West Virginia for an overnight assignment. (Tr. 356-357) This was the first time Marolf had been assigned a job out of town since July 2018. (Tr. 358) Although Marolf was directed to report out of town, Hight testified that he resumed work at The Crossings. (Tr. 542) Marolf and Baccus left for Martinsburg in the morning on Monday, March 18 to repair a unit. (Tr. 357) Before leaving, Marolf advised organizer Hancock that he was assigned to work out of town. (Tr. 358) On Tuesday, March 19, Hancock came to the job site and spoke to Baccus about the Union; Baccus and Marolf returned home later that day. (Tr. 357, 359, 475) Marolf was assigned to work in the Bradley warehouse with Bob Baccus for

the remainder of the week cleaning and organizing the shop. (Tr. 360) Marolf testified that he had never been assigned to clean the warehouse before that time. (Tr. 360)

On Wednesday, March 27, Marolf was still working in the warehouse when Daniel asked to meet with him. (Tr. 361, 362) In Daniel's office, Daniel advised Marolf that he should know why he was there and handed him a write up for sharing confidential company information with an outside organization. (Jt. Ex. 10; Tr. 362) Marolf had no idea why he was meeting with Daniel. (Tr. 362-363) Daniel mentioned that only a few people knew about the Martinsburg job, and Marolf did not respond. (Tr. 363, 364) Marolf was irritated because he never received an Employee Manual and did not know it was against the rules to tell Hancock about the Martinsburg job. (Tr. 364) Marolf had never been told not to discuss job site information with non-employees before Respondent gave him the March 27 disciplinary write-up. (Tr. 359) Daniel then commented that they were playing baseball and after three strikes, Marolf would be out. (Tr. 364) Marolf worked the remainder of the day. (Tr. 365) Marolf was the only employee disciplined for engaging in this conduct, although others have communicated jobsite information in the past. (Tr. 72-73, 365) Marolf worked in the shop for about 2 weeks before his return to The Crossings on April 1. (Tr. 366, 367)

#### **11. Brandon Armstrong's Layoff**

Respondent permits employees who are laid off for lack of work to return when work is available. (Tr. 63) As of February 4, the date of the safety meeting to which Faubel was not invited, Respondent had reassured its employees that it had never laid anybody off. (Tr.106) Respondent also claims it follows a last in, first out, rule. (Tr. 619) However, on March 27, McGuffin told Armstrong that Respondent had plenty of people for the job and he was being laid off because he was the last one hired, so the first to go. (Jt. Ex. 12; Tr. 107, 444, 595, 656) McGuffin advised Armstrong he did not know about it until that morning and that he had no

chance of rehire but did not explain why. (Jt. Ex. 12; Tr. 444, 657) McGuffin then offered to give Armstrong a good reference and told Armstrong it had nothing to do with him. (Tr. 107, 116, 595, 656, 657) Foreman Tierson testified that he was unaware of Respondent's plan to lay off Armstrong until McGuffin told him so that morning; Tierson had not been consulted nor was he involved in the decision to lay off Armstrong. (Tr. 107-108) Respondent did not recall Armstrong. (Tr. 445)

When requested to provide all lay off documents issued to employees since 2017, Respondent maintained that no such documents existed, and that Armstrong was the only employee to whom Respondent had issued a layoff notice. (G.C. Ex. 6) Respondent also claimed in its position statement that Armstrong was the last employee hired and therefore, the first employee laid off, but its company records indicate differently: HVAC helper Kevin Keith and Faubel were both hired after Armstrong. (G.C. Ex. 26, p. 4; Jt. Ex. 12; Tr. 594) Armstrong testified that although Keith was a good worker, he was young, and Armstrong had to teach him procedures as they worked together. (Tr. 447) Keith remains employed with Respondent. (Tr. 447)

In its position statement, Respondent also asserted that Armstrong was laid off at a time when current work projects did not indicate that any work would be available in the foreseeable future to necessitate adding any manpower. (G.C. Ex. 26, p. 4) But, Respondent never released employees early due to lack of work. (Tr. 446) As of February, Respondent planned on hiring three or four more people to complete the work. (Tr. 445, 446) Additionally, Respondent still had a lot of work to complete at The Crossings, and was awarded new, big contracts in March and April. (Tr. 406, 622) Foreman Tierson admitted that he did not know why Armstrong was laid off because they needed more people and had a lot of work to do. (Tr. 406, 407, 408) After Armstrong's layoff, work at The Crossings increased, and Respondent started asking its

employees to work an hour later, work overtime, and work on Saturdays. (Tr. 251, 369, 370, 372, 373, 407, 408, 580, 623, 648) Respondent had not required this of its employees before. (Tr. 211, 231-232, 317, 368, 372, 406, 422) Paul Castle testified that Tierson commenced hanging out deadlines. (Tr. 406)

Marolf testified that Tierson also told him that Jarrett Construction was pushing Respondent to complete more work and there were not enough employees on site to perform the work needed. (Tr. 369, 370) Tierson said he kept asking Respondent to hire more employees. (Tr. 369, 370) Furthermore, a tornado hit The Crossings in the summer which resulted in a lot of damage to work already completed by Respondent. (Tr. 571, 581, 582, 649)

During the hearing, Respondent attempted to provide a different defense to its layoff of Armstrong. (Tr. 108-109, 511, 555, 565, 579, 646, 653) It endeavored to claim Armstrong had work performance issues, that it received complaints from employees, but also admitted Armstrong did what he was told. (Tr. 108-109, 511, 512, 555, 565, 566) <sup>6/</sup> However, Respondent failed to mention work performance issues to Armstrong as a reason for his layoff and failed to provide it as a reason in support of its position during the unfair labor practice investigation. (Jt. Ex. 12; G.C. Ex. 26, p. 4) Additionally, Respondent never confronted Armstrong with these accusations during his employment nor was he disciplined with respect thereto. (Tr. 109, 455, 518, 568-569, 653, 654) To the contrary, Armstrong testified that he was praised for his work: Tierson commended him on a project he completed on site and Armstrong never received negative feedback about his work quality. (Tr. 443-444)

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<sup>6/</sup> Respondent's witness, Earl Lehrman, who criticized Armstrong's work performance also has intentions of retiring from Respondent, thus should not be credited due to bias towards Respondent. (Tr. 568)

## **12. Castle Returns from Strike**

On March 27, the Union notified Respondent that employee Paul Castle was willing to return from strike to work beginning March 28. (Jt. Ex. 11; Tr. 404) Castle testified that before he went on strike, he worked with everybody at The Crossings; he installed ductwork, made sure materials were available, ran equipment to put materials on floors and line sets, and hung pancake units. (Tr. 404) After his return, Tierson directed Castle to wrap duct on the second and third floor, which he did for about a month, and he worked only with Steve Parrish <sup>7/</sup> and Stephen Marolf. (Tr. 405)

