UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

KENNY/OBAYASHI V, A JOINT VENTURE	
and	**CASE 08-CA-226350**
LABORERS' LOCAL UNION NO. 894 A/W LABORERS INTERNATIONAL UNION OF NORTH AMERICA	

COUNSEL FOR THE GENERAL COUNSEL'S
REVISED BRIEF TO ADMINISTRATIVE LAW JUDGE THOMAS RANDAZZO

Counsel for the General Counsel Cheryl Sizemore (General Counsel) respectfully files this revised brief with the Honorable Thomas Randazzo, Administrative Law Judge (ALJ). This matter was heard on August 6 - 9, and October 7, 9 and 10, 2019, by Judge Randazzo in Cleveland, Ohio. In this brief, General Counsel sets forth the operative facts and legal theories to sustain the allegations in the Complaint.[1]

This matter comes before Judge Randazzo based on a Complaint that issued on April 25, 2019, and its amendment on July 23, 2019, alleging that Kenny Obayashi V, a joint venture between Kenny Construction Company and Obayashi, USA, LLC, (Respondent) terminated its employee Ivan Thompson (Thompson) because of his union and other concerted activities in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. (Act) (Jt. Exh. 1)

As explained below, the record demonstrates that Respondent terminated Thompson in response to voicing his concerns and criticisms to Labor Relations Manager Catherine Moncada that Respondent's supervisors and managers discriminated against jobsite employees on the basis

[1] References to the official transcript in the proceeding will be referred to as "Tr." General Counsel Counsel's Exhibits will be referred to as "G.C. Exh." Respondent Exhibits will be referred to as "R. Exh." And Joint Exhibits will be referred to as "Jt. Exh.".

of their race and their union affiliation. Seven days after his concerted and protected communications to Moncada, Respondent terminated Thompson. The record evidence demonstrates that Respondent violated Section 8(a)(1) and (3) of the Act, and the General Counsel urges the ALJ to make such a finding, to issue the proposed conclusions of law and the proposed order, and to order the posting of a notice to employees.

I. ISSUES PRESENTED

1) Whether Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully terminating its employee Ivan Thompson in retaliation for his union and other concerted activities?

2) Whether Granite Construction, Inc.'s Labor Relations Manager Catherine Moncada constitutes an agent of Respondent within the meaning of Section 2(13) of the Act?

II. FACTS

A. BACKGROUND AND OVERVIEW

Respondent is a joint venture between Kenny Construction Company, a wholly-owned subsidiary of Granite Construction, Inc. (Granite), and Obayashi USA, LLC, a wholly-owned subsidiary of Obayashi Corporation. It is engaged in the construction of the Ohio Canal Interceptor Tunnel in Akron, Ohio. (Jt. Exhs. 1 and 2) The primary purpose of the Ohio Canal Interceptor Tunnel is to reduce sewage overflow from Akron, Ohio into the Cuyahoga River and nearby waterways. (Tr. 43) This construction project includes the excavation of a one mile-long and twenty-seven foot diameter tunnel. (Tr. 43) Respondent maintained three primary jobsites on this tunnel project, including the jobsite at-issue, known as the Cuyahoga site or OCIT 1. (Tr. 43-44)

Laborers' Local Union No. 894, affiliated with Laborers' International Union of North America (Local 894 or Union) represents laborers employed in the Akron, Ohio area. (Jt. Exh. 2; G.C. Exh. 1(i)) Respondent and Local 894 are signatories to a Project Labor Agreement (PLA) between the City of Akron, the Tri-County Building and Construction Trades Council and various affiliated unions. (Jt. Exh. 2) The PLA was executed on July 1, 2014 for purposes of facilitating construction of the Ohio Canal Interceptor Tunnel and to address the terms and conditions of employment of employees on this project. (Jt. Exh. 2; G.C. Exh. 14) Section 6 of the PLA contains a non-discrimination provision prohibiting discrimination based on age, race, creed, color, sex, veteran status or national origin as it relates to the hiring, training, promotion, transfer or termination of employees. (G.C. Exh. 14, p. 10) The PLA also provides that covered employees shall utilize the PLA's grievance procedure to resolve specified claims of employment discrimination. (G.C. Exh. 14, p. 10)

Since late 2016, David Chastka has been Respondent's Project Manager overseeing the overall direction, completion, and financial outcomes associated with the project. (Tr. 45; Jt. Exh. 6) Chastka retains and exercises final authority over employee hiring, performance reviews, layoffs, and terminations. (Tr. 100; Jt. Exh. 6) Respondent's General Superintendent Michael Quinn assists Chastka with employee termination and layoff decisions. (Tr. 46-50) Respondent's field supervisory personnel include the following: Night Shift Superintendent Terry Quinn; Foreman Mark Seese, who supervised yard activities and served as Thompson's immediate supervisor; Safety Manager Brad Swinehart; Foreman Jack Harris, who supervised tunneling activities, and Foreman Travis Heatley, who directed the night shift tunnel crew. (Tr. 46-50; Jt. Exh. 4)

