

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**M&T ENGINEERING AND CONSTRUCTION
LLC**

and

Case 14-CA-240972

DONNIE SCRUGGS, an Individual

and

Case 14-CA-241119

CONRAD MONACO, an Individual

and

Case 14-CA-241121

BRYAN SCRUGGS, an Individual

and

Case 14-CA-241333

SCOTT CHANEY, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY BRIEF TO
RESPONDENT'S FINDINGS OF FACT CONCLUSIONS OF LAW
TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully Submitted by
Julie M. Covell
Counsel for the General Counsel
National Labor Relations Board
Subregion 17
8600 Farley St. – Suite 100
Overland Park, KS 66212

Counsel for the General Counsel (GC) respectfully files this Reply Brief¹ in response to M&T Engineering and Construction LLC's (Respondent) Findings of Fact Conclusions of Law to the Administrative Law Judge (ALJ) (hereinafter referred to Respondent's Brief to the ALJ) in this matter. For the reasons set forth below, Respondent's arguments in its Brief to the ALJ are neither supported by the record nor Board law.

I. Respondent Mistakenly Identifies the Legal Issues In this Case

In its Brief to the ALJ, Respondent mischaracterizes the General Counsel's legal claim as a wage claim. R. Brief at pp. 1-2, ¶ 1; p. 35, ¶ 81. However, the General Counsel's Amended Consolidated Complaint, identified as GC 2A, contains no allegations that Respondent violated the National Labor Relations Act (Act) by underpaying the Charging Parties Donnie Scruggs (D. Scruggs), Bryan Scruggs (B. Scruggs), Conrad Monaco (Monaco), and Scott Chaney (Chaney) (collectively referred to as "the Charging Parties"). Rather, the GC's Amended Consolidated Complaint alleges, in part, that Respondent violated Section 8(a)(1) of the Act when Respondent terminated the four Charging Parties (1) in retaliation for their protected, concerted activities (2) in retaliation because it believed the Charging Parties had engaged in protected, concerted activities, and (3) to discourage employees from engaging in protected, concerted activity. GC 2A, pg. 5 (Complaint Paragraph 5(h) and (i)). While the employees' protected, concerted activity arose from disputes about whether they had been correctly compensated for work performed and for their OSHA 10 training, the GC is neither alleging nor attempting to remedy any underpayment of wages to the Charging Parties for the days they worked in April 2019. Instead, the GC's Consolidated Amended Complaint seeks to remedy, among other things, the unlawful

¹ References will be denoted using the following abbreviations followed by the page number: Trial Transcript (T); General Counsel's Exhibits (GC); Respondent's Exhibits (R); General Counsel's Brief to the ALJ (GC Brief); and Respondent's Findings of Fact Conclusions of Law to the ALJ (R Brief).

terminations of the four Charging Parties by Respondent. As a result, neither the ALJ nor the Board is collaterally estopped from ruling on the GC's allegation that Respondent unlawfully terminated the Charging Parties, including D. Scruggs.

II. As Admitted by Respondent, the General Counsel Has Met Its Burden To Show The Charging Parties Were Terminated in Violation of Section 8(a)(1)

As explained in the GC's Brief to the ALJ, the appropriate framework for analyzing the Charging Parties' terminations is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).² Under this framework, the General Counsel has met its burden to show that Respondent's animus toward the Charging Parties' actual or perceived protected, concerted activities motivated Respondent to terminate their employment. Moreover, the record clearly supports that Respondent also unlawfully terminated their employment in violation of Section 8(a)(1) of the Act when Respondent did so in order to discourage or prevent future protected, concerted activity.³

A. The General Counsel Has Established that Employees Were Engaged in Protected, Concerted Activity or that Respondent Believed They were Engaged in Such Activity

