

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

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

and

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

Cases 09-CA-235304
09-CA-235307 et al.

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the General Counsel takes exceptions to the decision of the Administrative Law Judge, which issued on January 15, 2020, in the above matter.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel respectfully excepts to the decision of the Administrative Law Judge in this matter as follows: ^{1/}

1. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) of the Act when Respondent interrogated employees during a safety meeting on January 10, 2020. (ALJD p. 30)
2. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(3) and (1) of the Act when Respondent failed to promote Eric Faubel to the foreman position. (ALJD p. 36)

^{1/} References to the Administrative Law Judge's Decision which issued on January 15, 2020 are referred to as (ALJD p. ____).

3. The Administrative Law Judge's finding that Respondent did not violate Section 8(a)(3) and (1) of the Act when it reassigned Eric Faubel to work at the vet clinic. (ALJD p. 36)
4. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) of the Act by promulgating and maintaining a new "anti-harassment policy" on March 8, 2019. (ALJD p. 46)
5. The Administrative Law Judge's failure to include his finding of the Section 8(a)(1) and (3) violation regarding Respondent's March 27, 2019 discipline of Stephen Marolf in the Conclusions of Law, Remedy, Order or Notice to Employees. (ALJD pp. 51, 57-63; ALJD Appendix)

Dated at Cincinnati, Ohio this 11th day of February 2020.



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COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

This case is before the Board on the General Counsel's Limited Cross Exceptions to Administrative Law Judge David I. Goldman's decision which issued in the above matter on January 15, 2020. ^{1/} The General Counsel excepts to the Judge's decision that relates to Respondent's interrogation of employees during a safety meeting on January 10, 2019 and its promulgation and maintenance of an anti-harassment policy on March 8, 2019, both violative of Section 8(a)(1) of the Act. The General Counsel also excepts to the Judge's decision that relates to Respondent's failure to promote Eric Faubel and its isolation of Faubel, also both violative of Section 8(a)(3) and (1) of the Act. Further exceptions are taken to the Judge's failure to grant certain remedial measures relating to the finding that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined Stephen Marolf on March 27, 2019.

^{1/} The Administrative Law Judge's Decision is referenced herein as (ALJD p. _____, ll. _____); the General Counsel's exhibits are referenced herein as (G.C. Ex. _____); the hearing transcript is referenced herein as (Tr. _____).

EXCEPTION 1:

Counsel for the General Counsel excepts to the Administrative Law Judge's findings that Respondent did not violate Section 8(a)(1) of the Act when Daniel Akers, one of the two highest ranking officials at Respondent, asked employees during a safety meeting on January 10, 2019 whether they had been contacted by the Union. (ALJD p. 30, ll. 2-3) Union salt Eric Faubel recorded the meeting. (ALJD p. 5, ll. 5; G.C. Ex. 9, 9(b)) It is undisputed that during the meeting, Daniel Akers said to employees, "So the union guys, is what I've heard, is calling everybody. Is that true? Has everybody got a call from the union guy? Because there's some in Beckley, that they've gotten a call and maybe he is just targeting specific people. And, you know, we're an at will employer, I don't want anybody to think ah...Obviously, you can do whatever you want to, um, but I wanted to let you guys know that we, we enjoy working with every one of you..." (ALJD p. 5, ll. 40-47; G.C. Ex. 9, 9(b))

The Judge found that Respondent's questioning of employees was interrogation but not unlawful because it was rhetorical in nature for which an answer was not expected. (ALJD p. 29). The Judge relied on the audio recording contained in General Counsel Exhibit 9 rather than the transcript contained in General Counsel Exhibit 9(b) in so doing. (ALJD p. 30, ll. 4-6) The Judge noted that Daniel Akers did not wait for employees to respond, nor did anyone respond. (ALJD p. 28, ll. 10-12) In concluding that Daniel's questions did not violate the Act, the Judge seemingly failed to consider the evidence that just the day before, on January 9, Daniel Akers expressed to Eric Faubel his disdain for the Union, and then unlawfully interrogated Faubel about the Union. (ALJD pp. 4-5; 26, ll. 23) During the January 9 conversation Daniel had with Faubel, Daniel stated, in reference to Union Organizer Steve Hancock, "...I'm fully aware of all this crap going on with the union guys coming into our shop and one of our ex-employees

disgruntled got – has called or given our call list to the main union guy. And that union guy solicited every single employee of ours both in Charleston and in Beckley.” (ALJD p. 4, ll. 50-51; 5, ll. 1-2; Tr. 143, ll. 4-10; G.C. Ex. 8, 8(b)) Daniel continued, “And so the funny thing I think about that is that same union guy came into my shop trying to get me to hire 15 guys. So if the union’s so great and has all of this work, then why is he trying to get me to hire 15 of his guys that he has just standing around with their hands in their pocket?” (ALJD p. 5, ll. 8-11; Tr. 143, ll. 12-17; G.C. Ex. 8, 8(b)) Thereafter, on January 14, 2019, just four days after the safety meeting, Owner Dan Akers asked Faubel about his union affiliation. (ALJD p. 30; Tr. 192, ll. 8-11; G.C. Ex. 10, 10(b))