Ivan Thompson is an African-American journeyman member of Local 894 and was employed by Respondent as a laborer from August 2017 until the events leading to his termination. (Tr. 710-728) Ivan Thompson's son, Monty Thompson (M. Thompson), is a Local 894 journeyman and is employed as a laborer on the same yard crew as Ivan Thompson. (Tr. 207, 1261-64)

B. THOMPSON'S TERMINATION

On August 9, 2018,[2] Local 894's Business Manager William Orr and Secretary Vern Floyd met with Chastka to discuss the Union's concerns that its members were receiving discriminatory treatment from Respondent's supervisors and managers based on their race and their union affiliation. (Tr. 110) Pursuant to the PLA, this meeting formally initiated a grievance on the discrimination issues. (G.C. Exhs. 6, 14) In support of Local 894's claims, Orr furnished Chastka with photographs of Caucasian employees and travelling laborers unaffiliated with Local 894, sleeping, smoking, and utilizing cell phones in derogation of Respondent's policies. (Tr. 111-112; GC. Exh. 3(b), 3(d), 3(e) and 3(g))

Following this meeting, the parties were unable to resolve Local 894's grievance and Chastka processed the grievance to the next contractual step. (Tr. 124; G.C. Exh. 6) Shortly thereafter, Respondent assigned the grievance for further investigation to Granite's Labor Relations Manager Catherine Moncada. (Tr.124; 488-490) By the time Respondent assigned the matter to Moncada, Orr notified both Chastka and Moncada that Local 894 had significant concerns about Respondent's pervasive discriminatory treatment towards employees on the basis of their race and their union affiliation. (Tr. 110, 432-433, 439, 488-490; G.C. Exh. 6)

On August 15, Moncada traveled to the Akron, Ohio jobsite to investigate Local 894's grievance and discrimination complaints. (Tr. 431) On August 16, Moncada interviewed

[2] Unless otherwise noted, all dates are in 2018.

Respondent's supervisors and foremen. (Tr. 434, 438) That evening, Orr and Floyd expressed the Union's concerns that Moncada's investigation was one-sided and that she failed to interview any employees to substantiate Local 894's complaints. (Tr. 547) Given the serious nature of the Union's allegations and its objection that she conducted a biased investigation, Moncada agreed to interview several current and former employees as part of her investigation. (Tr. 439-41) On August 17, Moncada interviewed former and current Local 894 members, including Ivan Thompson, in the presence of Orr and Floyd. (Tr. 223)

During his 45-minute interview, Thompson told Moncada his personal observations of the treatment of employees by Respondent's supervisors and managers. He also relayed to Moncada his conversations with his co-workers, as well as his conversations with supervisors and managers, about the treatment received by African- American employees and employees affiliated with Local 894 at the hands of Respondent's supervisors and managers. (Tr. 743)

Thompson began his interview describing Foreman Jack Harris as "the most fucked-up person in the world." (Tr. 744) Thompson detailed a racial incident in which Harris referred to him and his son Monty as "boys" when Harris discussed their job assignments with Master Mechanic Jason Dolan. (Tr. 744-48) Rather than immediately confronting Harris about his racially charged comment in front of his son and Dolan, Thompson told Moncada that he privately spoke with Harris to explain the inappropriateness of his comment. (Tr. 744-48) Thompson told Moncada he believed this incident caused Harris to deny Thompson and his son lucrative job assignments working with the master mechanic inside the tunnel. (Tr. 744–48) In short, Thompson told Moncada that he believed Harris is "a racist and cost me and my son $40,000." (Tr. 744)

Thompson further described to Moncada an incident in which Superintendent Quinn prevented him and M. Thompson from earning overtime pay. (Tr. 748-49) In that situation, a union carpenter requested assistance from Thompson and his son to build steps following the completion of a Saturday shift. Quinn denied Thompson and his son this overtime assignment. (Tr. 749-52) Quinn instead assigned this work to employees Andy Snyder and Raychel Shaffer, the daughter of Quinn's girlfriend. (Tr. 749-52) The union carpenter later told Thompson that the work completed by Shaffer and Snyder was of a lower quality than that evidenced by the work of Thompson and his son. (Tr. 749-52)

Thompson detailed to Moncada another example of Foreman Harris' preferential treatment towards a non-Local 894 employee in an incident he observed involving M. Thompson and traveler/laborer Raychel Shaffer. (Tr. 752, 753) In that incident, Shaffer asked M. Thompson to get her a broom. When M. Thompson refused Shaffer's request, Harris approached him in an aggressive and confrontational manner. (Tr. 753) Despite M. Thompson's attempt to walk away from Harris, Harris escalated the confrontation until Ivan Thompson and another individual were forced to physically separate Harris from M. Thompson. (Tr. 754-55)

Thompson also told Moncada that most African American employees were excluded from the more lucrative work assignments inside the tunnel. (Tr. 755) During the interview, Thompson urged Moncada to review Respondent's assignment records which would corroborate Thompson's observations that employees who worked above ground, in lower paying positions, "pretty much was black" and that employees who performed higher paying assignment inside the tunnel, "pretty much was white." (Tr. 755, 756)