## **13. Eric Faubel's Termination**

On May 24, the Union made an unconditional offer for Faubel to return to his former position of employment. (Jt. Ex. 13) Respondent instructed Faubel to report to The Crossings jobsite on Tuesday, May 28. (Tr. 239) When Faubel reported to work that morning, Dan and Tim McGuffin approached him and Dan gave Faubel a termination letter. (Jt. Ex. 15; Tr. 240-241). Dan told Faubel Respondent no longer needed his services and they would see him in court. (Tr. 241) Faubel left the jobsite. (Tr. 241)

Faubel's termination letter indicates he was terminated for alleged improper installation of numerous fire dampers at The Crossings. (Jt. Ex. 15) Respondent's letter states it is unclear whether his conduct violated West Virginia law and notes it will cooperate with any criminal investigation or prosecution by the West Virginia State Fire Marshall, the State Police, or other law enforcement agency. (Jt. Ex. 15) However, Respondent failed to provide any proof of such investigations at the hearing. The letter also notes that numerous witnesses had provided statements indicating the Union had repeatedly asked them to engage in unlawful industrial

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<sup>7/</sup> The record does not disclose Parrish's union sentiments.

sabotage resulting in serious public safety risks. (Jt. Ex. 15) However, Respondent similarly failed to provide evidence at the hearing to support this assertion.

Further, Respondent's position statement similarly notes that if it had any knowledge of unlawful activity, it would not threaten the alleged perpetrator of that activity, but would report the activity to the authorities. (G.C. Ex. 26, p. 3) Respondent failed to adduce any evidence that it had made a report of unlawful activity to any governing body and Faubel was the only employee Respondent disciplined for allegedly improper fire damper installation. (Tr. 72-73, 608)

Most importantly, Faubel credibly denied that he incorrectly installed fire dampers or instructed anyone to do so or to sabotage Respondent's jobs. (Tr. 241, 241-242, 377) He was never instructed to do so either. (Tr. 241, 242) Further, the Union never told employees to sabotage Respondent's work. (Tr. 377, 378, 408) Additionally, May 28, the date of Faubel's termination, was the first time Faubel was notified of this alleged conduct; that Respondent had never asked Faubel how he had installed fire dampers or confronted him with this accusation prior to terminating him on that date. (Tr. 630, 659, 660) <sup>8/</sup> Finally, Faubel testified that about March 13, Respondent gave Faubel a good 90-day review and failed to mention anything about fire damper installation. (Tr. 234-235)

Faubel is undeniably skilled and experienced at installing fire dampers. For 14 years, he performed HVAC installation work and installed fire dampers. (G.C. Ex. 17, 18; Tr. 241, 258) He is also licensed to perform HVAC work at the national level. (Tr. 258) In December 2018, before Faubel had installed a fire damper for Respondent, the Fire Marshal came to The Crossings and, upon observing unlicensed employees installing fire dampers, stopped the installation. (Tr. 236) Faubel testified that it was at that time that Faubel reminded Respondent

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<sup>8/</sup> Although McGuffin testified that he did question Faubel about his installation of fire dampers, portions of McGuffin's testimony should not be credited for the reasons discussed herein. (Tr. 655)

that he maintained a valid license. (Tr. 236, 314) Faubel also noticed that Respondent was installing the incorrect fire dampers – vertical ones instead of horizontal – and he notified former foreman Mike Doughton of the mistake so that he would not install the incorrect dampers. (Tr. 236, 237, 262, 263, 376, 377, 452-453, 584) <sup>9/</sup> Faubel testified that although the vertical dampers were incorrect, installation manager McGuffin had instructed employees to put foil tape over the dampers' instructions and maintain the incorrect dampers. (Tr. 243) <sup>10/</sup> Based on Faubel's input, Respondent subsequently removed the vertical dampers that were installed horizontally. (Tr. 247, 377) Additionally, even though Faubel was the only HVAC installer with a fire damper license, other HVAC installers were installing dampers at that time as well. (Tr. 54, 263, 454, 545, 546, 549, 586) <sup>11/</sup>

Right after Christmas 2018, when Respondent obtained the replacement dampers, former foreman Doughton, Faubel, Armstrong, Hight, Castle, Tierson, and Jimmy Ruff started installing the new dampers. (Jt. Ex. 14; Tr. 246-247, 248, 375, 425-446) Employees Chris Kilgore, Steve Parrish, Steven Marolf, Earl Lehman, Kevin Keith, and James Jones also installed fire dampers at The Crossings. (G.C. Ex. 10, p. 22; Jt. Ex. 14; Tr. 426) Faubel testified that the Fire Marshal was present at the jobsite several times about that time. (Tr. 292) However, Faubel was still the only HVAC installer on The Crossings jobsite with a license to install dampers at that time and continued to install them when he worked as foreman. (Tr. 245, 247, 248 313, 374, 454, 536, 564, 584, 640)

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<sup>9/</sup> At the hearing, installation manager McGuffin wrongly claimed that the horizontal dampers were the incorrect dampers. (Tr. 639)

<sup>10/</sup> The fire dampers have a directional arrow directing which way to install the damper and McGuffin was suggesting that Respondent cover the arrow with foil. (Tr. 245-246)

<sup>11/</sup> Hight's contradicting testimony should not be credited: he initially denied he installed fire dampers before receiving his permit about February 4, but later admitted he could install them if someone else was licensed, and ultimately confessed that he did install dampers. (Tr. 54, 263, 454, 545, 546, 549, 586)

At the hearing, Respondent attempted to infer that because Faubel was the only HVAC employee licensed to install fire dampers, any errors regarding installation fell on his shoulders. (Tr. 640) However, Faubel testified that Respondent never told Faubel he was responsible for other employees' fire damper installation or that because he held a certificate, he was responsible for fire dampers that he did not install. (Tr. 659, 660)

Respondent also tried to claim that Faubel incorrectly installed fire dampers during his time at The Crossings in January. (Tr. 597, 598) However, the evidence indicates any removal and re-installation of fire dampers at The Crossings took place as of January 18, which was Faubel's last day of work before his reassignment at the vet clinic. (Tr. 208, 209, 210, 211, 597, 608, 641-642) Several employees may have installed fire dampers incorrectly around that time as well. (Tr. 597, 600, 601, 606, 644, 645) Respondent admitted that employee Howard Baccus also incorrectly installed fire dampers, but was not disciplined for doing so; rather, Baccus remained employed by Respondent as of the date of the hearing. (Tr. 600, 601, 645) Respondent also claimed that Armstrong incorrectly installed dampers, but admitted it never confronted or disciplined him regarding this alleged conduct. (Tr. 600, 601, 644, 645) Further, the fire marshal found issue with dampers installed throughout the building, not just where Faubel had been working. (Tr. 601) About March 13, when Faubel returned to The Crossings after picketing, he observed that the fire dampers were improperly installed with screws at the end of the duct run, and the dampers were also "cock-eyed." (Tr. 237-238, 248) Faubel testified that he notified Tierson that the fire dampers were still installed incorrectly. (Tr. 238, 249)

