

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

M&T ENGINEERING AND CONSTRUCTION, LLC

and

DONNIE SCRUGGS,

Case No. 14-CA-240972

and

CONRAD MONACO

Case No. 14-CA-241119

and

BRYAN SCRUGGS

Case No. 14-CA-241121

and

SCOTT CHANEY

Case No. 14-CA-241333

FINDINGS OF FACT CONCLUSIONS OF LAW

Following hearing that began Wednesday, October 2, 2019 and continued until conclusion on Friday, October 4, 2019, before the Honorable Michael A. Rosas, Administrative Law Judge for the National Labor Relations Board the following Findings of Facts and Conclusions of Law are made and entered in this case.

FINDINGS OF FACT

CLAIMANTS

1. The claimants are four individuals: Donnie Scruggs, Bryan Scruggs, Conrad Monaco who all worked briefly as masons and Scott Cheney who worked as a laborer. These Claimants have asserted individual claims in the Complaint against their common employer, M&T Engineering and Construction LLC, with the three mason Claimants alleging that they were

“shorted” on the number of hours they worked and for which they were actually paid; while Claimant Cheney asserts that he was shorted as well, he also claims to have been improperly dismissed accusing the Respondent of failing to call him back once work resumed. All the Claimants also assert that the Respondent violated their rights in violation of Section 7 of the NLRA by interfering with their right to come together and discussing their respective claims.

2. The separate claims of the Claimants have been consolidated together for the purpose of hearing and for the presentation of evidence; however, the merit of each claim will be determined on an individual basis.

RESPONDENT

3. The Respondent employer, M & T Engineering and Construction, LLC, is a Kansas limited liability company (“M&T”), that had recently been formed. The project that the Claimants worked on was M&T’s first job ever (p.352 l.17-18). M&T is owned by a husband and wife, both having degrees as Civil Engineers. They are lawful immigrants to the United States from Iran, coming in 2013. The husband, Majid or Max, has a graduate level degree in Civil Engineering and Architecture and is certified by the American Concrete Institute (p.350 l. 6-13). His wife, Tania Tavakkoli, the President and CEO of M&T, is also a Civil Engineer and also has graduate level degrees in her discipline which includes a Ph.D. (p.473, l. 14). In addition, each have extensive construction experience, earlier in their career and since arriving in the United States where each worked in related fields prior to organizing their own business.

4. The job in question (“the job”) was the very first job that M&T ever had. It was hired as a sub-contractor for work to be performed at the Kansas City Zoo. M&T would need to hire masons and laborers for the job as well as a foreman to oversee the workers in the absence of the owner. The employees were all to be paid at the “prevailing rate” as provided in the contract with

Kansas City. (p.4511.20-21). After the first week of work, M&T would be required to return the job site to the general contractor for the performance of certain tasks for the job to remain on schedule. Once the general contractor completed its work, the job site would be returned to M&T for the completion of its work (p.537, l. 24-25).

5. In addition to the testimony of all of the parties, Anthony Riley, a laborer on the job, Diego Venegas, the new mason foreman, and Kenneth L. Burch or “Ken”, an M&T employee who was an estimator and project manager, also were involved in the job and each testified during the hearing.

HIRING MASONS AND LABORERS

6. Mr. Donald “Donnie” Scruggs (“D. Scruggs” or “Donnie”) the primary claimant, was hired by M&T as a mason working foreman for the job after being interviewed by Ken Burch, (P25, L17) he was also interviewed by Max Nowrouzi, (“Max”) an owners of M&T. D. Scruggs presented himself well, claiming to have at one time owned his own masonry company and that he knew Ken Burch from 18-19 years previously in the masonry business. (p.25 l.8) He had been in the industry since he was 16 years old. He and Ken discussed the job, what the foreman would be doing. (p.27, l.12-25), the anticipated crew size (p.28 l.20) and he learned that the job would last up to six weeks (p.31, l. 3-4). He was also told by Ken that M&T would pay his OSHA certification and that the job paid prevailing wage (p.29, l.10-18). Max wanted to be sure that Donnie could read blueprints although Donnie does not remember Max asking that; (p 107, l.13-18; p 108, l. 12-13) but Donnie admitted that he could read blueprints anyway (p.108 l.12-13). Donnie also indicated he was “somewhat” familiar with the American Concrete standards for rebar reinforcement. (p108. L. 17-21). Before leaving the “hand-off” meeting Donnie had been provided a set of the blueprints for the job. (p 453, l. 4-7).

7. D. Scruggs was a disappointing employee and foreman. When hired, M&T expected they were employing an experienced and able craftsman. Instead, it turned out they got someone who was bias and bigoted in his treatment of the business owner Max, (p 532, l. 25) who described their relationship as “awful”. Max then went on to provide specific examples of incidents with Donnie that included: refusing to follow instruction, making derogatory remarks as to his religion and claiming that he was an Israeli so he could bomb people everyday and that was why Max was in construction. He told him that in America “...we don’t let guys like you to be our boss...” Donnie would deliberately make fun of him, call him ma’am, claim to be mediating while the other workers laughed at Max when he questioned why Donnie was not working; arguing that he could not understand Max due to his accent and then pretending he had a hearing problem; also Donnie made fun of him, the other guys would not take him seriously; when urging him to try and pick up the pace, Donnie responded with “... In America we are not like you. You guys have always have (sic) war and bomb each other, bomb built... maybe fast is your culture... the fast here is what we are doing.”; he would even ask him where’s your hat, referring to a skull cap worn by Jewish men. (p 533, l. 7- 25; pp.534-535, l. 1-25 and 537 l. 15-25; p538, l. 1-18).

8. Donnie, as a mason, was hardly serious about performing his work responsibilities. Rather, he presumed he could just rely on his experience and used M&T’s time crunch to compete the first course of block as a shield, protecting him from his failure to study the blueprints or confirm construction standards for the grouting of the rebar in block construction.

9. It was obvious that he intended to get by on his years in the trade and as a former business owner rather than properly prepare for this project. (p.431, l.17-18). He attempted to avoid any responsibility for the failure of three experienced masons’ inability to turn on a brand new mixer. Even when hired and told the number of blocks that were expected of him and his team to

place per day, he implicitly accepted it; but failed to make any effort to perform at that level. His display of knowledge as to basic masonry related tasks when dealing with block construction was shockingly limited. Further, he was either lazy or lacked the ability to deal efficiently with common masonry equipment, like silo's and mixers or perform precise measurements. (p. 431, l.7-9).

10. Donnie was someone who cared more about amassing as many work hours that were being paid at prevailing rate, despite the contract terms; rather than, what was achieved during those hours. Several unfortunate examples can easily be found that display his limits and his substandard performance as a mason and foreman. Probably none more apparent than his failure to review and understand the blueprints that had been given to him prior to the commencement of the project. If he had studied the blueprints, the grouting error would never have happened. Regrettably, this also raises concerns about whether his actions were from lack of knowhow; or whether they were deliberate. Worse yet, D. Scruggs' display of personal animus and religious bias towards Max taunting him and humiliating him before the other workers verify that his performance was unacceptable. It also interfered with the focus of the other masons as well. (p. 536, l. 6-17).

11. D. Scruggs' mere three days of work were enough for M&T to become familiar with his work ethic, conduct and ability. It also allowed ample time to measure his demeanor towards Max so that it could no longer tolerate his caustic attitude infecting the entire job as it had already appeared to have. Nor, could M&T further accept the continuous blunders of the masons that he led. This substandard performance at so many levels, justified M&T's replacement of Donnie and the other masons for cause. This happened prior to the most colossal masonry blunder

of all; the improper location of three separate walls in the building being built under his foremanship. Had they not been previously fired; this certainly would have been adequate cause.