Thompson also noted to Moncada his observation that Respondent's safety manager Brad Swinehart applied Respondent's safety policies concerning the wearing of safety glasses, gloves, and equipment accidents in a disparate manner. (Tr. 757–59)

Thompson also raised to Moncada several additional incidents involving racial discrimination, including the termination of African-American employee Cedric Coleman, who was subsequently replaced on the night shift tunnel crew by the son of one of the crew members. (Tr. 780, 781) Thompson told Moncada that Coleman was discharged before he had sufficient time to learn his job. (Tr. 780, 781) In addition to Coleman, Thompson recounted that Respondent terminated another African American male employee because the Respondent could not understand his heavy accent despite its retention of a non-African-American employee named Contaro, who is similarly difficult to understand due to his accent. (Tr. 783)

Thompson relayed rumors that Foreman Harris was "getting rid of all the black people on the job that he can" (Tr. 783) as the job came closer to completion. Thompson told Moncada, "if those were the kind of people that she wanted running her company or whatever, that she's going to have a whole bunch of [sic] problems over and over and over again." (Tr. 783)

On August 24, a mere seven days later, Superintendent Quinn approached Thompson while he was working in the yard and handed Thompson a check without offering any explanation. (Tr. 732) Thompson waited for Quinn to say something and Quinn remained silent. (Tr. 733) Thompson took the check and told Quinn, "well I guess we all got to go sometime." (Tr. 733)

At the hearing, Respondent asserted that Thompson was laid off on August 24 because the concrete segment work that Thompson had been temporarily performing due to the injury of M. Thompson was complete. (Tr. 139, 339; R. Exh. 8)

III. LAW & ARGUMENT

Respondent terminated Thompson because he participated in the Respondent's investigation into the discrimination grievance filed by the Union, and his candid and forthright responses to Moncada in that investigation supported that there was, in fact, discrimination occurring at the job site.

In determining whether an employee's termination is unlawful in violation of Section 8(a)(1) and (3) of the Act, the Board applies a mixed motive analysis as set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's union or protected conduct was a motivating factor in the employer's adverse action. The General Counsel satisfies this burden by showing that: (1) the employee engaged in union and/or protected concerted activities; (2) the employer had knowledge of that activity; and (3) the employer harbored animus against such activities. *Strongsteel of Alabama*, 367 NLRB No. 90 *slip. op.* at 1 (Feb. 13, 2019); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-85 (2011). Regarding evidence of animus, the General Counsel must establish a connection or nexus between the employer's anti-union animus and the adverse action taken against the employee. *Tschiffrie Properties Ltd.*, 368 NLRB No. 120, *slip op.* at 3 (Nov. 22, 2019). Such a nexus can be shown by proximate timing of the employer's adverse action in relation to the employee's protected activities. *Id*.

Upon the General Counsel's showing, the burden shifts to the employer to prove it would have taken the same action in the absence of such protected conduct. *Strongsteel of Alabama*, *supra.* at 2. If the employer's proffered reasons are pretextual (i.e., either false or not actually relied upon), it fails by definition to show that it would have taken the same action for those reasons

regardless of the protected conduct. See e.g., *National Captioning Institute, Inc.*, 368 NLRB No. 105, *slip op.* (October 29, 2019); *Parkview Lounge, LLC*, 366 NLRB No. 71 *slip. op.* (April 26, 2018); *K-Air Corp*. 360 NLRB 143, 144 (2014); *LA Film School, LLC* 358 NLRB 130 (2012) citing *Golden State Foods Corp.,* 340 NLRB 382, 385 (2003).

In the instant case, the credible evidence establishes that Respondent discharged Thompson because of his union and concerted activities in violation of the Act. The Respondent's contention that he was laid off for lack of work is belied by the record evidence that shows that Thompson would not have been laid off or terminated absent his protected activities.

1. Thompson Engaged in Union and Protected Concerted Activities

There is no question that Thompson engaged in union and concerted activities when he participated in the grievance investigation interview with Moncada on August 17. The purpose of Moncada's meeting with Thompson was to investigate the Union's claims of racial and union discrimination on the jobsite. Moreover, Local 894 representatives Orr and Floyd were present during Thompson's interview with Moncada. Thompson communicated his personal observations of racist and other discriminatory behavior by Respondent's supervisors and managers, including Harris, Quinn and Swinehart. Thompson's communication with Moncado was union activity, inasmuch as the interview was part of Moncado's investigation into the discrimination grievance filed by the Union. Moreover, it is well-established that union and concerted efforts by employees to alleviate racially discriminatory employment conditions are protected under the Act. See *Vought Corp.,* 273 NLRB 1290, 1294 (1984).