² Although Respondent generally contends that the Charging Parties lost the protection of the Act, Respondent does not provide any basis for why this case should be analyzed under a framework other than *Wright Line*. R. Brief, pg. 29, ¶ 67. Regardless, Respondent has failed to show how the Charging Parties lost the protection of the Act. Any argument that the Charging Parties lost the protection of the Act for making false wage claims should be rejected. There is no evidence that those claims were made in bad faith, and the Board has held that employees are still protected by the Act even if they are mistaken in some facts when they discuss their working conditions. *See, e.g., Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995). Furthermore, Respondent's assertion that employees falsified their claims should be rejected based on Respondent's representation of the record evidence. Respondent contends that "Procedurally, Max would go to Anthony [Riley] and confirm when each of the other employees arrived and departed the job site." R. Brief, p. 14, ¶ 33. Respondent offers no citation to the record, but its statement two sentences later suggest that the evidence could be found in Riley's testimony. *See id.* However, neither the testimony of Riley nor that of Nowrouzi supports Respondent's assertion that Nowrouzi regularly followed any procedure for tracking time, much less one that involved asking Riley for the times that the other employees worked. *See* T 490-519 (Riley's Testimony); T 547-549 (Nowrouzi's testimony that he asked Riley on Thursday).

³ In its Brief to the ALJ, Respondent fails to address the allegation that the Charging Parties were terminated to discourage employees from engaging in protected, concerted activities. For all the reasons described in the GC's Brief to the ALJ, and as conceded by Respondent by its failure to rebut the allegations at the hearing or in its post-hearing brief, that allegation, found in Amended Consolidated Paragraph 5(h) and (i) is a proven violation of the Act.

At multiple points in its Brief to the ALJ, Respondent admits that the Charging Parties Monaco and Chaney were engaged in protected, concerted activity or that Respondent believed the employees were engaged in such activity. First, the topics identified by Respondent are terms and conditions of employment within the meaning of the Act. Respondent admits that D. Scruggs was contacting Anthony Riley (Riley) about being underpaid and the correct prevailing wage rate for his work. R Brief, p. 28, ¶ 65; *see also* p. 12, ¶ 28. Respondent also admits that D. Scruggs contacted its other employees about “about having lost his job, seeking witnesses for his worker’s compensation claim and complaining about Max and money.” R Brief, p. 28, ¶ 66.

Second, Respondent, by its own characterization of the facts, admits that the employees were engaged in concerted activity or that Respondent believed employees were engaged in concerted activity. In *Marburn Academy, Inc.*, the Board reaffirmed the following principles:

The Board has recognized the activity of a single employee in enlisting the support of his or her fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153-154 (2014); *Whittaker Corp.*, *supra* at 933. Additionally, concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed. *See e.g., Circle K Corp.*, 305 NLRB 932, 933 (1991); and *Meyers II*, 281 NLRB at 887.

368 NLRB No. 38 (Aug. 1, 2019).

Contrary to Respondent’s assertions that D. Scruggs was just “griping,” the topics raised by D. Scruggs were not only protected but his efforts to enlist the support of other employees were concerted. Griping about terms and conditions of employment is unprotected when it is done without any aim toward group action. However, Respondent admits that D. Scruggs’ communications with employees was done for the purpose of “enlisting” their support on various issues, including wages and a worker’s compensation claim. R. Brief, p. 28, ¶ 65; p. 29, ¶ 68. For example, Respondent admits that D. Scruggs told Riley that he was being underpaid and sent him the prevailing wage sheet. That is not a personal gripe; no individual benefit inures to D. Scruggs

if Riley raised concerns about his own wages with Respondent. “In short, proof employee action inures to the benefit of others is proof the action is for mutual aid or protection.” *Marburn Academy, Inc.*, 368 NLRB No. 38 (Aug. 1, 2019). As detailed more fully in the GC’s Brief to the ALJ, the GC has met its burden to show that Respondent knew or believed that Chaney and Monaco were engaged in protected, concerted activity.

In its Brief to the ALJ, Respondent fails to address the allegation that D. Scruggs and B. Scruggs were engaged in protected, concerted activities *prior* to their terminations. For all of the reasons described in the GC’s Brief to the ALJ, and as conceded by Respondent by its failure to rebut the allegations pertaining to D. Scruggs and B. Scruggs at the hearing or in its post-hearing brief, the allegations set forth in Amended Complaint paragraph 5(a) and (b) are proven violations of the Act.