12. Donnie also claimed to have sustained a work-related injury and admitted that Friday evening, April 5, 2019, he contacted the Superintendent of the general contractor to determine how to make a workers' compensation claim. It is credible to conclude that in speaking with the general contractors, Superintendent of the Zoo project, he learned among other things, that he and the other masons had been terminated after Max informed Shields of this decision. This conclusion is further supported by the testimony of Anthony Riley who testified on that same Friday night, Donnie called him and asked if he had seen him fall on the job. During that conversation he told Anthony that "Max ended up getting rid of him...." (p.516, l. 13-20).

13. Donnie claims that on April 3, 2019, he came to work since this was the actual first day of the job but admitted he performed no masonry task. He claimed that both Ken and Max asked him to come to the job that day. (p31, l.18-21) and he was there by 7:00 a.m. in order that he would be available for delivery of block to be used in the construction of the job. (p.32, l. 10-13). All of these claims are contested by both Max and Ken in their testimony. Ken was articulate that he testified that the only preconstruction time Donnie was authorized at the job site was for an afternoon foreman's meeting. He was very precise saying that only Anthony was authorized to be present both April 3 and 4 because he was a forklift driver and would be helpful in the unloading of deliveries. Further, Ken pointed out that the work hours were contractual, that the general contractor dictated when to arrive at either 7:30 and work until 4 p.m., or arrive at 8:00 and work until 4:30. Ken also made a point of testifying that all of this was explained to Donnie at the "hand-off meeting. (see all citations to the record *infra*).

14. On each of the three workdays, Anthony was always the first to arrive and was authorized to be on the job site by management. However, Donnie and his cousin Bryan also claim to have arrived each day, including Wednesday and Thursday when no masonry work was performed and both admitted that the only work that they performed was laborers' work, (p.219 l. 8-19). (With the exception of Donnie attending a foreman's meeting at 2 p.m. on Wednesday). (p.32 l. 6-7).

15. This brings into question, why either Donnie or Bryan were at the job site Wednesday or Thursday seeking to be compensated for their time at the job; when neither were scheduled, requested or needed. In fact, as to Thursday, serious doubt exists as to Donnie ever being present at the job site. Bryan first raised eyebrows when his testimony omitted Donnie helping unload rebar that day. Instead, when he testified, Bryan pointed out that it was raining and that they really couldn't work so when a load of rebar arrived, he, Anthony and the Centic Superintendent helped unload it. (p.221 l. 2-6). Also, Bryan admits finishing work at 10:00 a.m. that day. (P.244 l. 14). When Max showed up at the job and found only Bryan and Anthony at work, but no Donnie. (P.245 l. 13), he asked Bryan about Donnie and was told he had to leave. A short time later, Donnie called Max explaining he had to go to the airport and pick up his girlfriend, but claimed he had been at the job earlier at 7:00 a.m. However, Anthony, the operator, laborer was always the first to arrive at the job and he did not get there until 7:30, (P.294 l. 20-24). He further testified that on Thursday, Donnie "I don't think he show up that day" (P.299 l. 17) and that he was the last to leave, but that he did not think Donnie showed up that day. (P.299 l. 16-25).

16. It was then that Donnie put together his plan to file a worker's compensation claim and gather the support of his co-workers, including Scott Cheney, who when initially asked if he had seen Donnie fall, claim that he had not; but after speaking to Donnie changed his original

recollection. Within days, Donnie hired a law firm to handle the worker's compensation claim on his behalf. The lawyers sent a notice letter to M&T on April 16, 2019 where they also made demand "...for 21 hours at a rate of \$55.16 per hour" and demanded that payment be remitted immediately. This letter was admitted into evidence and D. Scruggs testified that he had also hired the lawyers to collect these funds on his behalf. (Respondent exhibit 5 and p. 212 l.18-25; p.213, l.1-25; p.214 l. 1-8). This demand made April 16, 2019 was made weeks prior to any interview, demand or filing of the Complaint by the NLRB on behalf of D. Scruggs and represents a conscious election of remedies by Donnie.

17. Bryan Scruggs, ("Bryan"), D. Scruggs cousin, was actually the first mason hired. He would then recommend his cousin for the job. (p. 241, l. 3-4). Bryan had heard about the job from some other bricklayers and was hired by Ken after meeting with him in M&T's office. (p. 216, l. 10-25; p. 217, l. 6). He had 29-30 years' experience in the masonry trade (p. 217, l. 14) and had also worked in other trades, (p. 240, l. 2-3). When hired he was told the job would take about six weeks and would pay prevailing wage. (p. 218, 14-5;7-13). When he heard this was a prevailing wage job, it meant generally higher than regular wage which was pretty good. (p. 240 l. 15-19). He had also worked with Ken Burch previously on more than one occasion (p. 240, l. 22-25; p. 241, l. 1-2).

18. Bryan also worked the same three days as Donnie and they along with Conrad Monaco had all worked together previously multiple times (p. 248, l. 18-22). Bryan claims he was fired (p. 216, l.8; p. 227, l.8-13). He claims that he was terminated in a text message on April 10, 2019 (p. 232, l. 1-3). He overlooks that when he and the other masons were released, he was still offered an opportunity to continue to work for M&T; but that he says he wasn't interested in doing so. (p. 264, l. 14-19, 25; p. 255, l. 3-5).

19. Conrad Monaco (“Conrad”) had worked as a mason more than once with Donnie and Bryan, so all the masons had experience working together. (p. 248, 19-22). He only worked one day and was terminated after that day. (p. 391, 1. 15-18). He learned of the job by an online placement (p. 391, 1. 20). He had 37 years of prior bricklayer experience. (p. 319, 1. 24-25). After an interview with Max where he was verbally tested, he was hired on the spot. (p.321, 1. 3).

20. Conrad came to the job on April 5, 2019 for his first day of work where he expected to lay block. (p. 322, 1. 13-25). He claims that he laid very few blocks that day because he had to help the inexperienced laborers. He spent time teaching them how to stock the brick (sic), then later fill the silo, made mud and grout and even drove a forklift. (p. 323, 1. 1-9). A portion of his time was interrupted when he had to assist operating the brand-new mixer that nobody was familiar with. He broke the pull cord twice and had to repair it and while involved with that, a guy he described as being from the rental company, came by and pointed out the safety kill switch which no one was aware of. Once aware of it, they were able to operate the machine and make mud. (p. 323, 1. 12-18). Then he worked at laying block and grouted the block once it was laid, although he had expected the laborers to do the grouting. (p. 323, 1. 19-25).

21. Conrad believes he was on the job ten and a half hours with a half hour for lunch that Friday. (p. 325, 1. 1-2). However, when he picked up his check, he claimed to have only been paid for seven and a half hours. (p. 327, 1. 10-11). That claim is contradicted by Anthony who was the first person at the job and he testified that he was the first to the site at between 7:45 and 8 a.m. or “8ish” as he said (p. 501, 1. 13-21), Anthony then said that Conrad and all other workers arrived together at the job site about 8:00. (p. 502, 1. 1-10). He never said anything to anyone about his belief that he had been “shorted hours”. (p. 328, 1. 4-5). He did communicate with Max and while Conrad was willing to accept what had been paid and accept the loss, after exchanging texts with

Max he learned that he would receive an additional check. (p. 335, l. 8-17). He came to M&T's offices and picked up the additional check on April 12, 2019 from Ken Burch. (p. 336, l. 17-23). After he left Ken called him and told him that his job had been terminated. (p. 337, l. 12-13).