At the hearing, Thompson testified in a sincere and forthright manner. In his meeting with Moncado, Thompson gave her accurate descriptions, based on his personal observations, of Respondent's practices at the jobsite. Of the employees interviewed as part of its grievance

investigation, Thompson was the only one who gave Moncado extensive accounts with consistent details of incidents at the jobsite supporting the Union's discrimination grievance. Thompson specifically identified supervisors and managers who he observed engaged in discriminatory conduct, including Superintendent Mike Quinn and Foreman Jack Harris. (Tr. 725–752) In *Honeywell Inc.,* 250 NLRB 160, 161 (1980), the Board found that "naming supervisors and others as engaging in racial discrimination" is protected activity. Thompson further provided Moncada with specific incidents of employees who received unfavorable and otherwise disparate treatment at the jobsite on the basis of their race and their union-affiliation. Established Board precedent supports that Thompson's conduct was protected union and concerted activity. See*, M.W. Kellogg Contractors, Inc.*, 273 NLRB 1049 (1984).

2. Respondent Clearly had Knowledge of Thompson's Union and Protected Concerted Activities Prior to His Termination

While it is anticipated that Respondent will claim that Chastka and Quinn lacked knowledge of Thompson's protected union and concerted activities prior to the August 24 termination, this claim is easily refuted by the record evidence. Acting on behalf of Respondent, Moncada conducted the investigation into the Union's grievance, sharing her findings with Chastka as her investigation proceeded. The record supports that Moncada relayed the substance of Thompson's interview with Chastka before Thompson's August 24 discharge. Accordingly, the General Counsel submits Respondent had knowledge of Thompson's union and protected activities.

A. Catherine Moncada is a Statutory Agent of Respondent

In its Answer, Respondent denies that Granite's Labor Relations Manager Moncada is a statutory agent for the Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(i)) In assessing whether an individual is a statutory agent, the Board applies common law agency principles. *Dr. Rico Perze Products*, 353 NLRB 453 (2008). An agency relationship can be

established by vesting an agent with actual or apparent authority. *Cornell Forge Company*, 339 NLRB 733 (2003). Respondent conferred actual authority upon Moncada when it identified her as its representative in the investigation and processing of the Union's grievance. Both Moncada and Chastka admitted that Moncada, on behalf of Respondent, was responsible for processing the PLA grievance filed by Local 894 alleging systemic race and union discrimination at Respondent's jobsite. (Tr. 489, 490) Respondent held Moncada out to be its agent in the processing of the Union's grievance and Moncada held herself out to the Union's representatives and Thompson as the Respondent's agent. In this connection, she interviewed supervisors, managers, and employees, including Thompson. Moncada also met and communicated with Local 894 representatives during her investigation, as well as in the effort to resolve the grievance on behalf of Respondent. Moreover, as explained below, Moncada, in her capacity as the Respondent's grievance representative, shared her investigatory findings with Chastka prior to Thompson's August 24 termination. (Tr. 489, 490; G.C. Exhs. 7, 10, 11) General Counsel urges the ALJ to find that Respondent conferred actual authority to Catherine Moncada to act on its behalf and to conclude that Moncada was an agent within the meaning of Section 2(13) of the Act.

B. Respondent, through Moncada, Possessed Knowledge of Thompson's Union and Protected Activities.

Knowledge of an employee's union and protected activities may be established through either direct or circumstantial evidence from which a reasonable inference may be drawn. *Montgomery Ward and Co.,* 316 NLRB 1248 (1995).

Chastka admits that shortly after Moncada began her investigation, he became aware of racially inappropriate conduct that was occurring at the jobsite. (Tr. 164) Moncada's testimony and the August 20 email exchanges between Moncada, Chastka and Project Manager John Criss

confirm that Respondent was aware of the substance of Moncada's interview with Thompson shortly before his discharge. (G.C. Exh. 10)

Moncada admits that on August 18, one day after her interview with Thompson, she met with Chastka and Criss to discuss the Union's claims of race and union discrimination. (Tr. 473) Moncada's August 20 email exchange with Chastka and Criss references an August 18 meeting they had, stating that "everything that they *discussed* [is] confidential" and based on these prior discussions, she asked that they provide her certain documents in connection with the investigation. (emphasis added) (G.C. Exh. 10) Moncada's insistence that Respondent maintain confidentiality regarding their prior discussion leaves little doubt that Moncada, Chastka and Criss discussed specific information gained from Moncada's investigation, including Thompson's observations of the discrimination in the workplace supporting the allegations of the Union's grievance. (G.C. Exh. 10)

Moncada's August 20 e-mail requests that Chastka and Criss provide her with information she learned exclusively through her interview with Thompson. (G.C. Exh. 10) Moncada identified certain individuals, including Foreman Dolan and Carl Johnson, whom Thompson specifically referenced to her in his August 17 interview. (G.C. Exhs. 10, 11, 12) Moncada's August 20 e-mail requests that Chastka and Criss conduct an "overall review of the movement of personnel from the tunnel to the portal to the yard" and that they need to take the allegation related to the movement of local hires seriously. (G.C. Exh. 10) Thompson communicated to Moncada during his interview that Local 894 African American employees were discriminatorily excluded from working in the tunnel or removed prematurely from tunnel assignments. (Tr. 745-752; GC Exh. 10) Thompson asked Moncada to corroborate his observations by seeking job site assignment

records showing that "everybody on the top pretty much was black," and everybody in the tunnel "pretty much was white." (Tr. 755, 756)

Moncada's August 20 e-mail to Chastka and Criss also requests other information which she learned from her August 17 interview with Thompson. This includes written documentation concerning the broom incident between M. Thompson, Raychel Shaffer and Foreman Harris, yet another event relayed to Moncada by Thompson. She further requested the contact information for Jason Dolan and documents showing Respondent's enforcement of policies concerning personal protective equipment (PPE) as Thompson contended that Swinehart disparately enforced these policies. (G.C. Exh. 10) The similarity between Thompson's interview subject matter and Moncada's e-mail to Chastka and Criss is not mere coincidence. A reasonable inference can be drawn that she shared her investigation findings, including the incidents raised and the participants in the investigation, directly with Chastka and Criss during their August 18 meeting, and the follow up e-mails among the three.