B. Respondent Fails to Rebut the General Counsel’s Evidence That Respondent Knew or Believed that Employees Were Engaged in Protected, Concerted Activity

In short, Respondent’s characterization of the facts, as described above, also establish that it knew or believed Chaney and Monaco were engaged in protected, concerted conversations with D. Scruggs. R. Brief, pg. 28, ¶ 65; pg. 29, ¶68. In its Brief to the ALJ, Respondent fails to refute that Respondent knew or believed that D. Scruggs and B. Scruggs were engaged in protected, concerted activities *prior* to their terminations. For all of the reasons described in the GC’s Brief to the ALJ, and as conceded by Respondent by its failure to rebut the allegations at the hearing or in its post-hearing brief, the General Counsel has established that Respondent knew and/or believed that the Charging Parties were engaged in protected, concerted activity within the meaning of the Act.

C. Respondent Fails to Rebut General Counsel’s Evidence of Animus

1. Respondent Does Not Rebut Independent Evidence of Animus

Respondent's Brief to the ALJ failed to rebut that on April 10, 2019, Respondent, by Max Nowrouzi, via text message, unlawfully prohibited employees from discussing their wages, hours and working conditions with other employees and that on April 10 and 11, 2019, Respondent, by Max Nowrouzi, via text message, unlawfully interrogated employees in violation of Section 8(a)(1). *See* GC 2A, p. 3 (Complaint Paragraph 4a(iii), (v)).

Respondent admitted that after Max Nowrouzi (Nowrouzi) found out that D. Scruggs had been contacting Riley about being underpaid and providing Riley a prevailing wage sheet, Nowrouzi contacted D. Scruggs and told him to leave Riley alone. R Brief at p. 28, ¶65. Respondent suggests that because Nowrouzi's statement prohibiting D. Scruggs from contacting Respondent's employees did not contain a threat that it is not unlawful within the meaning of the Act. *Id.* Respondent's argument is neither factually nor legally supported. The first text message from Nowrouzi to D. Scruggs on April 10 about contacting employees did contain a threat of legal reprisal. GC 11 at p. 8. Even if there was no threat in either statement, there is no legal basis to support Respondent's contention that a prohibition against contacting other employees must contain a threat of reprisal to be found unlawful. *Hobson Bearing International, Inc.*, 365 NLRB No. 73 (May 11, 2017). The right of employees to discuss their working conditions, including wage issues, with other employees is a central tenet of the Act, and an employer's prohibition to employees that they cannot engage in such activity requires no other threat to be found unlawful.

Respondent also admits that Nowrouzi questioned Monaco and Chaney about their conversations with D. Scruggs. R. Brief at p.12, ¶ 28. Respondent offers no legal basis to support its contention that such questioning was lawful within the meaning of the Act. While Respondent attempts to explain away the questioning as a natural response, as explained in the GC's Brief to the ALJ, Nowrouzi's questioning of his employees was unlawful within the meaning of the Act. *See* GC Brief, pp. 13-15, 17-18. Moreover, Nowrouzi's unfamiliarity with the National Labor

Relations Act and the rights conferred to his employees under the Act is not a defense to unlawful behavior.

For neither of these allegations does Respondent provide legal support for its assertion that Nowrouzi acted lawfully when he prohibited employees from discussing their working conditions and then interrogated employees about the substance of their conversations with other employees.

2. Respondent Does Not Deny Independent Evidence of Animus

Respondent's Brief to the ALJ failed to deny or provide any substantive arguments in response to the following allegations set forth in the GC's Amended Consolidated Complaint and confirmed by the record:

- (a) About April 9, 2019, Respondent, by Max Nowrouzi, via text message, threatened employees with monetary action if they engaged in protected activity with other employees regarding their wages, hours, and working conditions. GC 2A, p. 3 (Complaint Paragraph 4(a)(i)).
- (b) About April 10, 2019, Respondent, by Max Nowrouzi, via text message, threatened to withhold employees pay if they engaged in protected, concerted activity with other employees regarding their wages, hours, and working conditions. GC 2A, p. 3 (Complaint Paragraph 4(a)(ii)).
- (c) About April 9, 2019, Respondent, by Max Nowrouzi, via text message, prohibited employees from discussing their wages, hours, and working conditions with other employees. GC 2A, p. 3 (Complaint Paragraph 4(a)(iii)).
- (d) About April 9, 2019, Respondent, by Max Nowrouzi, via text message, prohibited employees from raising employment issues, such as pay issues, with the Respondent on behalf of other employees. GC 2A, p. 3 (Complaint Paragraph 4a(iv)).
- (e) About April 10, 2019, Respondent, by Max Nowrouzi, via text message, threatened to terminate employees if they exercised their right to discuss wages, hours and working conditions with other employees. GC 2A, p. 4 (Complaint Paragraph 4a(vi)).
- (f) About April 11, 2019, Respondent, by Max Nowrouzi, via text message, informed employees that other employees had been terminated because they discussed wages, hours, and working conditions with other employees. GC 2A, p.4 (Complaint Paragraph 4a(vii)).
- (g) About April 12, 2019, Respondent, by Ken Burch, via text message, informed employees that they had been terminated because they discussed wages, hours, and working conditions with other employees. GC 2A, p. 4 (Complaint Paragraph 4(b)).

For all the reasons described in the GC's Brief to the ALJ, and as conceded by Respondent by its failure to deny or rebut the allegations at the hearing or in its post-hearing brief, the Complaint allegations set forth above are proven violations of the Act.

III. Respondent's Bases for Terminating the Charging Parties Are Pretextual

Respondent's Brief to the ALJ further demonstrates that Respondent's proffered bases for terminating the four Charging Parties are pretextual. Respondent's alleged bases for the terminations are not supported by the record and are in many cases contradicted by documentary evidence.

First, Respondent continues to present a shifting timeline of events. Respondent asserts that D. Scruggs knew that he had been fired as early as April 5. R. Brief 27, ¶ 61. Yet, Nowrouzi admits that he did not tell D. Scruggs on April 5 that he was fired. T. 366: 17-22. Respondent argues that D. Scruggs would have known that he was terminated because he learned it from Brian Shields, the General Contractor's superintendent. R. Brief, p. 27, ¶ 63. In support of its argument, Respondent cites to Riley's testimony as lending credence to the idea that D. Scruggs had learned from Brian Shields on April 5th about his termination. Respondent's argument is wholly without merit. First, Respondent failed to call the one person who could substantiate this theory – Brian Shields. Second, there is no record evidence that Nowrouzi called Brian Shields on Friday April 5 and told him that D. Scruggs had been terminated. Third, there is no record evidence that D. Scruggs called Brian Shields on Friday, April 5th. Riley's testimony as to the date of his phone call falls with D. Scruggs falls well short of establishing that D. Scruggs had been terminated as of April 5. Respondent also contends that B. Scruggs and Monaco "learned of their terminations when it came time for them to pick up their checks." R. Brief, p. 27, ¶ 63. The record does not support Respondent's characterization of the timeline. The record evidence clearly supports that B. Scruggs was terminated the day after he picked up his check and Monaco was terminated three

days after he picked up his check. Despite irrefutable documentary evidence in the form of text messages and uncontroverted testimony about the dates they were terminated, Respondent's inability to admit to and stick with the dates that it fired these employees suggests that Respondent's bases for terminating the three masons are just as unreliable as its timeline.

Second, a reasoned evaluation of record evidence does not support that these three Charging Parties would have been fired for the bases cited by the Respondent. Respondent's argument that it would have terminated the three masons based on the quality of their work lacks factual support. Respondent's actions in April 2019 are inconsistent with its current position that the three masons were "just dreadful; an embarrassment that displayed both a lack of knowledge and skill" and were "fired due to their incompetence." R. Brief, p. 25, ¶ 59; p.20, ¶ 47. For example, as admitted by Respondent, it offered B. Scruggs "an opportunity to continue to work for M&T." R. Brief, p. 8, ¶ 18. Respondent's willingness to offer B. Scruggs a different job casts doubt not only Respondent's argument that these masons were fired for being "dreadful" and "incompetent" but on the severity of the errors. Similarly, Respondent's treatment of Monaco also raises questions about the legitimacy of Respondent's arguments on this matter. Monaco was not terminated until April 12. This was a week after Respondent claims the masons were terminated and only a day after Monaco and Nowrouzi exchanged text messages about when the job would be starting up again. GC 22, p. 1-3. Again, the timing of Monaco's termination does not lend credence to Respondent's argument that the masons were such terrible employees that they had to be terminated. Moreover, in its Brief to the ALJ, Respondent now attempts to suggest that it had safety concerns related to Monaco, something else not supported by record evidence. *See* R. Brief, p. 27, ¶ 63.