22. Conrad claimed he got to the Zoo early because they had to park in a special lot and his own lack of familiar with the Zoo. (p. 338, l. 22-23). He also admits that despite arriving at the job site before 7:00am no work was being done at that time. he stated that he believed that Donnie clocked them in. (p. 339, l. 16-17). It was his recollection that he and the others left the job site at 5:30pm. (p. 340, l. 3).

23. Conrad claimed that he was familiar with laying block with rebar coming through it. He also understood that you had to allow for the rebar coming through. However, when grouting he testified that whether to leave the rebar cell open or to grout it, would depend on the desire of the general contractor. (p. 341, l. 15-25; p. 342, l 11-12). However, in this job he was not involved in laying the block, he was making grout. (p. 342, l 9-23).

24. Scott Chaney ("Scott"), the final Charging Party, worked as a laborer for M&T and claims he was let go for an unknown reason after working one day. He found the job online. (p.282, l. 8-18). He came to the company's office and met with Max and Ken who interviewed him. (p.283, l. 2-11). He was told the job was at the Zoo, would last six weeks and paid prevailing wage. (p.284, l. 1-4). His only day of work was April 5, 2019. It was that day that he met his co-workers for the first-time meeting Conrad in the parking lot and together they went in. (p. 285, l. 1-20). As a laborer he carried block all around, he also mudded the block full and carried mud to the bricklayers. (p. 286, l. 5-18). He and Donnie left together, and Anthony and Max were still there. (p.287, l. 5-10). When he got his paycheck the following week at the offices of M&T, he thought it 'seemed like we were short'. (p. 286, l. 12).

25. When he believed that his check was incorrect, he returned to the office, knocked on the door to speak to Max and Ken, but found they were in a private meeting. (p. 290 l. 10-18). Interestingly, when quizzed as to what made him believe his paycheck had been “shorted”, he responded that while he was not a tax man the amount did not appear correct claiming he was entitled to ten hours of pay at \$45 dollars. (p. 304, l. 5-14). He went on to say that he arrived at the job at 7:00 and left at close to 7:00 p.m. but had lunch as well. (p. 304, l. 10-20). The testimony of his coworkers Anthony and Conrad contradict these claims. Anthony who was the first person at the job testified that he was the first to the site at between 7:45 a.m. and 8 a.m. (p. 501, l. 13-21), he then reported that Scott and all other workers arrived together at the job site about 8:00. (p. 502, l. 1-10). Conrad testified that he believed he and the others left the job site at 5:30. (p. 340, l. 3). Reducing the number of hours that Scott worked and would be paid for.

26. Following that day, he claimed he received a text from Max about returning back to the Zoo once the job started again. (p.290 l. 1-12). Exhibit 26 was a copy of the text message and Scott thought he was still employed by M&T (p. 293 l. 25). Also, on April 10, Max called Scott to ask him about what happened in the job and about Donnie. (p. 294 l. 21-25). In another text message Max asked Scott to recheck with him on April 15. (p. 300, l.19-20). For some reason, Scott never did. Very clearly, there was a misunderstanding as to what Scott was to do concerning returning to the job once the general contractor returned the site to M&T. In a text message, Max asked Scott to “recheck with him”. When he failed to do so, M&T went on without him. Scott claims since he was not contacted again, he was terminated. Max’s request that Scott recheck with him on the 15th disagrees with this view, claiming that Scott abandoned the job.

27. All of this testimony and the text message exhibit which Scott confirmed receiving, cause Scott claim for more than 10 hours paid to lack credible. Further, Ken Burch made it clear

the prevailing wage handbook contained the work hours and stated that the compensable workday could not start prior to 7:30 a.m. or 8:00 (p. 451, 1.22-25). Also, as Max advised, the workday could not extend beyond 5:30 p.m. since the Zoo did not allow construction crews to remain past that time. (p. 392, 1.19-20; 24-24; p. 393, 1.1-11). This of course was consistent with the prior testimony of Conrad *supra*.

28. Another fact issue is the allegation that M&T interfered with the Claimants' right to engage in concerted activity. The claim that Max tried to intimidate them into not filing claims or take action against M&T. They claim that through text messages Max did these actions. Max made it very clear that he was an engineer and had no awareness of the NLTB or Section 7 rights. (p.393, 1.1-11). He also testified that Anthony had notified him of Donnie's efforts to enlist Anthony and told him that he would be the next one fired. Upon learning this Max began asking Conrad and Scott what representation Donnie had made to them and made it clear he did not want Donnie interfering with his fledgling business or employees. Such a response is natural and almost maternal, much like a mama bear protecting her cubs. It obviously did nothing to interfere with the concerted efforts of the Charging Party claimants. Afterall, Anthony testified that as early as Friday night when Donnie called him and among other things shared that he had been fired, Anthony didn't want to talk with Donnie. (p.393, 1.1-11). Anthony's response shows lack of interest and not interference.

HOURS

29. The essence of the Charging Parties' claims is that they "worked" hours for which they have not been paid. However, on the subject of actual hours worked, the testimony of the witnesses is diverse and conflicting. This of course was made possible by M&T not having an established procedure in place for the one actual workday and the two preparation days that work was

compensable. The Claimants, like a well-rehearsed choir, all sang the same tune. They each claimed that time would be reported to the foreman or team leader for team members. However, Max made it clear that Donnie was no longer trusted after he found him at the airport some 29 miles away from the job site rather than working. (p.393, 1.1-11). Instead, Max kept the time records and relied on what the workers told him that he could confirm. Max had a safety net in dealing with workers time; he had Anthony Riley. Anthony was the only employee actually asked to be on the job each of the three days this group was employed by M&T, Anthony was also the first M&T employee on the job site each of the three workdays in question. Also, on Wednesday and Thursday, he was the last man to leave the job. And, on Friday April 5, Max himself was the last M&T person to leave the jobsite. Max trusted Anthony and he felt that he had reliable hours for each employee.

30. Actually, the discussion of time must start with the testimony of Mr. Ken Burch. He made it clear that when he hired each of the Charging Parties, he told each of them during the interview process the ground rules and limits on access to the job site (p. 450, 1.24; P451, 1.01-6). Ken shared what the standard hours would be at this job site, making it clear that compensable time does not start until the set work hours and that this was all spelled out in the prevailing wage handbook. (p. 451; 1.18-25) His testimony was clear, "... you're not paid for commuting, you're not paid for a shuttle, you're paid when the clock starts when you're on the site with your tools and you're ready to go to work. That's when time starts." (p. 451, 1. 22-25). He also made it clear that the work hours were to be either, 7:30 to 4:00 or from 8:00 to 4:30, depending on the general contractor. (p.433, 1 3-15). Then he testified that Donnie, as foreman was responsible for enforcing those hours and that no overtime was permitted without approval from the office. (p.434, 1 1-4).

He also explained the rules on deliveries which provided that no deliveries could be made after 9:00 due to the public nature of the facility where they worked. (p.434, 1 5-8).

31. Mr. Burch also challenged Donnie's alleged justification for he and his cousin appearing on the jobsite on either Wednesday or Thursday when no blocks were being laid and only laborer's work was performed. He testified that Donnie Scruggs was not authorized to be working on the job site until masonry work was to be performed. The only exception was to be Donnie attending a foreman's meeting. This was the only preconstruction services that he was authorized to perform. (p.435, 1 2-5).