Simply put, Respondent attempted to defend its decision to terminate Faubel by pinpointing him as the source or the only one to be held accountable for alleged incorrect fire damper installations. However, its defense is unavailing: Respondent had issues with fire damper installations throughout the project, Faubel was the only employee disciplined for alleged fire

damper installation in the face of evidence that others incorrectly installed dampers but were not disciplined for doing so. Further, Respondent failed to notify Faubel of any issue or provide him with an opportunity to defend himself before his termination. (Tr. 234, 235, 511, 518, 630, 659, 660)

## V. CREDIBILITY RESOLUTIONS

Tim McGuffin's testimony regarding the January 18 conversation with Faubel is clearly contradicted by the recordings that Faubel made and should not be credited. (C.P. Exs. 1(a), 1(b)) McGuffin attempted to explain away Respondent's reasons for not promoting Faubel by claiming that he was aggressive, combative, and disrespectful. However, none of this conduct is corroborated by the recordings. (C.P. Exs. 1(a), 1(b)) Similarly, Tierson's testimony was internally inconsistent and does not support Respondent's claim that Faubel improperly installed fire dampers. He initially testified that Faubel installed fire dampers from January 18 through February 28 at The Crossings, however Faubel was working at the vet clinic at that time. (Tr. 599) Then, when asked again, Tierson confirmed that Faubel was, in fact, not present at that job during the specified time frame. (Tr. 599-560) There are numerous cases where the Board has found the testimony of a current employee particularly credible, because the employee testifies adversely to the employer's interests. See, *ADF, Inc.*, 355 NLRB 81, slip op. at \*4 n. 9 (2010)(citing *Shop Rite Supermarket*, 231 NLRB 500, 505, n. 22 (1977)). After several bouts of questions, both Tierson and McGuffin both admitted that Howard Baccus and Brandon Armstrong engaged in the same alleged conduct as Faubel – the alleged improper fire damper installation – but admitted that they were never reprimanded. (Tr. 588, 600, 601, 645) Therefore, because these witnesses testified adverse to their employer's interests, they should be credited for this portion of their testimony. See, *ADF, Inc.*, 335 NLRB 81, 83 n. 9 (2010).

## VI. LEGAL ANALYSIS

Counsel for the General Counsel submits, as demonstrated below, that Respondent engaged in the following violations:

- 1. Respondent violated Section 8(a)(1) of the Act when Daniel R. Akers (i) on January 9, interrogated Eric Faubel about his Union membership, and (ii) on January 10, interrogated employees about their union activities, solicited employee complaints and grievances, and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity**

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7. It is well established that an employer violates Section 8(a)(1) when it interrogates employees about their union affiliations. See, *Westwood Health Care Center d/b/a Medicare Associates*, 330 NLRB 935, 939 (2000) (following totality of circumstances and “Bourne” factors) (citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom.; Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). “[Q]uestions involving union membership and union sympathies in the context of a job interview are inherently coercive and thus interfere with Section 7 rights.” See, *Service Master-All Cleaning Services*, 267 NLRB 875 (1983). It is undisputed that on January 9, during Daniel R. Aker’s phone conversation with Eric Faubel, Daniel asked Faubel if he had been contacted by the Union. (G.C. Ex. 8; Tr. 145) Thus, Respondent violated Section 8(a)(1) when it asked Faubel, a covert union adherent at the time in question, about his union activity because “his chance of being [promoted] was implicated.” See, *Facchina Constr. Co., Inc.*, 343 NLRB 886 (2004).

Similarly, it is undisputed that on January 10, during an employee safety meeting, Daniel brought up the Union and asked his employees if they had been contacted by the Union. (G.C. Ex. 9(b), p. 19) He then proceeded to tell employees that Respondent enjoys working with all of

them but they are “at-will.” (G.C. Ex. 9(b), p. 19) He went on to tell employees that if they had a problem with anything, to call him at any time, no matter how big or small, and he is “there to help.” (G.C. Ex. 9(b), p. 19) He said that if anyone needs anything or needs him to remedy any issues, to let him know because that is what he is there for. (G.C. Ex. 9(b), p. 19) He then asked employees if they had anything they wanted to talk about. (G.C. Ex. 9(b), p. 19) Considering all relevant factors, Daniel’s statements violated Section 8(a)(1) inasmuch as he is a high-level official of Respondent and directly asked employees about their union activity, to which no one responded, reminded employees that they are at-will, and then solicited employee complaints and grievances and accompanied this with a promise to remedy any issues raised. See, *Manor Care of Easton, PA, LLC, d/b/a Manorcare Health Services-Easton*, 356 NLRB 202 (2010); *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992)(citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971)); *Westwood Health Care Center*, 330 NLRB 935, 939.

Although the third consolidated complaint mistakenly alleges that Dan M. Akers, not Daniel R. Akers, engaged in the conduct alleged above concerning these allegations, Respondent was afforded due process at the hearing and was given an opportunity to defend itself. (G.C. Ex. 1(vv)) Further, Respondent did not object to admission of the recordings containing the unlawful statements at the hearing nor did it dispute that it was Daniel R. Akers, not Dan M. Akers, who was speaking on the recordings. (G.C. Exs. 8, 9; Tr. 164, 175) Thus, notwithstanding this error, it is still appropriate to find a violation of Section 8(a)(1) based upon the evidence presented.

**2. Respondent Violated Section 8(a)(1) of the Act when Dan Akers Interrogated Eric Faubel About his Union Membership on January 14, 2019 and Failed to Promote him to the Foreman Position about January 21, 2019**

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7. As noted above, it is

well established that an employer violates Section 8(a)(1) when it interrogates employees about their union affiliations and “questions involving union membership and union sympathies in the context of a job interview are inherently coercive and thus interfere with Section 7 rights.” See, *id. Service Master-All Cleaning Services*, 267 NLRB 875. Further, prior to asking Faubel about his union membership, Dan Akers told Faubel he was about Faubel’s union contractor reference. Thus, Respondent violated Section 8(a)(1) when it asked Faubel about his union membership because “his chance of being [promoted] was implicated.” See, *Facchina Constr. Co., Inc.*, 343 NLRB 886 (2004).