General Counsel notes various inconsistencies regarding Chastka and Moncada's testimony on the grievance investigation and the subsequent information Moncada shared with Chastka. Despite Chastka's contention that he did not know of the underlying investigatory findings from Moncada prior to Thompson's discharge, Respondent's August 23 e-mail suggests otherwise. (Tr. 127) In the e-mail dated August 23 from Moncada to Union representative Orr states, "Dave [Chastka] and I have been working together investigating the complaints made by its union members." (G.C. Exh. 7)

At the hearing, Moncada repeatedly denied that she conducted any investigation concerning Thompson's complaint regarding the broom incident among M. Thompson, Shaffer and Dolan. (Tr. 449, 482) G.C. Exh. 10, however, directly contradicts her testimony. When

Moncada was confronted with her August 20 e-mail to Chastka and Criss asking for information related to the broom incident, she admitted that she asked for the information to determine if any discipline issued. (Tr. 474-78)

Likewise, testimony from Chastka and Moncada claiming that Moncada did not disclose to Chastka the identity of employees and supervisors who were interviewed in her grievance investigation is undermined by Moncada's August 23 e-mail to Chastka. (G.C. Exh. 10) In the August 23 e-mail, Moncada specifically identified an employee named Wilk and his job site concerns regarding the qualifications of certain laborers. The email exchange also identifies Supervisor Mark Seese as the individual who complained about time card changes. (G.C. Exh. 10) Both Wilk and Seese were interviewed as part of Moncada's grievance investigation. (Tr. 968, 975-77) A reasonable inference can be drawn that other employees who participated in Moncada's grievance investigation, including Thompson, were identified by Moncada to Chastka in their discussions about the Union's discrimination claims. Given that Thompson provided the most consistent and replete accounting of discrimination on the jobsite, identifying Foreman Harris and Superintendent Quinn as bad actors, it is implausible that Moncada would not communicate those events and Thompson's identity to Chastka in their follow up discussions regarding the grievance investigation.

Finally, Respondent's contention that Superintendent Quinn's phone log establishes that Respondent lacked knowledge of Thompson's protected activity prior to his August 24 termination is logically flawed. While Quinn's phone log shows he did not make or receive telephone calls from Moncada's phone number from August 17 through August 24, that phone log does not account for the universe of conversations between or among Moncada, Chastka, Criss and/or Quinn. While cellular telephones are ubiquitous, there are other avenues of communication,

including land lines, other cellular telephones, electronic mail, text message, walkie-talkie, in-person communications. Quinn's cell phone records prove only that this one device did not communicate with Moncada's telephone number from August 17 to August 24. Significantly, Chastka's own testimony that he spoke directly with Quinn regarding its layoff decision during the weekend of August 18 belies any contention that the Quinn's cell phone records prove that the Respondent lacked knowledge of Thompson's protected activities. (Tr. 141) Moreover, Quinn testified that he was aware that Thompson was interviewed by Moncada. (Tr. 1084)

3. Respondent Held Animus Toward Thompson's Union and Protected Activities and There is Overwhelming Evidence that the Asserted Reasons for His Discharge are Pretextual

With regard to the third element of the *Wright Line* test, the Board considers circumstantial as well as direct evidence to infer discriminatory motive or animus, such as: (1) the timing or proximity of the protected activity and adverse action; (2) departure from past practice; and (3) evidence that an employer's proffered explanation for the adverse action is a pretext. See e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, *slip op.* at 14 (May 13, 2018); *Novato Healthcare Center*, 365 NLRB No. 137, *slip op.* (Sept. 29, 2017); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011).

There is overwhelming evidence that Respondent's claimed reasons for Thompson's termination are pretextual. In *Electrolux Home Products, Inc.,* 368 NLRB No. 34, *slip op.* (August 2, 2019), the Board noted that evidence of pretext, standing alone, cannot establish that the actual reason an employer's unlawful actions is animus against union or protected concerted activities. Unlike *Electrolux,* in addition to the compelling evidence demonstrating that Respondent's actions were pretextual, the close timing of Thompson's termination to his protected activities and

Respondent's departure in the manner it conducted prior layoffs show that Thompson's discharge was unlawfully motivated.