32. Further, Ken pointed out that he and Donnie had a "hand-off" meeting in March, prior to starting the project (p.455, 1 3-15). At that meeting he laid out the groundwork for how the project should proceed. (p. 430, 1. 6-11). This meeting covered those items that were to be Donnie's responsibility as foreman, starting and quitting hours, amount of block to be laid, delivery schedules; these were all discussed with Donnie during the hand-off meeting. (p. 430, 1. 2-25). Ken also recalls that Donnie, when asked did not take issue with anything that was discussed; rather, he acted like it was all old news as if he already "...knew this stuff." (p. 431, 1. 6-18).

33. Procedurally, Max would go to Anthony and confirm when each of the other employees arrived and departed the job site. He would then record that information and turn it over to the company's accountant for the preparation of the employee's paychecks. The Court finds that the testimony of Mr. Riley was credible and free from any self-serving intent or purpose and the procedure followed by M&T to be acceptable.

34. Ken Burch also testified that he was present for the mobilization when the materials arrived including the silos. He testified that Anthony was the only person on site (p.427 1.15-17 and 23-25). Anthony was there because he was a forklift operator which was needed in the

unloading of materials and items. He made it clear that no foreman was required for that. (p.428 1.11-18). He even recalled speaking with Max as to who would be needed on April 3 and both agreed that Anthony would be the only laborer invited on jobsite; and that masons needed to start only when all the materials were present, and the site prepared for them. (p.428 1.19-25 and p.429 1.1-3).

35. Anthony testified that on April 3, workers, arrived at the job site at 8:00 and just performed laborers work for a few hours until around noon when he left and only Donnie remained. (p.496; 1.2-25). The next day on April 4, when he came to the job site at 7:45 (p.499, 1.8), and left at 2:00 or 3:00 (p.500, 1.10), he remembers Bryan Scruggs showed up after him and left before him. More important, Anthony testified that Donnie Scruggs never came to the job that morning (p.499 1.16). Instead, the undisputed testimony is that on April 4, Max came to the job at 9 o'clock and found only Anthony and Bryan present (p.244, 1 17-19). He approached Bryan and was told Donnie had been in earlier. Only after Max conferred with Bryan so that Bryan knew that Max might be looking for Donnie, did Max then receive an unsolicited call from Donnie. (p.53, 1. 16-19). Here, Donnie claimed that he had been to the job but had left because it was raining. He said he left to go to the airport to pick up his girlfriend who was flying in to be with him. Donnie believed that Max was "alright" with his neglecting his work responsibilities. (p.54, 1. 8-10). That was hardly credible. Donnie's presence as a mason was not necessary, it was rainy, and no real work could be accomplished. The airport was 29 miles away from the Zoo and even if Donnie had stopped at the jobsite, it would only have been momentarily, and no work of any nature would have been performed. Also, Anthony again the first to arrive claimed Donnie had not come to the job. No need to go into the arrogant attitude that made Donnie feel justified to leave the job to run

a personal errand. Shortly, after he arrived, Max sent Bryan and Anthony home, taking them also off the clock. No credible evidence exists that he was at work that day.

36. While Donnie was paid for Thursday, it is hard to believe that he actually appeared at the job site during work hours or that he performed compensable work had he been there. Nevertheless, M&T did pay him for time that morning.

TERMINATION OF THE MASONS

The new mixer

37. Prior to Friday, April 5, 2019 both Donnie and his cousin Bryan came to the job and performed no masonry work. Instead they arrived uninvited, performed menial labor and were paid at the prevailing wage of a mason. This did not please either Max or Ken.

38. Then on Friday when the full array of M&T employees were at the jobsite, no productive work took place until after 10:00. This was despite each mason having over 25 years' experience and a foreman who had even owned his own masonry business. It seems as though none of the masons were capable of turning on the brand-new mixer that had been delivered to the jobsite. (p. 355 l. 19-25; p. 372 l. 5). Now Donnie would claim that he and Bryan were actually laying block out while this was going on. (p. 127 l. 15-23). In fact, when Max arrived at the job at 10:00, found no one was working and asked why that was the case? (p. 371 l. 8). He quickly learned that it was the inability of this experienced crew to be able to turn on the mixer. By several accounts they had tried for several hours, yet no one had called him or the company for instruction. Afterall, Max pointed out the mixer was very simple. (p.373 l.25; 374 l.1-).

39. So, Max displayed both initiative and leadership. He called the seller company for instruction since all of the prior efforts had failed to start the mixer. However, as he was on hold with the vendor, a delivery driver appeared, and pointed out the kill switch and safety key and

promptly showed them how to turn on the mixer. This took place just as Max reached the vendor and could confirm the delivery driver words and action. (p. 356 l.1-7) That morning when Max came to the job at 10:05, he believed that “the employees didn’t care (p. 355 l.23) since nobody was working” (p. 371 l. 8) especially since “... they didn’t have any mortar (p. 371, l. 8-11) and you cannot lay block without mortar” (p. 371. L. 11-16). Max made it clear that no blocks had been put into the ground by the time he arrived at the job. (p. 371 l. 15-19); He also mentioned that only one employee was around the mixer trying to get it started. (p.355, 1.19-25). When Max appeared, he asked “why nobody is working” (p. 371 l. 24). When he learned the mixer was not working, he asked why they did not call him or the seller of the mixer. (p. 371, l. 25; p. 372, l. 1-12).

40. When Burch learned of the mixer problem, he was amazed pointing out that it took four people three hours to start the mixer because they missed an automatic shutoff button on the top of the mixer housing. (p. 445 l.17-22), and that it took three hours to pull the cord out of the mixer. (p. 445 l.24-25; p. 444, l. 1-3). This was not competent work performed by experienced masons led by an experienced foreman.

Grout error “\$1,500 mistake”

41. It was only after the mixer became operative, at approximately 10:10 that morning (p. 373 l. 19), that the team was able to make mortar and then finally being to lay the first course of block. (p. 374 l. 11-15). Max helped out working as a laborer (p 375 l. 4). He and everyone else worked until noon when he saw them all workers go to lunch before, he himself left for lunch and to run errands, (p. 375 l. 9-25; p. 376 l. 2). By contract, lunch ran from 12:00 to 12:30. (p. 375 l. 11-12).

42. Now as to the pouring of the grout and being sure to not cover the rebar holes, Max testified that he was aware that Donnie had been instructed on how to properly grout the block. (p. 376 l. 22-25). He stated that he, and Ken Burch had each told Donnie how it was to be done and of course the instruction was also in the drawings. (p. 377 l. 1-9). Donnie had been provided the drawings at the “hand-off” meeting.

43. When Max returned after lunch, everyone was working; however, no grout had been made or laid (p. 376 l. 3- 12). At 4:15 when he left the job site to run another errand. (p. 376 l. 6-14). 30 to 45 minutes later when he returned grout had been mixed and it was being poured onto all the openings of the block laid for the first course. (Donnie believed that Max may have left while they were grouting). (p. 64 l. 6-7). This included placing grout in the same holes of the block that included where the rebar protruded and where the rebar for subsequent courses would be required to extend downward to create the strength of the structure and safety for the public when occupying the building.