Further undermining the Judge ‘s finding that Daniel Akers’ interrogation was lawful, is his conclusion that Respondent unlawfully solicited employee complaints and promised to remedy them immediately after inquiring about their union activity. (ALJD p. 28, ll. 11-35, 40-42) Therefore, considering the totality of the circumstances, the timing of Daniel’s questions to employees, that Daniel unlawfully solicited grievances and promised to remedy them impliedly if employees refrained from union activity immediately after questioning employees about the union, the number of instances of unlawful conduct found to have occurred during the Union’s organizing campaign, Counsel for the General Counsel submits that Daniel’s questions to employees during the January 10 safety meeting were more than just rhetorical, but rather an unlawful attempt to interrogate employees about their union activities in violation of Section 8(a)(1) of the Act. (ALJD p. 28, ll. 40-42); See *Westwood Health Care Center d/b/a Medicare Associates*, 330 NLRB 935, 939 (2000) (following totality of circumstances and "Bourne" factors) (citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom.*; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). Further, *Camaco Lorain Mfg. Plant*, (2011) NLRB 1182,

1182 (2011); (ALJD p. 27, ll. 10-11) cited by the Judge, notes that an employee's attempts to conceal union support weigh in favor of finding an interrogation unlawful. Thus, the employees' silence in the fact of Daniel Akers question should be construed as supporting a finding of unlawful interrogation than rhetoric.

EXCEPTIONS 2 AND 3:

Counsel for the General Counsel also excepts to the Judge's failure to find a Section 8(a)(3) and derivative 8(a)(1) violation when Respondent failed to promote Eric Faubel about January 18, 2019, and when Respondent transferred Faubel to a smaller jobsite, thereby isolating him, on January 21, 2019. (ALJD p. 36, ll. 13-15, 24-25) The Judge concluded that Respondent's failure to promote Eric Faubel to the foreman position did not violate the Act because there was insufficient evidence to establish Respondent's knowledge of Faubel's union sympathies or activities at the time it declined his promotion. (ALJD p. 36) However, inferences of knowledge may be deducted from animus, the timing of a disciplinary action, an employer's general knowledge of union activities, the existence of disparate treatment, and the enumeration of pretextual reasons relative to the disciplinary matter at issue. See *T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 526, 528 (1995). Inherent in this concept of establishing knowledge is an understanding that an employer's knowledge of an individual's union activities and/or sympathies need not be proven where the evidence manifestly reveals that an employer's disciplinary action was prompted by an unlawful discriminatory motive. See *Treanor Moving & Storage Co.*, 311 NLRB 371 (1993); see also *T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 528 (noting a discharge motivated by an employer's *belief or suspicion* that an employee engaged in union activity violates the Act)(emphasis added) (citing *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), *enfd.* 657 F.2d 512 (3rd Cir. 1981).

In his decision, the Judge noted it was a “close call” inferring that Respondent knew of Faubel’s union affiliation as of the date he was denied the promotion, on January 18, 2019. (ALJD p. 34, ll. 8) The evidence indicates that on January 9, 2019, Daniel Akers asked Faubel if he had been solicited by the Union, to which Faubel said he had not. (ALJD p. 5, ll. 13; Tr. 145, ll. 1-4; G.C. Ex. 8, 8(b)). Then, before Owner Dan Akers called Faubel on January 14 to discuss the promotion, Dan Akers conducted a Google search on Faubel’s reference, John McDougal, at which time Dan Akers became aware that McDougal was a union contractor. (ALJD p. 8, ll. 37-38, 46-50; p. 34, fn. 18; Tr. 191, ll. 17-24) This evidence supports the premise that, at a minimum, Respondent suspected Faubel had union ties, so much that this suspicion led Dan Akers to mention to Faubel on January 14, 2019 that when he asked McDougal whether Faubel worked on the Union or non-union side, McDougal replied non-union, and Dan then asked Faubel whether he was a member of the Union. (ALJD p. 8, ll. 37-41, 47-50; Tr: 192, ll. 6-11; G.C. Ex. 11, 11(b))