Respondent's arguments that the masons would have been terminated for working without authorization also lack factual support. In its Brief to the ALJ, Respondent writes that "the

discussion of time must start with the testimony of Mr. Ken Burch.” p. 13, ¶ 30. However, Ken Burch’s (Burch) testimony should be discredited as to the issue of whether the masons attempted to claim time when they were not authorized to work. Respondent contends that D. Scruggs and B. Scruggs reported to work prior to April 5 without authorization. R. Brief, p. 7, ¶ 15, p. 13; ¶ 29, p. 16, ¶ 37. Yet there is irrefutable documentary evidence in the form of text messages that both D. Scruggs and B. Scruggs were not only invited but authorized to be at work on April 3. GC 3, p. 1; GC 4, p. 5; GC 5, p. 1-2. There are only two explanations for Burch’s testimony on this issue. Either he intentionally misled the court, or he was unfamiliar with what happened between the employees and Nowrouzi in the days leading up to April 3 and 4. In either instance, his testimony should be discredited. The text messages between D. Scruggs and Nowrouzi on April 3 also reflect that the plan was for employees to work on April 4. GC 5, p. 4-9. The record contains no affirmative testimony that Respondent informed D. Scruggs or B. Scruggs on the evening of April 3 or the morning of April 4 not to report to work. While Burch contends that they were not authorized to be there, D. Scruggs had clearly worked out a plan with Nowrouzi to be there the following day. Burch did not testify that he told D. Scruggs that the plan had changed. In summary, Respondent’s argument that it would have terminated employees for showing up on April 3 and 4 without authorization is clearly pretextual given that irrebuttable evidence shows that they were authorized and expected to be there. As detailed in the GC’s Brief to the ALJ, neither Board law nor the record support Respondent’s defense to the terminations of the three masons.

Finally, Respondent’s argument regarding the termination of Chaney should be rejected because it, too, lacks factual support. In its Brief to the ALJ, Respondent contends that it “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.” p. 21, ¶ 50.

Respondent contends this is supported by text message evidence. R. Brief, p. 33, ¶ 77.

Presumably, Respondent is referring to GC 27 which is the only text message between Chaney and Nowrouzi that mentions April 15. However, GC 27 does not support Respondent's argument. In that text message, Nowrouzi informed Chaney that there was a problem with his paycheck and that "The accountant will be in the office sometime next Monday April 15 2019 5:00 p.m. week and he will recheck and will mail you the balance to the address in your employment document." GC 27, p. 2. There is no instruction from Nowrouzi to Chaney asking him to check in on April 15. The instruction was to provide an updated address by that date. Respondent has failed to prove that it had a legitimate non-discriminatory reason for the way it treated Chaney.

IV. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent's Brief to the ALJ fails to provide factual or legal justification for the unlawful conduct set forth in the General Counsel's Amended Consolidated Complaint and as supported by the record.

Date: November 19, 2019

Respectfully Submitted,

/s/ Julie M. Covell

Julie M. Covell
Counsel for the General Counsel
National Labor Relations Board,
Subregion 17 8600 Farley St Ste 100
Overland Park, KS 66212-4677
(913) 275-6527
Julie.Covell@NLRB.gov

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Reply Brief to Respondent's Findings of Fact Conclusions of Law to the Administrative Law Judge on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Division of Judges and with service by electronic mail on the parties identified below.

Dated: November 19, 2019

/s/ Julie M. Covell
Julie M. Covell
Counsel for the General Counsel

PARTIES RECEIVING ELECTRONIC MAIL:

Benny Harding
Benny@hardinglawkc.com

Donnie Scruggs
Donniescruggs17@gmail.com

Bryan Scruggs
bscrugz@aol.com

Conrad Monaco
Rdt974@gmail.com

Scott Chaney
scotthchaney@hotmail.com