44. Max was gone for about half an hour to 45 minutes and returned at approximately 4:45 to 5:00 (p. 395 l. 8-9) when the grouting was taking place. On his return, he saw that the grout was improper, or as Donnie would say “...he said we grouted the wrong holes in the block”. (p. 64 l. 14-15). Max directed that the team cease placing grout in the rebar holes and to finish their work for the day. When informed of the error, Donnie offered to stop, remove the grout before it hardened but Max said “no”. (p.64. 1.14). It was apparent that Donnie did not understand why Max did not order the immediate removal of the grout prior to hardening. Instead, Donnie also claims that Max said not to worry about it that it would be taken care of down the road. (p. 64, l. 21-22). Also, to further support Donnie’s lack of comprehension of why the rebar holes should not be grouted, he claimed to understand Max’s explanation of this error would require the rebar

would now need to be cut at the top once the concrete hardened. (p. 65 l. 1-13). Just as disappointing Bryan believed that all the holes in the first course needed to be filled. (p. 258, l. 11-21).

45. Instead, Max explained that the reason he did not wish to immediately remove the grout from the rebar holes had to do with public safety and the standards of the American Concrete Institute (“ACI”) where he was certified to do so would be unacceptable. This was because the block must be dry, and once you place grout in the block, water would be absorbed and would not bond with the rebar. The remedy would have required taking out the “wet” blocks which they did at a later time. (p. 391 l. 15-25; p. 392 l. 1-2). He knew he was required to take out the old block and replace it with new block. (p. 392 l.16-17). Otherwise it would be a violation of construction standards (p. 392 l. 11). To do as Donnie suggested also wasn’t even practical since this was all happening at near 5:30 and the Zoo would not allow construction crews to remain past. (p. 392 l. 19-20; 24-25; p. 393 l. 1-15).

46. ACI standards are followed throughout, North America (p. 387 l.1-7). These standards are on the plans and specifications (Respondents Exhibits 9 and 10) that were to be followed and indicated how the project was to be built. Max testified at length that this was supposed to be 32 inches of overlap between the rebars coming up and down to promote the safety of the building. (Respondent exhibits 9, 10 and 11 (p. 383, l. 18-25; p. 384, l. 1-25; p. 385, l. 1-25; p. 386, l. 1-25; p. 387, l. 1-25; p. 388, l. 1-25; p. 389, l. 1-25; p. 390, l. 19-25; p. 391 l. 1-4). He made it clear that Donnie, as the foreman, was responsible for doing this properly; however, if his work would have gone unchecked instead of 32 inches of rebar steel overlay, they would have had 24 inches of overlap, which was in violation of these standards. (p. 391, l.1-7). The blueprints indicated that the rebar holes were not to be filled with grout until the overlap is available (p. 391 l.8-13).

Unchecked, this major construction safety hazard would have endangered the public for years to come since the base rebar steel would had been compromised causing the structure to be erected on a less than safe foundation. This error was a clear display of incompetence.

The inexcusable “out of square” layout

47. Even after the mason crew had been fired due to their incompetence and Donnie’s lack of leadership and understanding of the project, the remnants of their shoddy workmanship had not yet reached its peak. On Monday morning, after they had been dismissed and a new crew had been hired and when Max thought the job site had been turned over to the general contractor for its work, he checked his email and found a message from Ken Burch forwarding an email of the Superintendent. That message indicated that the layout and first course placed by M&T’s former crew had made errors in the placement of three walls of varying size, and that it was out of square. (p. 438 l. 9-11).

48. Ken Burch was the first to learn of the blunder that all of the masons had made, but primarily the foreman Donnie Scruggs when it came to measuring and laying out the location of where the structure would be built. Ken first learned of it when he received an email from the superintendent Monday morning, April 8, advising that “...the foundation was off by one and a half inches out of square”. (p. 438 l.7-11). He believed such work and errors were an inexcusable mistake for a foreman with 30 years’ experience. (p. 441 l.7-12). Worse yet, such an error would have a “compounding” effect on the other trades. To him this meant that neither the steel, nor the roof would fit and that it would expose M&T to huge loss. (p. 441 l.13-16). For both Ken and Max, when they learned of this; they had had enough. (p. 441 l. 13-18). For Ken, it was then that he learned that Max told him he had already replaced Donnie and the other masons with a new crew. (p. 444 l.17-8).

49. When Max learned of the inexcusable error, he contacted Diego who he had hired the prior Saturday and was working in Texas and urged him to come back to Kansas City with his crew and start the job immediately. Diego agreed arrived Tuesday April 9 and remained with the project until it was finished.

50. The Respondent had adequate justification in terminating the three mason employees due to incompetence. Respondent asked Chaney to recheck with Max on April 15, the date he anticipated receiving back the jobsite from the general contractor. Chaney never called and the job moved on without him.

CONCLUSIONS OF LAW

JURISDICTION

51. The National Labor Relations Act (NLRA) originally enacted in 1935, regulates labor disputes that affect interstate commerce (29 U.S.C. §§ 151 to 169). The National Labor Relations Board (NLRB) is an independent federal agency charged with administering the (NLRA), the principal federal law governing labor relations between union and private sector employers. The National Labor Relations Board (NLRB) does not have jurisdiction over all employers, employees, and labor disputes. This dispute does not involve unions or its members, but instead seeks to gather its Jurisdiction from the alleged unfair labor practice protections found in Section 7 of the Act.

52. Section 157 of the NLRA specifically grants to employees the right to engage in “concerted activities for... mutual aid or protection”. Section 158 specifies a list of acts that are considered ‘unfair labor practice’ by an employer, the first of which ,“to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. Both the U.S. Supreme Court and the NLRB have recognized that the NLRA's protections extend to

employees' concerted activities that don't involve labor unions or unionization efforts. As a result, General Counsel has stated a colorable claim within the jurisdiction of the Board.

BURDEN OF PROOF

53. The burden of proof lies with the General Counsel who must meet its burden of proof by a preponderance of the evidence that the motivating factor in the employer's decision to terminate the Charging Party was the Charging Party's "protected conduct" and not a legitimate business reason. Donaldson Bros. Ready Mix Inc., 341 NLRB 958, 961 (2004). Further, The General Counsel bears the burden of establishing a violation of the Act, O'Neil's Mkts. v. United Food and Commercial Workers' Union, 95 F.3d 733, 736 (8th Cir.1996), and he exercises exclusive control over the issues contained in any complaint that he files. Des Moines Mailers Union, Teamsters Local No. 358 v. N.L.R.B., 381 F.3d 767, 769 (8th Cir. 2004). In contested cases, "... the General Counsel's burden of proving these employees' protected activities were a motivating factor in the terminations and late recalls...From this evidence, the Board could reasonably infer that MDI's hostility to unions and desire to discourage future organizing activity were motivating factors in the adverse employment actions." See DBM, 987 F.2d at 543; Ballou Brick Co. v. NLRB, 798 F.2d 339, 342 (8th Cir.1986). N.L.R.B. v. MDI Commercial Servs., 175 F.3d 621, 625 (8th Cir. 1999).

However, when considering the burden of proof, it must be remembered:

The principle is firmly established that the burden is upon the General Counsel to prove the essential elements of the charged unfair labor practices. Boyle's Famous Corned Beef Co. v. N.L.R.B., 400 F.2d 154, 165 (8th Cir. 1968); N.L.R.B. v. Howard Quarries, Inc., 262 F.2d 236, 242 (8th Cir. 1966). We would indeed be hard pressed to find that this burden was carried here....