Clearly, Respondent pinned Faubel for the promotion to foreman; Faubel had several conversations with Dan and Daniel about his job duties, pay increase, and responsibilities during which Dan and Daniel expressed excitement over Faubel’s qualifications and work ethic. (G.C. Exs. 9(b), 10, 11) On January 14, prior to checking Faubel’s references, Dan told Faubel he was in charge, and promised him an immediate \$4/hour promotion to \$22/hour. (G.C. Ex. 10, pp. 11, 12, 13) Dan also told Faubel that if he received a good reference, he would start earning \$25 an hour. (G.C. Ex. 10, pp. 11, 23) Further, Dan received a good recommendation and reported such to Faubel on January 14; this was the last confirmation Dan needed to increase Faubel’s hourly rate to \$25/hour. (G.C. Ex. 11; Tr. 191) Thus, as of January 14, Faubel had received the promotion. Although at the hearing, Respondent argued that it never submitted a promotion request to its payroll provider, Dan clearly intended to and did promote Faubel as of January 14, 2019. (G.C. Exs. 10, 11; Tr. 500)

The Board has held that when an employer fails to show it would have rejected an applicant for a promotion in the absence of their protected and/or union activity, it violates the Act in failing to promote the applicant. See, *Innova Health Systems*, 360 NLRB 1223, 1230 (2014); also see, *Georgia Power Co.*, 341 NLRB 576 (2004). Pursuant to *Wright Line, a*

*Division of Wright Line, Inc.*, the record evidence clearly establishes that Faubel, a union salt, was engaged in union activity. See, 251 NLRB 1083 (1980). It is also clear that Respondent was on board with Faubel's promotion to foreman, clearly excited about the opportunity of Faubel running The Crossings, having received only positive reviews, until it discovered Faubel's union activity on about January 14, and then inquired into it further that week. (G.C. Exs. 8; 9, pp. 28, 30; 10, pp. 2, 6, 7, 16; Tr. 47, 48, 49, 53, 55, 142, 268); see, *Wright Line*, 251 NLRB 1083.

Respondent's attempt to argue that it failed to promote Faubel because of his alleged conduct during the January 18 meeting he had with Dan and McGuffin lacks merit. First, contrary to McGuffin's testimony, which should not be credited for reasons discussed above, Faubel was not belligerent, or angry, but merely questioned the disciplinary warning during their conversation. (G.C. Ex. 21; C.P. Exs. 1(a), 1(b); Tr. 205-206, 675) Second, Respondent did not discipline Faubel at all for this alleged insubordinate behavior. (Tr. 654) Third, Faubel was clearly the stronger candidate for the foreman position in comparison to Tierson. Faubel's HVAC installation experience clearly exceeded Tierson's and Tierson did not have a fire damper certification license as of the time of his promotion. (G.C. Exs. 7, 15, 20; Tr. 592, 593) Fourth, Respondent neglected to tell Tierson he was under consideration for the foreman position until Respondent determined not to promote Faubel. (Tr. 45) Clearly, Faubel was "the man" until Respondent discovered his union activity, and then immediately withdrew his promotion in fear of Faubel attempting to organize its employees and promoted Tierson off-the-cuff.

Further, Respondent's immeasurable animus towards the Union and its employees' union activities is evidenced by Daniel's response to phone calls from the Union, the January 10 union flyer, by Dan expressing concern to Faubel that his prior employer was a union contractor, and questioning Faubel's references about his union activity. Thus, Respondent's fear of the Union

organizing its employees and Faubel's pro-union status caused Respondent to rescind Faubel's promotion in violation of Section 8(a)(1) and (3) of the Act.

**3. Respondent Violated Section 8(a)(1) and (3) of the Act When it Transferred Eric Faubel to a Small Jobsite, Thereby Isolating him from other Employees**

The evidence indicates that Respondent unlawfully changed Faubel's terms and conditions of employment when it transferred Faubel, giving him a different work assignment, and isolated him from the majority of Respondent's employees in violation of Section 8(a)(1) and (3) of the Act. This is particularly evident in that the transfer occurred immediately after Respondent rescinded Faubel's, about January 21. Further, there is no difference in the type of work performed by Respondent's employees at The Crossings jobsite and the vet clinic; the only difference between the two jobs is the size. Additionally, regular vet clinic employee Tim McClung has worked for Respondent for a significant time, hoping to retire from Respondent, and is presumably an unlikely candidate to persuade to embrace the Union. (Tr. 503, 504, 518) By transferring Faubel to the vet clinic, Faubel was prevented from freely and effectively communicating with employees about the Union. Based upon Respondent's history of animus against the Union, its failure to promote Faubel, and its knowledge of Faubel's union affiliation as of the time of his transfer, it is clear Respondent ordered this transfer in retaliation for Faubel's union activity and to isolate him from other employees.

**4. Respondent Intentionally Excluded Faubel from the February 4, 2019 Safety Meeting in Violation of Section 8(a)(1) and (3) of the Act**

Just a few days after Faubel published his support and position with the Union on January 30, Respondent held safety and anti-union meetings on February 4. (G.C. Exs. 5, 24, 13; Tr. 58, 219, 321, 323, 428) Daniel posted a notice at the Bradley office time clock notifying employees of the meeting (Tr. 322, 323) Contrary to Respondent's testimony at the hearing, employees were specifically directed to attend the meetings which took place during work time.

(G.C. Exs. 5, 24; Tr. 58, 219, 321, 323, 428) However, Faubel was not invited to attend.

(Tr. 59, 83)

In *Wimpy Minerals USA*, the Board held that where an employer admittedly treats employees in a disparate manner with respect to their terms and conditions of employment because they have publicly committed themselves in favor of or against union representation, the employer thereby engages in conduct which tends to impinge on employees' Section 7 rights. See, 316 NLRB 803, 805 (1995). The record evidence indicates Respondent denied Faubel the ability to attend a mandatory and informational safety meeting, and an anti-union meeting because he was a known union supporter. Although an employer may restrict meetings to employees whose sentiments are unknown, this meeting included relevant and important work-related material and offered employees the benefit of pay without performing their job duties, donuts and lunch. (Tr. 106, 236) Further, the meetings discussed relevant safety information, violations of which employees can be disciplined for, and excluding Faubel from the meetings further isolated him and deprived him of information that was pertinent to his employment.

(Tr. 58, 324, 325, 326, 428-429)

**5. Respondent Violated Section 8(a)(1) of the Act by Maintaining its At-Will Policy, Effectively Threatening Employees with Discharge if they Formed a Union**

The record indicates that beginning about January 24, Respondent distributed its Employee Manual to select employees and asked them to sign acknowledgment form receipts and return to the company. (Jt. Exs. 1, 3; Tr. 42, 211-212, 213, 302, 392, 427) As noted above, the acknowledgment and receipt form provided, in bold, that either the employee or Respondent can terminate the relationship at will, with or without cause, at any time, so long as there is not a violation of federal or state law. (Jt. Ex. 3) The second to last paragraph also reiterated the fragility of the employment relationship, emphasizing the handbook does not create a promise or

representation of employment and that an employee can be terminated at any time. (Jt. Ex. 3)

No other portions of the document are in bold. (Jt. Ex. 3)