A. Timing of Thompson's Permanent Layoff/Discharge

It is well-established that the timing of Respondent's discriminatory actions is strong evidence of unlawful motivation. *Success Village Apartments*, 348 NLRB 579, 579 fn. 5 (2006); *Detroit Paneling Systems, Inc.,* 330 NLRB 1170 (2000); *Maslund Industries*, 311 NLRB 184 (1993). Thompson's termination seven days after his cooperation in Respondent's grievance investigation in which he was forthcoming with racial and union discrimination perpetrated by Respondent's supervisors and managers supports that his discharge was unlawfully motivated.

B. Respondent's Departure from Past Practice

An employer's deviation from past practice may be considered evidence of animus. *Allstate Power Vac, Inc.*, 354 NLRB 980 (2009). Respondent asserts that Thompson's August 24 termination was a part of its reduction in force as its work neared completion. Respondent failed to give the Union or Thompson any written notification of an impending lay off. On or about December 15, 2017, Respondent laid off yard and tunnel crew employees for a three-week period. (G.C. Exh. 4). Respondent provided the Union with prior written notice of the employees subject to layoff and their subsequent recall dates. (G.C. Exh. 4) Respondent's departure from its past practice of giving notice of a lay off caused Local 894's Business Manager Orr to e-mail Moncada questioning the Respondent's abrupt decision to have a layoff without notice to the Union, coupled with questioning its selection of Thompson for layoff and whether his selection was due to his cooperation in the grievance investigation. (G.C. Exh. 16)

C. Respondent's Proffered Explanation for Thompson's Layoff is Pretextual

Even more compelling is the overwhelming evidence showing that Respondent's asserted explanation for Thompson's termination is pretextual. Respondent claims that Thompson was laid off because the concrete segment delivery work remaining in the yard was nearly complete. While such segment delivery work was complete, the record evidence shows that prior to Thompson's August 17 union and other protected activities, Respondent considered Thompson its most knowledgeable and qualified yard crew employee. (Tr. 91 93-96, 245-246) Despite these qualifications, upon his layoff, Thompson's yard assignments, unrelated to the concrete segment delivery work, were reassigned to other employees. The yard work, specifically many of the yard assignments performed by Thompson, remained ongoing for numerous months after August 24, belie Respondent's contention that there was a lack of work justifying a layoff. The General Counsel submits that but for his protected activities, Thompson would have retained his yard crew position.

1) Respondent Viewed Thompson as its Most Knowledgeable and Qualified Yard Crew Member

Chatska valued Thompson as a very good worker. (Tr. 91) Indeed, there is no evidence that Thompson received prior discipline or violated Respondent's safety rules. (Tr. 91) During the course of his employment, Thompson mastered all of the qualifications necessary to perform the requisite duties for a yard crew position, and notably was the only yard crew member satisfying these requirements. (Tr. 245, 246) The record is replete with Thompson's versatility in all aspects of his work. Thompson assisted with the assembly and construction of the project's tunnel building machine (TBM). (Tr. 710-711) In the Fall 2017, Thompson was responsible for setup/completion of the batch plant, construction of steps, completion of a dry house's plumbing system, maintenance of the dry houses, as well as the assembly of storage containers referred to as conexes. (Tr. 714-18) After the assembly of the conexes, Thompson organized, and distributed

tools and equipment stored in the conexes. (Tr. 212, 213; 716,717) Thompson prepared, packaged and shipped lumber, tools and equipment necessary for the project. (Tr. 723, 724) He stuffed wind bags utilized in the tunnel and assembled bag clips. (Tr. 725) He also performed general maintenance activities in the yard including tree removal and fence replacement. (Tr. 720) In the Summer 2018, Thompson was assigned to assist M. Thompson with the processing and documentation of concrete segment deliveries for the project. (Tr. 211, 212; 720-721) The concrete segments consisted of heavy concrete rings utilized to build the tunnel walls. (Tr. 721) At the same time, Thompson continued to handle other yard crew duties, including the organization of the convexes, shipping and distributing tools and equipment involved in the tunnel excavation work, as well as yard maintenance. About August 7, M. Thompson sustained an injury requiring Thompson to handle and process all of the concrete segment work. (Tr. 1279)

Despite Respondent's claim that Thompson was laid off because the concrete segment delivery work had been completed, Thompson's immediate supervisor, Mark Seese testified that at the time of his layoff, Thompson was the most knowledgeable yard crew employee on the jobsite to perform the remaining yard duties.[3] (Tr. 245, 246)

At the hearing, Supervisor Seese offered credible testimony that Thompson possessed vast knowledge regarding the location of parts, tools and equipment necessary to complete yard work. (Tr. 245-246) Seese testified that when Superintendent Quinn needed parts or equipment shipped to another jobsite, he routinely selected Thompson to locate, gather and place the materials in the

[3] In its complaint, General Counsel did not allege Mark Seese to be a statutory supervisor as he did not participate in Respondent's decision to layoff or to terminate Thompson. From about November 2017 through August 24, 2018, Seese was employed as a foreman for the yard crew. In that capacity, Seese directed and assigned work, approved employee leave requests, and effectively recommended discipline of employees. (Tr. 46-50, 200, 201, 204). Superintendent Quinn testified that foremen directed and assigned work to employees and had the ability to recommend employee discipline and termination. (Tr. 1079) The uncontroverted evidence demonstrates that Seese possessed primary indicia of supervisory authority within the meaning of Section 2(11) of the Act. *Kentucky River Community Care,* 532 U.S. 706 (2001). Accordingly, General Counsel urges the ALJ to find that at all material times, Respondent's foreman Mark Seese was a supervisor of Respondent within the meaning of Section 2(11) of the Act.

convexes. According to Seese, "[n]obody else knew where the stuff was. Anytime something needed organized, Ivan was very organized and clean, so I knew he would get the job done and get it done well." (Tr. 246) General Counsel submits that based on his qualifications and skills, Respondent's selection of Thompson for the August 24 layoff or in the alternative, its decision to terminate Thompson was based on unlawful considerations.