N. L. R. B. v. St. Louis Cordage Mills, 424 F.2d 976, 979 (8th Cir. 1970).

54. The ultimate judicial evaluation of NLRB action will be evaluated on an established standard endorsed in by Appellate Courts. We are reminded that:

When reviewing an NLRB order, we “afford great deference to the Board's affirmation of the ALJ's findings.” *Cintas Corp. v. NLRB*, 589 F.3d 905, 912 (8th Cir. 2009)... We will enforce the Board's “order as long as the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole.” *Id.*.. To determine whether the Board's decision is supported by substantial evidence, we also **consider adverse evidence**. See *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 553 (8th Cir. 2015). Although the Board is permitted to draw reasonable inferences and may select between conflicting accounts of the evidence, it may **not “rely on suspicion, surmise, implications, or plainly incredible evidence.”** *Id.*... On legal issues, “we defer to the Board's interpretation of the Act, so long as it is rational and consistent with that law.” *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012).

A. Section 8(a)(1) violations.

Section 7 of the Act guarantees employees the right to organize and bargain collectively. See 29 U.S.C. § 157. Under § 8(a)(1), an employer commits an unfair labor practice if it “**interfere[s] with, restrain[s], or coerce[s] employees in the exercise of their rights**” under § 7. *Id.* § 158(a)(1). Section 8(c) provides that “[t]he is **expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit,**” *id.* § 158(c), and thereby “implements the First Amendment,” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). (Emphasis added).

S. Bakeries, LLC v. Nat'l Labor Relations Bd., 871 F.3d 811, 820 (8th Cir. 2017)

UNLAWFUL LABOR PRACTICES

55. The Charging Parties claim that M&T did not pay them for all of their hours worked and that they engaged in concerted activities to determine this. Then when they were involved in “concerted activities” of comparing their hours and pay General Counsel claims three masons were terminated while the fourth, a laborer was not called back to work after having been told that he would. Then, General Counsel claims that somehow M&T tried to intimidate or interfere with the Charging Parties rights by telling Donnie not to spread lies and misrepresent facts. These assertions are factually inaccurate and do not create a violation of the Act.

56. While the General Counsel has the burden of proof, that must be met by the preponderance of evidence, it must be viewed against the conflicting evidence presented by the

Respondent. *Donaldson Bros. Ready Mix, Inc. & Int'l Union of Operating Engineers, Local 400, Afl-Cio*, 341 NLRB 958 (2004):

... the burden of proving that the applicants had the experience or training relevant to the announced or generally known requirements of the positions for hire. Even assuming that this burden had been met, the judge observed, the Respondent had established a defense, by showing that the applicants did not possess the specific qualifications the position required.

Donaldson Bros. Ready Mix, Inc. at ____

57. Despite this language not being precisely not 'on all fours' with the facts of this case, it is instructive on how the facts and evidence presented by both sides to the controversy and that both sides evidence must be evaluated. Although General Counsel presented cumulative testimony of the Charging Parties to support the allegations that they may have been underpaid for the total hours worked, that collusive testimony is questionable when challenged by contrary evidence fact evidence. As a result, while the General Counsel may have superficially met its burden of proof, it has not successfully met its burden of persuasion.

58. The testimony and evidence of the Respondent through evidence and witnesses disputed whether Charging Parties Donnie or Bryan were even to be at the jobsite on Wednesday or Thursday, or if Donnie ever came to the jobsite on Thursday when the corroborative testimony of Bryan is considered as he described the tasks actually performed that morning and Donnie's absence was revealed by Anthony. The same witness whose unchallenged testimony was that Donnie never came to the job that morning also supported Bryan's description of the work they performed (some with the help of the Centic's Superintendent). Instead, it is uncontested that Donnie was actually at the airport some 29 miles away from the Zoo where he claimed to be working. This represents substantial evidence; as courts have defined to mean:

"We have defined substantial evidence to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Cintas Corp.*

v. *NLRB*, 589 F.3d 905, 912 (8th Cir. 2009). Further, it is appropriate to consider adverse evidence.” *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 553 (8th Cir. 2015).

Afterall:

“the Board is permitted to draw reasonable inferences and may select between conflicting accounts of the evidence, it may not “rely on suspicion, surmise, implications, or plainly incredible evidence.” On legal issues, “we defer to the Board’s interpretation of the Act, so long as it is rational and consistent with that law.” *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012).

S. Bakeries, LLC v. Nat’l Labor Relations Bd., 871 F.3d 811, 820 (8th Cir. 2017)

59. The masons were just dreadful; an embarrassment that displayed both a lack of knowledge and skill. The one day that all three worked, they squander work hours, delayed the initiation of any meaningful tasks or the performance of their one specific time driven task, the installation of the “first course”. This was caused by their inability to work together and turn on a brand new mixer; but when the mixer was finally operational, they then performed work that would have to be redone because the foreman failed so miserably in his functions. He neglected to take his job seriously and perform his work duty and read and review the blueprints that he had since the “hand-off” meeting so that he would know how to properly grout the blocks they were charged with laying. This error, euphemistically referred to as the “\$1,500 mistake” actually cost the Respondent more than \$1,500 to repair, but in and of itself represented sufficient justification to make a clean sweep of the masons and merited the termination of all three masons. Then when the personal animus of Donnie towards his employer Max is also considered and how it had poisoned Max’s stature and authority with the other masons, M&T was well within its rights of terminating the masons for cause. This was also prior to learning of the monumental blunder that was made that day at the jobsite when Donnie, working with Bryan and Conrad improperly measured and laid out the location of walls for the building they were constructing. That surely

would have doomed their continued employment, except it was not realized until after they had already been dismissed. This is in keeping with the court's decision in *Donaldson Bros. Ready Mix, Inc. supra*, that the Respondent was within its rights not accepting unqualified employees. This represented the presented a viable defense.

60. As to Friday April 5, 2019, each of the four Charging Parties sang the same song - almost. All four Charging Parties claimed they came to the job at 7:00 and worked a long day, however, it was there that some of the lyrics were performed out of tune. While Donnie, Bryan and Scott claim to have been on the job until 7 p.m., Conrad admitted that he left at 5:30. Then some Claimants want the court to believe that really worked 10 on Friday. For the General Counsel to accept and champion these plainly incredible claims is for them to rely on "suspicion, surmise and implication" that was determined to be inappropriate by the court. *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012).

61. Afterall, to do so flies in the face of established Zoo policy for the safety of the public, the established work rule of the City of Kansas City, Missouri expressed in the prevailing wage handbook, the procedures and rules that Donnie was to have become familiar with from his "hand-off" meeting and the foreman's meeting he was paid to attend, the established work hours set by the general contractor, the testimony of Anthony who was always the first to arrive at the job and the admitted agreement that Max was the last to have left on Friday. The hours reported by each Charging Party for Friday was an overstatement that they orchestrated among themselves to extract more compensation from M&T after the masons were terminated for good cause. As to Scott, he was as culpable as the masons in overstating his hours, but he was not terminated. Instead, he elected not to return to work as a decision that he made for whatever reason he made it.

62. As to the actual termination of the mason Charging Parties Max testified that he fired the mason's the evening of Friday, April 5, when he wrote a termination letter to each of them following due and appropriate evaluation of all of the events of the day. He also told Brian Shields of Centic's, the general contractor, that he was replacing the masons. It was actually the following day that that was done when Max located Diego who was working in Texas at the time.