Although Respondent has about 49 rank-and-file employees, it only provided its Employee Manual to a handful of employees, claiming only those who had not yet received a manual were given one. (Jt. Exs. 1, 3; Tr. 42, 211-212, 213, 302) However, Stephen Marolf and Kevin Keith never received a manual. (Jt. Exs. 3, 14; Tr. 214, 302, 314) The evidence indicates that only after the Union began its organizing campaign did Respondent distribute and ask for signatures from its employees; it did not require this before of its employees. (Jt. Ex. 3) Further, it only distributed the form to employees who were working at the same jobsites as Faubel – the vet clinic and The Crossings. (Tr. 211-212, 213, 302, 392, 427) This counteracts any potential argument that Respondent simply provided handbooks to those who did not receive them when they were hired. Put frankly, the bolded language of the acknowledgement and receipt form, combined with the timing of asking employees to sign and Respondent’s obvious hostility to union activity, is reasonably interpreted as a threat of discharge to employees who engage in union activity in violation of Section 8(a)(1). (G.C. Exs. 9(b), pp. 19, 27-28; Jt. Ex. 3; Tr. 42, 78, 79, 80, 81-82, 84-85, 142-143, 429, 464)

**6. Respondent Violated Section 8(a)(1) of the Act by Maintaining its Confidential Information Policy, in Part, and its Solicitation and/or Distribution Policy**

Respondent’s Employee Manual has been in effect since about 2014. (Tr. 615) The confidentiality policy contained in the Manual provides, in part, “Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.” (Jt. Ex. 1, p. 23) Confidentiality rules which prohibit the discussion of wages and benefits are unlawful as there is no legitimate interest in banning employees from discussing

wages or working conditions sufficient to overcome Section 7 rights. Thus, this part of the rule, on its face, is unlawful as it prohibits discussion of wages and benefits in violation of Section 8(a)(1). See, *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016).

Additionally, the Manual provides the following: "Solicitation and/or distribution, as well as gambling are prohibited on company property." (Jt. Ex. 1, p. 27) Although an employer may limit solicitation to non-working areas during non-working time, this rule prohibits all solicitation and/or distribution without any qualifications of where or when, and clearly violates Section 8(a)(1) of the Act. See, *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943).

**7. Respondent Violated Section 8(a)(1) of the Act when Tierson Threatened Employees by Telling Them that Anyone Caught Talking to Faubel Would be Fired, that he had been Instructed to Isolate Union Supporters, and that Union Supporters Should be Isolated from their Coworkers**

About February 25, the same day Tierson told Faubel he was to work away from everyone, foreman Tierson told employees that anyone talking to Faubel will be fired after Stephen Marolf asked Faubel a question in the morning. (Tr. 223, 224, 332) Around this same time, Tierson also made a similar comment to Armstrong: Tierson told Armstrong that he was instructed to put Armstrong, Faubel, Steve Marolf and Jared Smith away from everyone. (Tr. 438, 441-442) Normally, four to six people worked in the same room or floor together and never had Tierson indicated someone other than himself was deciding where employees should work. (Tr. 438, 442) Even though Tierson did not tell Armstrong why he was instructed to sign union supporters away from other employees, it is apparent from the conversation and grouping of pro-union employees and former strikers mentioned that Tierson was conveying a threat to Armstrong that employees were being isolated because of their union support.

Additionally, in early March on a couple of occasions, Tierson told employee Paul Castle that the pro-union employees needed to be isolated from the rest of the employees. (Tr. 399, 401) Castle also heard Tierson tell McGuffin they were to isolate union guys from the rest so they would not spread union propaganda. (Tr. 399-400) McGuffin remarked as if he agreed. (Tr. 400) Thus, Tierson engaged in numerous threats to Respondent's employees – by one way or another, communicating to employees that if they engaged in union activity or supported the Union, they, too, would be isolated in violation of Section 8(a)(1) of the Act. See, *Corliss Resources, Inc.*, 362 NLRB 195, 203 (2015)(statement by employer to employee reasonably understood to mean that company was trying to isolate pro-union employees)(citing *Tyson Foods*, 311 NLRB 552 (1993)(*Montgomery Ward & Co.*, 93 NLRB 640, 640-41 (1951), enfd. as modified 192 F.2d 160 (2d. Cir. 1951)).

**8. Respondent Violated Section 8(a)(1) and (3) of the Act when it Isolated its Employees Armstrong, Castle, and Marolf Based upon their Union Activity**

Tierson followed through on his threats to isolate pro-union employees starting on February 25. On February 25, Tierson told Faubel he was to work away from everyone. (Tr. 223) Although Faubel often worked in pairs with other employees, he worked by himself that day. (Tr. 223, 256, 257) About that same time, Tierson similarly told Armstrong that he would be working with Faubel on one floor, and everyone else would be working on a different floor. (Tr. 438) Before Respondent was aware of Faubel's and Armstrong's support for the Union, sometimes six people worked on the same floor with four people in a room together. (Tr. 438)

About March 13, when Faubel, Smith and Marolf returned to The Crossings, they were assigned to work on the same floor together: Faubel and Armstrong worked across the hall from

Marolf and Smith whereas the remainder of Respondent's employees worked in separate areas of the building. (Tr. 289, 342, 442, 443)

Additionally, since September 2018, Marolf had only been paired with Tim Rhodes; he had never worked with Jared Smith. (Tr. 316, 318, 341) Smith had never worked at The Crossings before but had only worked in the office and shop with Bob Baccus and delivered materials to the site. (Tr. 342, 343) Marolf was then assigned to work by himself cleaning the jobsite, a task he had never been assigned to do before. (Tr. 345, 382) He was later assigned to work in the shop with manager Baccus, again performing a task he had never done before. (Tr. 356-357, 361, 362, 366, 367)

Paul Castle returned to work from strike on March 28. (Jt. Ex. 11; Tr. 404) Before Castle went on strike he worked with lots of employees – he installed ductwork, made sure materials were available, ran equipment to put materials on floors and line sets, and hung pancake units. (Tr. 404) However, after his return from strike, Tierson directed Castle to wrap duct on the second and third floor, which he did for about a month, and worked only with Steve Parrish and Stephen Marolf. (Tr. 405)

Respondent failed to defend itself with respect to these allegations. It provided no justification for why it assigned pro-union employees to work together, away from its other employees, and why it isolated these individuals. Thus, Respondent's re-assignment of pro-union employees to work together, and away from other employees, violated Section 8(a)(1) and (3) of the Act. See, *Corliss Resources, Inc.*, 362 NLRB 195, 196 (noting employer's reassignment was designed to isolate pro-union employee from other employees and thus violated Section 8(a)(3) of the Act).