2) Respondent's Proffered Explanation that Thompson's August 24 Layoff was Due to the Lack of Yard Work is Unsupported by the Evidence

The record establishes that once Respondent completed the concrete segment delivery and TBM work on the project, ample yard work remained for several months after Thompson's August 24 termination. Accordingly, Respondent's explanation that Thompson's August 24 layoff was necessary is unsupported by the record evidence.

At the hearing, Seese provided extensive testimony that it was expected that yard crew employees would remain on the job site well after the TBM and tunneling work was completed. (Tr. 218-223) On several occasions, Superintendent Chastka told Seese that once the tunneling job was complete, yard crew employees would remain employed to load and ship equipment to other locations. (Tr. 219) Chastka's direct report Bob Rautenburg told Seese that yard employees would continue to work at the jobsite for at least eight months after the tunnel was completed. Both Rautenburg and Superintendent Quinn told Seese that the yard crews would be the final employees phased out of the project. (Tr. 220-221)

Respondent's business records corroborate that the yard work remained ongoing well after Thompson's August 24 layoff/termination. Additionally, on July 5 and July 18, Respondent requested that the Union furnish three yard crew or surface employees to work for approximately three to four months in the same yard where Thompson worked. (G.C. Exhs. 32(a), 32(b))

Respondent's request for additional yard employees about a month prior to Thompson's alleged layoff for lack of work does not stand to reason.

Respondent's time card records corroborate that there was ample yard work remaining for several months after Thompson's August 24 layoff/termination. Time card records reveal that from August 27, 2018 through January 2, 2019, yard crew members, including Master Mechanic Nucci and Operating Engineer Shaffer, as well as tunnel employees received overtime and Saturday hours for performing yard work that had previously been performed by Thompson. (Jt. Exh. 3(a) p. 1864, 1903, 1932, 1936, 1948, 1952, 1956, 1960, 1964, 1968, 1976, 1980, 1984, 1988, 2001, 2006, 2010, 2014, 2018, 2022, 2025, 2029, 2033, 2037, 2041, 2045, 2048, 2052, 2055, 2059, 2062, 2066, 2069, 2076, 2082, 2086, 2091, 2096, 2101, 2105, 2112, 20117, 2122, 2127, 2132, 2137, 2149, 2154, 2159, 2164, 2173, 2178, 2183, 2188, 2193, 2197, 2201, 2205, 2209, 2216, 2219, 2222, 2225, 2228, 2234, 2238, 2242, 2246, 2250, 2254, 2257, 2260, 2263, 2266, 2269, 2272, 2274, 2277, 2280, 2283, 2295) Specifically, time cards dated September 15 and September 22 show that Respondent paid overtime to eleven tunnel employees to do yard work, including work on conexes, and cleaning and maintenance of the shop. These jobs were previously performed by Thompson. (Jt. Exh. 3(a) p. 1947, 1971)

Respondent cannot credibly argue that there was a lack of work in the yard. The record is replete with evidence that there was plenty of work in the yard that was performed by yard employees with fewer qualifications than Thompson

3) Respondent's Retention of Yard Crew Employee Mark Strong Over Thompson Based on Strong's Abilities and Team Work is False and Pretextual

Respondent's contention that it selected Thompson for its August 24 layoff rather than yard crew employee Mark Strong because Strong possessed greater abilities and due to his team work

is disingenuous. Strong lacked the level of experience possessed by Thompson. Respondent hired Strong for the yard crew on July 10 and Thompson possessed almost a year more experience than Strong at the time of Thompson's termination. (Tr. 1032; Jt. Exh. 3(a)) Unlike Thompson, Strong's primary duties consisted of cleaning, weed whacking and yard maintenance and he lacked the versatility in job skills and duties that Thompson possessed. (Tr. 238) Unlike Thompson, Strong was issued a written discipline. Just nine days prior to Thompson's termination, Strong was written up for damaging electrical wires, failing to immediately report the damage, and denying the damage to his foreman. (Tr. 234–2336; G.C. Exh. 8) During the investigation of the damage, Strong denied that he was involved. (Tr. 234, G.C. Exh. 8) Further, while Strong claimed that he worked with Thompson performing concrete segment work, Seese did not corroborate this claim and Respondent's time card records fail to show that Strong performed such work prior to August 24. (Tr. 237-38; Jt. Exh. 3(a), p. 1648-1855). Additionally, Strong worked at other locations prior to Thompson's termination. (Tr. 1036; Jt. Exh. 3(a) p. 1836, 1840, 1842, 1843)

At hearing, Superintendent Chatska attempted to shift Respondent's reasons for retaining Strong over Thompson. Initially, Chatska denied that Strong was retained over Thompson because of Strong's " team work." (Tr. 930, 931 However, when confronted with his affidavit in which he addressed this matter, Chatska admitted that team work was part of the reason he retained Strong over Thompson.[4] The Board has found that references to employees for "not being a team player" are coded references or euphemisms for union and or protected concerted activities. *See*, *Fort Wayne Foundry Corp.*, 269 NLRB, 127, 132 (1989).