63. Credible evidence exists that Donnie became aware of this when he spoke with Shields concerning his slip and fall at the jobsite. This conclusion is supported by the testimony of Anthony who was also contacted by Donnie and to whom he admitted that he had been terminated. Donnie even admitted speaking to both Shields and Anthony that evening, but resisted admitting that he knew of his discharge, despite what Anthony would tell us later in the case evidence. Bryan and Conrad each learned of their termination when it came time for them to pick up their checks. As to Bryan, there is undisputed evidence that he was offered an opportunity to continue working with M&T, who asked him to apply so they could be familiar with his other work related skills and other know how required to be an inside man as Max would call it, working in the masonry field. Conrad received the news after he was given his check and had left the premises out of a concern for safety.

64. No evidence suggests that Scott was ever terminated; in fact all of the evidence confirms that despite the termination of the masons, Scott was specifically told that he had not been terminated; but rather, that he was wanted after the hiatus when the jobsite was returned to M&T by the general contractor. Because that exact date was unsure, he was asked to contact M&T by April 15, when the site was initially scheduled to be returned to M&T. Somehow Scott concluded that he was to be contacted by the Respondent. When he failed to hear from them, he

unilaterally concluded that he had been terminated in favor of another employee which is without any factual support in the record at all.

65. Then, as to the alleged “unfair labor practice” claimed by General Counsel that arose from the text exchanges between Max and Donnie over Donnie’s efforts to enlist Anthony as a Charging Party by claiming he was being underpaid and even sent him the alleged prevailing wage rates for the work that he was doing. Donnie also told Anthony that he was the next to be fired. After Anthony shared all of this information with Max, he texted Donnie and told him to leave Anthony alone and not to make claims as to what M&T would do. General Counsel claims that this was unlawful asserting that Max’s texts were unlawful labor practice. These assertions of: “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of their rights” under § 7. *Id.* § 158(a)(1) were addressed in *S. Bakeries, LLC v. Nat’l Labor Relations Bd.*, supra, and held not to be unlawful labor practice.... [if] no threat of reprisal or force or promise of benefit” was made part of the response.

66. This was not some effort by the employer to interfere with or deter a unionizing campaign as is frequently the cause of such claims, or some substantive interaction among employees expressing their concerns about safety, work conditions or potential retaliation. This was Donnie seeking out his cohorts in what can best be described as a “gripe” session. As he called each of the workers from the site, Donnie complained about having lost his job, seeking witnesses for his worker’s compensation claim and complaining about Max and money. He was griping and hoping to gather assistance in his worker’s compensation claim because he realized he had lost his credibility by failing to report the claim when it happened. In *NLRB v RELCO Locomotives, Inc.*, 734 F.3d 764, 730 (8th Cir. 2013) citing *JCR Hotel*, 342 F. 3d , the court said that mere “griping” was not protected by the NLRB. It pointed out that it required the employees

to do more than that. Here, these Charging Parties failed to indicate what more they did as they conferred to aid one another, other than “gripe”. As a result, the General Counsel failed to meet its burden of proof in this instance as well.

67. In other cases dealing with the content of the mutual aid discussions that made up Charging Parties claim of concerted acts, it has been agreed that the mutual aid needs to be more than talk about “disloyal or recklessly disparaging....” Rather, cases point out that the concerted acts employee activity loses protection when it reaches “a point where their methods of engaging in that activity [took] them outside the protection of the Act.” *See St. Luke's*, 268 F.3d at 581 (quoting *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir.1972)). *MikLin Enterprises, Inc. v. N.L.R.B.*, 818 F.3d 397, 407 (8th Cir. 2016), reh'g en banc granted, opinion vacated sub nom. *MikLin Enterprises, Inc. v. Nat'l Labor Relations Bd.*, No. 14-3099, 2016 WL 4651405 (8th Cir. June 22, 2016), and on reh'g en banc sub nom. *MikLin Enterprises, Inc. v. Nat'l Labor Relations Bd.*, 861 F.3d 812 (8th Cir. 2017).

68. Here, General Counsel overreaches seeking to make “concerted activity” over Donnie’s griping. It was also made after the masons had been terminated for their collective incompetence in performing skilled labor tasks by the experienced masons. They conferred to gripe about M&T, count as many hours as they could claim, to enlist witness for Donnie’s worker’s compensation injury claim and nothing else. In conducting these dialogues, Donnie also enlisted Scott Chaney who had been offered continued employment when the job would resume. Donnie failed in his efforts to secure Anthony Riley the lone holdout from this work crew. When Anthony shared with Max news of Donnie’s efforts which also claimed that Anthony would soon be fired, Max took issue with this and insisted that Donnie stand down and stop defaming him. No threats were made

and nothing of any improper nature was said. These communications do not rise to concerted activities protected by the act.

69. Anthony was the first M&T employee at the job site Wednesday, Thursday and Friday, the only workdays involved. He put the lie to the claims of the Charging Parties that they arrived at the job site prior to 8:00 on any of those days. He was always the first to come to work and acted as a "door guard" welcoming his crew members each day. As to Donnie and Bryan, that means he erased an hour each day from their claimed arrival time. Or, stated another way, his testimony alone verified that these Charging Parties had overstated their "short" claim by three hours on just morning arrival times. In addition, as to Donnie, Anthony also verified that he was a "no-show" on Thursday despite having been paid for one and one half hours that day while picking up his girlfriend at the airport. That's another hour and a half that he overstated his hours.

70. As to Friday, he was able to shave an hour from each of the Charging Parties who sang the same song when they claimed to have arrived at 7:00 that morning. Anthony once more testified that they did not arrive at the jobsite until 8:00. Thus, another hour is overstated per man. Worse yet, at the end of this disastrous workday, another one and one half to two hours were eliminated from the Charging Parties' claims. Anthony confirmed that M&T co-owner Max Nowrouzi was the last to leave at 5:30. Max, also confirmed that each Charging Party had taken a lunch break, notwithstanding Donnie's claim that he took no lunch that day. This is further supported by the job site rules of both the general contractor and the Zoo that required construction to end by 5:30. This challenges the credibility of the claims that the crew worked until 7:00 that night. This translates to the loss of yet another hour and one half per man, plus 30 minutes (lunch) for Donnie. It is clearly not plausible to work until 7:00 at a public facility like the Zoo without gathering objection from either the premises staff or the general contractor.

71. So, as to Donnie who claimed he worked 12 hours without a lunch break, his work hours are reduced to merely 8:00 to 5:30 with a half hour for lunch or 9 hours (and not 12) because of the verifiable testimony of the remaining witnesses. His Wednesday hours are written down due to Anthony's testimony of an 8:00 to 2:00 workday and not the 7:00 to 3:00 that had been claimed. Now for Donnie, he did attend the foreman's meeting from 2:00 until 3:00 so his compensation claim should also include that hour. As to Bryan, who also claimed to have come to the site (uninvited) Wednesday at 7:00 and worked until 10:00 his time was shaved to an 8:00 to 10:00 workday on Wednesday.