**9. Respondent Violated Section 8(a)(1) of the Act when Tierson Engaged in Surveillance of Employees Engaged in Union Activities on February 28 and March 6, 2019 by Taking Photographs and Created an Impression of Surveillance when he held a cell phone Directed at Striking Employees on February 28, 2019**

The Union and employees Eric Faubel, Stephen Marolf, and Jarod Smith engaged in an unfair labor practice strike from February 27, 2019 until March 13, 2019 at Respondent's Bradley office and The Crossings jobsite. (G.C. Ex. 1; Jt. Exs. 4, 6; Tr. 224, 225, 468, 469, 470)

An employer creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to believe that their union activities have been placed under surveillance. See, *Durham School Services, L.P.*, 361 NLRB 393 (2014). It is undisputed that on February 28, the second day of the strike at The Crossings, foreman Tierson held up a phone, directed it at striking employees, and created an impression among employees that their conduct was under surveillance, as if Tierson was recording their activity. (G.C. Ex. 14; Tr. 106; 228, 337-338, 471, 472, 474, 587) In doing so, Tierson violated Section 8(a)(1). Further, not only did Tierson create an impression to employees that he was surveilling their union activity, he actually took photographs of those on strike. (G.C. Ex. 14; Tr. 106; 228, 337-338, 471, 472, 474, 587) Tierson then engaged in the same conduct on March 6; he held up a cell phone and directed it at those picketing The Crossings. (Tr. 229, 231, 338, 339, 469 472-472, 474)

Contrary to Respondent's attempts to argue that those who participated in the strike engaged in aggressive, threatening behavior, it failed to provide any evidence to substantiate its assertions other than general testimony and Tierson's photographs of the picketers which failed to corroborate this defense. (G.C. Ex. 14) Further, there is no evidence to warrant documentation of the picketers' conduct because they were engaged in peaceful behavior. (Tr. 226-227, 335, 336, 337, 470, 471, 591, 592, 593) Absent proper justification, Tierson's

photographing employees on the picket line clearly constituted unlawful surveillance because it tended to intimidate and coerce employees, thereby interfering with Section 7 rights in violation of Section 8(a)(1). See, *F.W. Woolworth Co.*, 310 NLRB 1197 (1993); *National Steel and Shipbuilding Co.*, 324 NLRB 499 (1997).

**10. About March 1, 2019, Respondent Violated Section 8(A)(1) of the Act When Daniel R. Akers, via Text Message, Threatened Employees, Asked its Employees to Disclose Union Activities of Other Employees, to Videotape and Disclose to him Employees' Union Activities, and Created an Impression That Employees' Union Activities Were Under Surveillance**

On March 1, Operations Manager Daniel Akers sent certain employees, including Paul Castle, two text messages. (G.C. Ex. 12; Tr. 88, 90, 231, 339, 340, 397, 440, 625) Daniel intentionally neglected to send the messages to Faubel, Marolf, and Armstrong. (G.C. Ex. 12; Tr. 90, 92-93, 231, 339, 340, 440) Respondent's animus is exemplified by it failing to send this message to employees who it knew to be union supporters – clearly it was not concerned for safety of all employees. In these messages, Daniel asked employees to record the picketers' "illegal" activity, offered to provide employees with a dash cam, ordered employees to report all events to him and he would call the police, and then provided NLRB and police contact information. (G.C. Ex. 12) By this message, Respondent threatened to call the police on employee and non-employee picketers at its facility, asked its employees to disclose the union activities of other employees, and created an impression among its employees that their union activities were under surveillance by asking employees to disclose and videotape the union activity of other employees. (G.C. Ex. 12) See, *Moffitt Building Materials Co.*, 214 NLRB 655, 656(1974)(finding 8(a)(1) violation where employer threatened employees with criminal prosecution for engaging in picketing and encouraging other employees to engage in strike); *Electric Hose & Rubber Co.*, 267 NLRB 488, 495, 496 (1983)(finding 8(a)(1) violation where supervisor interrogated employee about other's union activity); *Durham School Services*, 361

NLRB 393; *Westwood Health Care Center*, 330 NLRB 935 at 939; *Gardner Engineering*, 313 NLRB 755 (1994), enf. as modified 115 F.3d 636 (9th Cir. 2000)(finding violation under “totality of circumstances;” questioning employee regarding union sentiments of others unlawful). As discussed above, there is no evidence that those engaged in picketing blocked the road, blocked access to the facility or engaged in any type of threatening behavior. Therefore, this request, coming from a high level official, coupled with Respondent’s expressed animosity against the Union, constituted a Section 8(a)(1) violation.

**11. Respondent Violated Section 8(a)(1) of the Act by Promulgating, Maintaining, and Distributing to Employees an Anti-harassment Policy Contained in its Flyer Titled “Tired of Union Threats?”**

About March 8, Respondent’s attorney created a flyer which it distributed to its employees with their paychecks. (Jt. Ex. 5; Tr. 94, 398) The flyer states the following: “. . . Anyone who violates the anti-harassment policy or is caught threatening employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law.” (Jt. Ex. 5; Tr. 94, 398) Clearly unconcerned about the safety of its pro-union employees, Respondent did not provide the flyer to Faubel, Marolf or Armstrong. (Tr. 94; 231, 252, 340, 341, 440, 441)

Contrary to Respondent’s position statement, the March 8 flyer was not quoted verbatim from its handbook because the Employee Manual does not mention police involvement. (G.C. Ex. 26, pp. 3, 15; Jt. Ex. 1, pp. 8, 12; 5) Rather, the Employee Manual provides “Misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately.” (Jt. Ex. 1, pp. 8, 12) While Respondent has maintained the same anti-harassment policy in its Employee Manual since at least 2014, it implemented a new punishment or criminal prosecution in the March 8 flyer in response to the Union’s organizing campaign. (Jt. Exs. 1, 5) This document, by its very nature, uses language different than that contained in the Employee Manual. (Jt. Exs. 1, 5) In creating and distributing this document, in

response to the union campaign, Respondent violated Section 8(a)(1) of the Act. See, *The Boeing Co.*, 365 NLRB No. 154, \*1 (2017)(citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

Section 8(c) of the Act provides that expressing views, argument, or opinion is not an unfair labor practice if the expression does not contain a threat of reprisal or promise of benefit. Unfortunately for Respondent, although the flyer first expresses Respondent's views on harassment by union officers, it then institutes harsher penalties for violation of its anti-harassment policy and threatens employees with criminal prosecution, rather than a written warning, suspension, or discharge for engaging in harassment. (Jt. Exs. 1, 5) Thus, Respondent also violated Section 8(a)(1) of the Act by maintaining this flyer which threatens employees for engaging in union activity. See, *Moffitt Building Materials, Co.*, 214 NLRB 655 at 656; see also, *Arcata Graphics*, 304 NLRB 541 (1991)(noting issue is whether statement is so vague as to invite employees generally to inform on fellow workers engaged in union activity)

#### **12. Respondent Violated Section 8(a)(1) and (3) of the Act by Disciplining Stephen Marolf on March 15 and March 27, 2019**

Section 8(a)(3) of the Act protects employees' Section 7 rights to join, form or assist a labor organization, or to refrain from doing so, without being subjected to retaliation by their employers. It is undisputed that Stephen Marolf participated in the strike and was engaged in union activity when he spoke to Roger Hight, when he offered Hight a sticker on March 15. It is also undisputed that Marolf was disciplined for engaging in that activity, and clearly, Respondent harbored animus against the Union itself and union activity engaged in by its employees. (Jt. Ex. 7); See, *Wright Line*, 251 NLRB 1083 (1980).