On direct examination, Chatska was evasive and unable to provide any logical explanation to support that Strong had better abilities or was a better at team work than Thompson:

[4] The Board has held that a witness' credibility is suspect when there is a substantial variation between an affidavit and testimony. *Kern's Bakeries, Inc.,* 227 NLRB 1329, 1329 at fn. 1, 1330 at fn. 2 (1997).

> Q. You said to General Counsel that you considered team work and ability in your decision in including Ivan in the reduction in force. You also, though, said that it wasn't because he was not a team player. So can you just explain what you meant by that?
>
> A. All I meant was that, you know, when we get down to that part of the job it's hard because people have got to go, and sometimes you're choosing between two good people. In my opinion, what I was trying to say there was that Ivan didn't necessarily lose that position because he wasn't a good worker, or he wasn't a team player. It was just a decision we had to make. We were going to send somebody home regardless. (Tr. 1140-41)

At the hearing, Chatska was unable to justify retaining Strong over Thompson and he readily admitted that he had minimal contact with Strong prior to Thompson's layoff/termination. (Tr. 930) Further, Chatska attempted to shift the responsibility to Superintendent Quinn to identify who should be selected for layoff. Not surprisingly, at hearing, Respondent failed to elicit any testimony from Quinn to support Chastka's testimony as to why Thompson was selected for layoff over Strong. An ALJ may discredit an employer's witness where its counsel fails to question a witness on significant matters. *Nevada County Publishing Co.,*251 NLRB 1030, 1038 (1980).

Based upon the foregoing, General Counsel submits that Respondent's claimed reasons for Thompson's layoff are false, not actually relied upon and are pretextual. Respondent's claim that Thompson was laid off is false. He was not recalled despite the ample availability of surface and yard work that he performed. Rather, Thompson was terminated and replaced.

The ALJ should find that Thompson was discharged by Respondent and his union and protected activity regarding Respondent's discriminatory employment practices was a motivating

factor in his discharge. The ALJ should further fine that Respondent would not have discharged Thompson in the absence of his union and protected activities.

IV. CONCLUSION

On the basis of the entire record, particularly the facts referred to above, and the applicable law, the General Counsel requests that the Administrative Law Judge issue the attached proposed conclusions of law and proposed order and posting of notice to employees.

Dated at Cleveland, Ohio this 13th day of December 2019.

Respectfully submitted,

/s/ Cheryl Sizemore

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PROOF OF SERVICE

I hereby certify that I served the foregoing Brief on all parties by e-mailing true copies thereof today to the following at the addresses listed below:

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EXHIBIT A

PROPOSED CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act, on or about August 24, 2018, by its permanent layoff and/or termination of its employee Ivan Thompson.

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

EXHIBIT B

PROPOSED ORDER AND NOTICE TO EMPLOYEES

The Respondent Kenny/Obayashi V, A Joint Venture, and its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Discharging or otherwise discriminating against Ivan Thompson or any other employee for engaging in activities on behalf of Laborers' Local Union No. 894, affiliated with Laborers' International Union of North America, any other labor organization and/or protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Ivan Thompson full reinstatement to his former job, or if that job no longer exists, a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ivan Thompson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy action of the decision.

(c) Compensate Ivan Thompson for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Ivan Thompson in writing that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at Respondent's Cuyahoga jobsite in Akron, Ohio copies of the attached notice set forth below. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physically posting of paper notices, notices shall be mailed to all current employees and former employees employed by Respondent at its Cuyahoga jobsite in Akron, Ohio at any time since August 24, 2018. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. If the Respondent has gone out of business or closed the jobsite involved in this facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director of Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to steps that Respondent has taken to comply.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATION BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered use to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union activities on behalf of Laborers' Local Union No. 894, affiliated with Laborers' International Union of North America or any other labor organization and/or for engaging in protected concerted activities.

WE WILL NOT, in any like or related manner, interfere with your rights under Section 7 of the Act.

WE WILL offer Ivan Thompson full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ivan Thompson whole for the wages and other benefits from his discharge, less any net interim earnings, plus interest, and **WE WILL** also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Ivan Thompson for the adverse tax consequences, if any, of receiving a lump sum backpay award, and **WE WILL** file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL remove from our files all references to the discharge of Ivan Thompson and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

KENNY/OBAYASHI V, A JOINT VENTURE

_____

(Akron OCIT Project)

_____

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)