Additionally, as of January 18, 2019, Respondent had already exhibited union animus to the point of unlawfully interrogating Faubel, unlawfully interrogating employees during the January 10 safety meeting, discussed above, and unlawfully soliciting grievances and promising to remedy them if employees refrained from organizational activity. (ALJD p. 26, ll. 24; ALJD p. 28, ll. 10-12; ALJD p. 29, ll. 38-40; ALJD p. 30, ll. 48-50; Tr. 145, ll. 1-4; 192, ll. 6-11; G.C. Ex. 9, 9(b), pp. 18-19)

The Judge also recognized Respondent’s sudden change of heart in promoting Faubel to foreman and concluded that the motive for its change of heart was an issue. (ALJD p. 32, fn. 16) He wrote that Respondent’s explanation for its change of heart concerning the promotion was “not very compelling” and barely plausible. (ALJD p. 34, ll. 26-30) Such finding belies his

conclusion that General Counsel failed to prove that Respondent was aware of, or at a minimum suspicious of, Faubel's union affiliation and/or sympathies as of the date he was denied the promotion. (ALJD p. 36, ll. 6-7)

Moreover, the Judge discredited Tim McGuffin's claim that Faubel was totally out of control during the January 18 meeting. (ALJD p. 34, ll. 26-28) Thus, it can reasonably be inferred from McGuffin's exaggerated testimony about the January 18 meeting that Respondent's abrupt "change of heart" in denying Faubel the promotion was linked to its suspicion or even knowledge that Faubel had ties with the Union. If Respondent had a justifiable reason for giving the foreman position to Jonathon Tierson, McGuffin would not have been so inclined to exaggerate Faubel's reaction to the matter in question; this conduct is evidence of pretext. See *T.K. Harvin & Sons, Inc.*, 316 NLRB 510 at 527.

Additionally, although the Judge noted that Respondent moved slowly and deliberately in its decision to fill the foreman position, the evidence indicates otherwise. (ALJD p. 35, ll. 51) To the contrary, after Respondent denied Faubel the foreman position on January 18, 2019, it moved quickly and abruptly in selecting Tierson for the promotion. (ALJD p. 11, ll. 5-7; Tr: 45, ll. 22-25; Tr. 202, ll. 17-21; Tr. 283, ll. 21-25; Tr. 284, ll. 4-8; Tr. 574, ll. 25; Tr. 575, ll. 1-8) Furthermore, Respondent failed to provide any evidence that Tierson was subject to the same vetting process as Faubel, that Tierson was asked to give references, or that Respondent investigated Tierson's background before offering him the promotion. The haste with which Respondent moved in selecting Tierson for the position, coupled with Respondent's persistent inquiries into Faubel's union affiliation, supports a finding that Respondent's sudden change of heart concerning its promotion of Faubel was caused by its concern that Faubel had Union ties.

Therefore, Counsel for the General Counsel requests the Board find that Respondent violated Section 8(a)(3) and (1) of the Act when it failed to promote Eric Faubel about January 21, 2019.

With respect to Respondent's immediate transfer of Faubel to the vet clinic on January 21, 2019, the Judge incorrectly dismissed the allegation on the same basis, i.e., that Respondent did not possess knowledge of Faubel's union activity at the time it made the assignment. (ALJD p. 36, ll. 22-25) However, as noted above, there is evidence to establish that Respondent was in fact aware of Faubel's union activity prior to the time it transferred him to the vet clinic. Additionally, Respondent failed to offer an explanation as to why it moved Faubel to the vet clinic other than that Faubel's services were needed there. (Tr. 210; G.C. Ex. 21) In doing so, Respondent moved Faubel away from The Crossings, it's biggest project with several employees, to a small project of similar work, with far fewer employees, because Faubel's union activity would make less of an impact. Thus, Counsel for the General Counsel submits that Respondent similarly violated Section 8(a)(3) and (1) of the Act when it transferred Faubel to the vet clinic jobsite about January 21, 2019, thereby isolating him from other employees.

EXCEPTION 4:

Counsel for the General Counsel also excepts to the Administrative Law Judge's finding that Respondent did not violate Section 8(a)(1) of the Act by promulgating and maintaining a new anti-harassment policy. (ALJD p. 46) General Counsel alleges that Respondent, by an insert distributed with employees' paychecks about March 8, 2018, violated Section 8(a)(1) of the Act. As noted by the Judge, General Counsel admittedly misquoted the language on the March 8, 2019 insert in the Complaint and in General Counsel's Post-Hearing Brief to the Administrative Law Judge. (G.C. Ex. 1(vv), p. 6; G.C. Brief at p. 51; Jt. Ex. 5) Notwithstanding this error, the Judge was at liberty to find a violation based on the actual unlawful language in