Respondent attempted to claim that Marolf was badgering Hight with union propaganda, and that he had left his assigned work area when the incident occurred. However, Marolf did not

leave his assigned area – he was assigned to clean and organize the whole building – and he simply asked Hight if he wanted a union sticker; Hight is the one who responded unreasonably by becoming aggressive and yelling at Marolf, as reflected by witness testimony; Marolf was simply joking around. Respondent had already made the decision to discipline Marolf when he arrived at Daniel’s office – Daniel did not give him a chance to explain the incident prior to completing the disciplinary document. See, *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998); *Road Trucking Co.*, 342 NLRB 895(2004)(noting failure to investigate alleged basis for discharging employee supports inference of discriminatory motive).

Additionally, Respondent sent Marolf away to an isolated jobsite to work with its shop manager, whereas it allowed Hight to return to The Crossings to resume his normal duties. The record evidence makes it clear that Hight was clearly anti-union. Respondent simply used this incident as a pretext when it unjustly disciplined Marolf in violation of Section 8(a)(3). There is no evidence to establish that Respondent would have taken the same action against Marolf, absent his union activity and Respondent failed to meet its burden under *Wright Line*. Further, Marolf’s March 15 disciplinary notice indicated he was allegedly harassing Hight about the Union and trying to put a union sticker on Hight’s hat and the March 17 notice indicated he was badgering employees with union propaganda. Consequently, Respondent also disciplined Marolf on March 15 because he had engaged in union activity in violation of Section 8(a)(3).

Alternatively, under a *Burnup & Sims* analysis, Marolf was clearly engaged in union activity during the incident for which he was disciplined and, absent this activity, he would not have been disciplined: he was not aggressive or offensive to Hight, but simply asked him if he wanted a sticker. 379 U.S. 21 (1964). Although Respondent contended it was concerned about its employees’ safety by sending the March 1 text message and distributing the March 8 flyer, it

failed to re-distribute the flyer or any anti-harassment policy to employees after the incident between Marolf and Hight.

Respondent also violated Section 8(a)(1) and (3) of the Act when it disciplined Marolf on March 27. Marolf's March 27 disciplinary notice indicates he was disciplined for violating its confidentiality policy, by sharing confidential information with the Union. Respondent's Confidentiality in the Workplace policy, which it cites to on the March 27 disciplinary notice, fails to mention work site location or employee location as confidential information. (Jt. Ex. 1, pp. 23; 10) Rather, the evidence demonstrates the Union was well aware of Respondent's work sites and employees prior to March 19 alleged in the discipline, and employees commonly shared job site information. (Tr. 365) Additionally, Marolf had never received an Employee Manual and was unaware that allegedly sharing this information could result in discipline. Thus, Respondent's defense in relying on its confidentiality policy was pretextual, and it violated Section 8(a)(1) and (3) by disciplining Marolf on March 27. See, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

**13. Respondent Violated Section 8(a)(1) and (3) of the Act by Permanently Laying off Brandon Armstrong Without a Chance for Recall on March 27, 2019**

The evidence establishes that Brandon Armstrong was laid off on March 27, without a chance for recall, because of his union activity in violation of Section 8(a)(1) and (3). It is undisputed that Armstrong was engaged in union activity and that Respondent had knowledge of it as of February 4, when Daniel observed Armstrong recording the safety meeting that day. Respondent also failed to send the March 1 text message about striking employees to Armstrong and provide him with the March 8 flyer about the Union, arguably because of his involvement in the Union. Respondent attempted to argue two positions in support of its decision to lay off Armstrong. First, it contended that Armstrong was the last employee hired, so the first to be laid

off. However, this is contradicted by record evidence. Second, it shifted its defense at the hearing to argue that Armstrong's work performance was lack-luster, which prompted its decision to lay him off. However, this alleged defense is also unsubstantiated by the record: Armstrong was never confronted with this alleged accusation or disciplined for it. Further, McGuffin offered to give him a good recommendation at the time of his lay off.

Additionally, Respondent's claim that Armstrong was laid off for lack of work is also contested by the record. There is substantial evidence to indicate that as of Armstrong's layoff, Respondent was in the process of interviewing and hiring new employees to keep up with the demands of the job. It also asked employees to work longer days, on Saturdays, and overtime to complete the work. Finally, it appears that a tornado hit the building site where Respondent had provided substantial work already and more labor was needed to clean up and redo the project. In fact, the evidence indicates that as of February 4, the date of the safety meeting, Respondent had never laid any of its employees off and provided alternative work for them to do in the event they needed less man power on its jobsites. Clearly, Dan and/or Daniel made the decision to lay off Armstrong, abruptly, as both McGuffin and Tierson, the foreman on the job, were not apprised of this decision until the morning of Armstrong's layoff. Therefore, Respondent failed to meet its burden pursuant to *Wright Line* and in doing so, violated Section 8(a)(3) of the Act when it permanently laid off Armstrong without a chance for rehire. See, *Shattuck Denn Mining Co.*, 362 F.2d 466 (holding where an employer's asserted reason for adverse action is false, the Board may infer it is concealing an unlawful motive).

**14. Respondent Violated Section 8(a)(1) and (3) of the Act when it Discharged Eric Faubel Without a Chance for Rehire or Further Employment on May 28, 2019, When it Failed and Refused to Reinstate Faubel to his Former Position of Employment since then, and Issued Faubel a Termination Letter, Thereby Threatening him with Criminal Prosecution and Civil Action**

As noted above, Section 8(a)(3) of the Act protects employees' Section 7 rights to join, form or assist a labor organization, or to refrain from doing so, without being subjected to retaliation by their employers. It is undisputed that Faubel was engaged in union activity and that Respondent had knowledge of his union activity since January 2019. After Faubel participated in the Union's second unfair labor practice strike, the Union requested his unconditional return to work on about May 28. When Faubel reported to The Crossings that morning, Dan and McGuffin approached him to advise that he was terminated. (Jt. Ex. 15) Faubel had not worked on the job since about March 15, when he left to participate in the strike.

Faubel's termination letter infers that Respondent discovered, and verified, that he was responsible for improperly installing fire dampers at The Crossings, and therefore, he was ineligible for rehire or further employment with Respondent. The letter goes on to state that it was unclear whether he violated West Virginia law, and that Respondent would cooperate fully with any criminal investigation, fire marshal prosecution, state police or other law enforcement agency. It also notes Respondent was seeking legal advice and may pursue civil action against Faubel to recover damages for willful acts of industrial sabotage. Faubel's termination and termination letter are unlawful for the following reasons.