72. Then Thursday, Bryan again claimed three hours of work asserting that he appeared at 7:00 and left at 10:00. He overstated his time by one hour while Donnie's time was not only overstated but overpaid for that day. He had the audacity to claim he worked for two hours, that's in excess of \$110.00 which represents his motivation for making this fraudulent claim but actually was paid for one and a half hours or over \$82.00 that the evidence showed he was not entitled to receive and for which Respondent is entitled to credit. The airport claim was originally supported by Bryan who claimed that Donnie had been there but had to leave. He also volunteered that they had both arrived at 7:00. Yet as further support that Donnie did not take his position as foreman seriously is the problems that such a claim created, even if Anthony was not available to set the record straight. The general contractor dictates when work began, and it was either 7:30 or 8:00, that was contractual. So were the Zoo rules which dictated when work might be performed as well as when deliveries could be made and other job site rules that a competent foreman would have been familiar with. Further, the prevailing rate rules that Donnie would later seek to cite to Anthony also dictated work hours different than Donnie was now claiming. Now add to that the testimony of Anthony that does not even place him at work at all that day. This is not only neglect

of understanding the job rules, it is amazing arrogance to exaggerate the claim time that exceeds the job rules while at the airport picking up a girlfriend. Is there any surprise that he also claimed that Max was “alright with it” when he heard about it.

73. It appears that when Max arrived, Bryan could no longer cover for his whereabouts once Max asked so after lying on behalf of his cousin, he called Donnie, alerted him to what had happened. As a result, Donnie promptly called Max perpetuating the lie.

74. As a matter of law, these ongoing lies that only serve one another further tarnish the credibility and testimony of both Donnie and Bryan and brings into doubt all of their respective testimony. As a result, all remaining outcome determinative issues and claims that are contested, the fact finder should be determine against both of them when contested facts are involved. As a result, it is determined that the hours claimed by each Donnie Scruggs and Bryan are hereby further adjusted downward to reflect a loss by Bryan of one hour for Thursday and a loss of two hours for Donnie that he claimed for Thursday plus a credit of the hour and a half actually paid him. The compensation that Donnie received for Thursday will be credited back to the employer as an over payment and used to meet any unfunded work hours should there be any.

75. As to Conrad and Scott. The same facts apply. Despite their claims to the contrary their workday will be paid on the same factual basis. First they will each be deemed to have arrived at the jobsite at 8:00, taken a 30 minute lunch break and left the job at 5:30. Conrad while claiming to have arrived earlier did agree that he left at 5:30, still tried to claim that he worked 10 and a half hours with a half hour lunch break. This is an overstatement of one hour and that will also be charged back against his claim along with the additional hour for his arrival time. Scott on the other hand also claimed to have arrived at 7:00 but also claimed to have worked until 7:00 that night or 12 hours, but just claimed 10 hours like Conrad. It appears that the concerted activities

of all of these Charging Parties was to come up with a consistent story for Friday hours. Unfortunately, Scott was not able to keep his facts straight when he testified that he worked 12 hours but was seeking compensation for 10. This also was an overstatement since the evidence does not support it.

76. As to the termination of Conrad, no unlawful employment practice was involved. Instead, the employer was within its rights expecting an experienced mason to be able to turn on a new mixer or to have the common sense to contact someone who did, like his fellow masons at the job, or Max, Ken or even the vendor of the equipment. Instead, he was so stubborn and avoided any reasonable steps to turn it on, that even after he broke the pull cord, he still resisted reaching out to someone for assistance, so that it might be used at the job site. Had he acted properly, several hours of lost productive work time would have been saved, and at least five additional manhours would not have been removed from the employer's budget. This termination was proper.

77. As to Scott, he was asked to remain an employee of M&T, just like Anthony. However, instead of contacting the company on April 15, as is supported by the text message evidence, he elected to ignore this and claim that the company was to have contacted him and tell him when to return to work, a claim contrary to the only evidence in the record. Thus, by intent or misunderstanding, Scott squandered his job by doing nothing and M&T moved on without him. M&T cannot be expected to do more than make a job available to employees. If they elect not to respond or accept another position that is within their rights; but it is not at the peril of M&T. Scott's claim for wrongful termination is denied. Also, Scott claimed that he received a text message as did the other employees advising of an error in hours and that a makeup check would be available for him. Since he always worked as a laborer, he was never entitled to the makeup

check which paid the difference between laborers' pay and masons' pay for the error Max made in classifying one and one half hours of laborers' time for the masons. Since the text was sent to him in error and he had been paid at the appropriate rate, any claim for underpayment based on the text is erroneous and denied.

78. Turning to the claim of Bryan, to the extent that the pay that he received is different than the hours authorized herein, he shall only be entitled to compensation for any hours that actually are proven to be owned, if any. Also, evidence was presented that for an unexplained reason Bryan failed to receive the pay differential that he was entitled to receive. M&T claims that they mailed it to him alone with the check that was sent to his cousin Donnie and while Donnie received his pay differential, Bryan never did. M&T is directed to stop payment of the prior check issued to Bryan Scruggs and to reissue the check once again. The Court finds no misconduct or actionable claim associated with this delay in payment.

79. The termination of Bryan was justified in that he was not able to rise above his own level of incompetence and properly perform his masonry duties. To some extent his and Conrad's actions are understandable because of the abysmal performance of the foreman who ignored specific direction from both Max and Ken to not fill the rebar holes with grout and his refusal to become familiar with the blueprints that he possession from late March at the "hand -off" meeting so that he would know how to properly perform the task and not put Bryan, Conrad or himself in this position.

80. Finally, the claims Donnie Scruggs are all without merit. He is clearly the ringleader that promoted this action, gathered the Charging Parties and in all likelihood wrote the script that they sought to follow in making these inappropriate claims. He is also the biggest offender, he openly displayed bigotry and distain for his employer as well as a professional disregard for his

craft that undermines hardworking masons. Being lazy and arrogant while lying is not a favored posture for a Charging Party. However, the ALJ need not revisit the evidence that would support each of those inappropriate acts and discriminatory conduct so as to support and justify his termination. Instead, Donnie Scruggs Complaint is dismissed as a matter of law.

81. Mr. Scruggs made an election of remedies on April 16, 2019, a date prior to his initiation of any NLRB claim. At that time, his retained counsel asserted on his behalf not only a worker's compensation claim; but also, a wage claim for the undeserved additional hours of compensation that he sought. The notice letter provided to M&T and admitted as exhibit 5 makes a clear demand for 21 hours of compensation at \$55.16 per hour, the identical claim that has been asserted for him by General Counsel.

82. The State of Missouri has a wage claim statute which sets out a notice process and provides consequences for the failure to pay such a claim. RSMo. § 290.110 says the following:

290.110. Payment due discharged employee--exceptions--penalty for delay

Whenever any person, firm or corporation doing business in this state shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of the servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of the discharge or refusal to longer employ and the servant or employee may request in **writing of his foreman or the keeper of his time to have the money due him**, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money or a valid check therefor, does not reach the station or office within seven days from the date it is so requested, then as a **penalty for such nonpayment** the wages of the servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days. This section shall not apply in the case of an employee whose remuneration for work is based primarily on commissions and whose duties include collection of accounts, care of a stock or merchandise and similar activities and where an audit is necessary or customary in order to determine the net amount due. (emphasis provided).

83. Donnie's counsel's Notice letter complied with this statute and represents a valid prior claim. This represents a clear election of remedies made by Donnie as to the remedies he chose to

seek from the Respondent. No party is entitled to make or seek a recovery for the same wage claim more than once. If this action were to be permitted that is exactly what the ALJ would be endorsing. The Missouri State law claim was asserted on April 16, 2019, prior to the May 9, 2019 filing of Charging Party's original case and as such supersedes this action. Such an election is an estoppel to further action by this ALJ or this Board in considering the claim of Donnie Scruggs as they are collaterally estopped as a matter of law.

Entered this 8th day of November 2019.

Administrative Law Judge

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was submitted for filing and a copy of the same was sent via electronic mail, to:

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