First, the letter on its face threatens Faubel with criminal prosecution or civil action; there is no getting around that. Additionally, Respondent failed to present any evidence during the hearing of any civil or criminal investigation, or any report conducted relating to Faubel's work performance by the fire marshal. Therefore, the letter on its face, threatened Faubel with legal action because of his union activity in violation of Section 8(a)(1).

Second, Respondent failed to substantiate its claims that Faubel improperly installed fire dampers, or encouraged or caused other employees to do so, or engaged in any type of “industrial sabotage.” Rather, the evidence indicates that as of December 2018, Faubel reported to Respondent that it possessed the incorrect kind of fire dampers; it was installing vertical dampers instead of horizontal dampers. Further, Faubel was the only employee, at that time, other than Respondent’s representatives who maintained a fire damper installation license. Additionally, Faubel continued to communicate with Respondent, via Dan, on January 14, about ways he believed would increase Respondent’s efficiency in installing the dampers, as it still possessed incorrect dampers. After Faubel worked that vet clinic, during which he did not install any dampers, he again noticed that some of the dampers were installed incorrectly at The Crossings, and reported that to Foreman Tierson about mid-March and before he went on strike. Faubel also reminded Dan and Daniel during his 90-day employment review that he noticed the incorrect dampers and had notified them of such in December 2018. It was during that meeting that Dan and Daniel commended Faubel on his work performance, failing to express any concerns with his performance or any issues with fire damper installation, and he continued to work at The Crossings until he went on strike about March 18. It was not until Faubel intended to return to work with Respondent, that it made the decision to pretextually discharge him for allegedly improperly install fire dampers and/or for allegedly engaging in industrial sabotage, both of which Faubel did not participate in. Respondent failed to mention any issue with Faubel’s work performance at all during his tenure with the company, failing to confront him with this incorrect accusation, and simply terminated, with finality, so he would not return to its jobsites and organize its employees.

Third, once Respondent took notice of the Union’s attempts to organize its employees in early January 2019, Respondent’s animosity since that time is clearly portrayed by the record. It

fails in any argument that Faubel was discharged for cause. Rather, it conjectured bits and pieces of un-corroborating evidence to try to provide its case that Faubel was discharged for the reasons outlined in its letter. In doing so, Respondent failed to support its decision, and led more credence to the fact that Faubel, a lead union activist, was discharged because of his union activity, and that Respondent refused to rehire him for that reason as well. See, *Wright Line*, 251 NLRB 1081 (1980); *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 171.

## **VII. REMEDY**

Counsel for the General Counsel seeks, among other things, an Order requiring Respondent to immediately expunge from its files and records any reference to the March 15 and 27 discipline of Stephen Marolf, the March 27 lay off of Brandon Armstrong, and the May 28 termination of Eric Faubel, and to notify these employees in writing to that effect. General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

## **VIII. CONCLUSION**

For the reasons discussed above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the consolidated complaints and motion to amend the complaint in Cases 09-CA-235304, et al. The recommended conclusions of law are set forth below:

1. Respondent violated Section 8(a)(1) of the Act when it, by Daniel M. Akers:
  - (i) interrogated employees about their union membership on January 14; (ii) about January 28, gave employee documents emphasizing they were “at will” and threatened employees with discharge because they formed the union and (iii) about May 28, issued a termination letter to an employee thereby threatening its employees with criminal prosecution and civil action because they supported the Union.

2. Respondent violated Section 8(a)(1) of the Act when it, by Daniel R. Akers: (i) about January 9, interrogated an employee about the employee's union activity; (ii) about January 10, interrogated employees about their union activities and (iii) about January 10, solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity.

3. Respondent violated Section 8(a)(1) of the Act when it, by Daniel R. Akers, on March 1 by text message: (i) threatened to call the police on employees for engaging in a strike; (ii) asked its employees to disclose to Respondent the union activities of other employees; (iii) asked its employees to videotape and disclose to Respondent the union activities of other employees and (iv) created an impression among its employees that their union activities were under surveillance by Respondent by asking employees to disclose and to videotape the union activity of other employees.

4. Respondent violated Section 8(a)(1) of the Act when it, by Jonathan Tierson: (i) about February 14, gave employees a document emphasizing they were "at-will" employees and threatened employees with discharge because they formed the Union; (ii) about February 28, by taking pictures of striking employees, engaged in surveillance of employees engaged in union activities; (iii) about February 28, by holding a cell phone and directing it at striking employees, created an impression among its employees that their union activities were under surveillance by Respondent; (iv) about March 6, by holding a cell phone and directing it at striking employees, created an impression among its employees that their union activities were under surveillance by Respondent; (v) about March 13, by telling an employee that he had been instructed to isolate union supporters, threatened to isolate employees if they engaged in union activity or supported the Union; (vi) on several occasions in March, by telling an employee that union supporters should be isolated from their co-workers, threatened to isolate employees if they engaged in

union activity or supported the Union and (vii) about February 25, by telling employees that they would be terminated if they spoke to employees who supported the Union, threatened employees with discharge if they engaged in union activity or supported the Union.

5. Respondent violated Section 8(a)(1) of the Act when it: (i) since about January 28, Respondent, by distributing employee manuals has maintained the following rule, "Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination;" (ii) since about January 28, Respondent, by distributing employee manuals has maintained the following rule, "Solicitation and/or distribution, as well as gambling are prohibited on company property;" (iii) about March 8, Respondent, by an insert distributed with employees' paychecks, promulgated and maintained its anti-harassment and promulgated and since then has maintained an anti-harassment rule and (iv) by maintaining and promulgating these three rules, discouraged employees from supporting the Union or engaging in other concerted activities and threatened employees with discipline, discharge, or criminal prosecution if they engaged in union or other concerted activities.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it: (i) about January 21, failed to promote Eric Faubel; (ii) about January 21, isolated Eric Faubel by transferring him to a jobsite that had only one other employee; (iii) about February 4, Respondent excluded its employee Eric Faubel from an employee meeting; (iv) since about February 4, Respondent isolated its employees Brandon Armstrong, Paul Castle and Stephen Marolf by assigning them to work away from other employees and work only with each other; (v) about March 15, Respondent issued a written warning to its employee Stephen Marolf; (vi) about March 27, Respondent issued a written warning to its employee Stephen Marolf; (vii) about March 27, Respondent permanently laid off its employee Brandon Armstrong without a chance for recall,

and (viii) about May 28, Respondent discharged its employee Eric Faubel without a chance for rehire or further employment.

7. Respondent violated Section 8(a)(1) and (3) of the Act when it: (i) since about May 28, failed and refused to reinstate Eric Faubel to his former position of employment. Attached hereto as Attachment A is a proposed Notice to Employees for your consideration.

Dated: October 24, 2019

Respectfully submitted,

*/s/ Jamie L. Ireland*

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CERTIFICATE OF SERVICE

October 24, 2019

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by electronic mail at the following addresses:

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