the insert because all relevant documents were received into evidence- Respondent's Employee Manual and the March 8, 2019 insert, record evidence establishes when Respondent promulgated both documents, and Respondent was provided an opportunity to defend itself at hearing and in brief. (ALJD p. 36, ll. 6-7; Jt. Exs. 1, 5; Tr. 94, ll. 1-8; Tr. 615-616); See *NLRB Division of Judges Bench Book Section 3-340*. See also, *In re Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 (2003)(default judgement case)(citing *NLRB v. Piqua Mumising Wood Products Co.*, 109 F.2d 552, 557 (6th Cir. 1940)("[t]he sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense."); see also *H.W. Weidco/Ren LLC d/b/a South Jersey Extended Care and United Food and Commercial Workers Union Local 152*, 367 NLRB No. 126, *3 (2019)(default judgement case wherein Member McFerran, dissenting, stated unlike in civil litigation, in an administrative proceeding such as this – where the filing of the complaint is preceded by the filing of an unfair labor practice charge by a third party and an administrative investigation – the respondent is already aware of the charges against it and has been given an opportunity to present its position)(citing *Artesia Ready Mix Concrete*, 339 NLRB 1224 at 1226)).

General Counsel submits that the language of the March 8 flyer speaks for itself. (Jt. Ex. 5) In the flyer, titled "Tired of Union Threats?", Respondent writes, "We are being told that some Sheet Metal union supporters are threatening some of our workers...It is a violation of

Federal Law for a labor union to threaten employees...It is also a violation of [Respondent's] anti-harassment policy...Anyone caught threatening our employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law." (Jt. Ex. 5) Evidence demonstrates that Respondent failed to distribute the flyer to Eric Faubel, Stephen Marolf, or Brandon Armstrong, all participants in the Union's strike. (Tr. 94, 231, 252, 340, 341, 440, 441)

Contrary to Respondent's position statement, the March 8 flyer was not quoted verbatim from its handbook because its employee manual does not mention police involvement. (G.C. Ex. 26, pp. 3, 15; Jt. Ex. 1, pp. 8, 12; Jt. Ex. 5) While Respondent had maintained the same anti-harassment policy in its employee manual since at least 2014, it implemented a new punishment of criminal prosecution in the March 8 flyer, directly in response to the Union's organizing campaign. (Tr. 93-94, 231; 340-341, 440-441; Jt. Ex. 1, 5) The document by its very nature uses language different than that contained in the employee manual, instituting harsher penalty for any alleged harassment. (Jt. Ex. 1 p. 8, ll. 13, 5) For these reasons, Counsel for the General Counsel submits that, in creating and distributing the March 8 flyer in response to the Union campaign, Respondent violated Section 8(a)(1) of the Act. (*The Boeing Co.*, 365 NLRB No. 154, *1 (2017) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

Section 8(c) of the Act provides that expressing views, arguments, or opinion is not an unfair labor practice so long as the expression does not contain a threat of reprisal or promise of benefit. (G.C. Brief at p. 52) Although the flyer first expresses Respondent's views on harassment by non-employee union officers, it then institutes harsher penalties for violation of its anti-harassment policy and threatens employees with criminal prosecution, rather than a written warning, suspension, or discharge for engaging in harassment as set forth in its policy. (Jt. Ex. 1,

p. 8, ll. 13; Jt. Ex. 5) Therefore, General Counsel asks the Board to find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining the flyer, which threatens employees for engaging in union activity. *Moffit Building Materials, Co.*, 214 NLRB 655, 656 (1974)

EXCEPTION 5:

Having found that Respondent violated Section 8(a)(3) and 8(a)(1) of the Act when it disciplined Stephen Marolf on March 27, 2019, Counsel for the General Counsel submits that this violation should have been included in the Conclusions of Law, Remedy and Order of the decision. (ALJD p. 51, ll. 35-36) In the Remedy, the Administrative Law Judge recommends, “The Respondent shall also be required to remove from its files any references to the unlawful discharge of Faubel and layoff of Armstrong and to notify them in writing that this has been done and that the discharge and layoff will not be used against them in any way.” (ALJD p. 59, ll. 37-39) In the Order, the Administrative Law Judge recommends that Respondent cease and desist from “Discharging, laying off, or otherwise discriminating against any employee for supporting the Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) or any other labor organization,” and that Respondent, within 14 days from the date of the Order, “remove from its files any reference to the unlawful discharge of Eric Faubel, and the unlawful layoff of Brandon Armstrong, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoff will not be used against them in any way.” (ALJD p. 61, ll. 35-37; ALJD p. 62, ll. 32-36) The Notice attached to the decision provides, “WE WILL NOT discharge you or lay you off because of your support for the Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) or any other labor organization,” and “WE WILL within 14 days from the date of this Order, remove from our files any reference

to the unlawful discharge of Eric Faubel and the unlawful layoff of Brandon Armstrong and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoff will not be used against them in any way.” (ALJD, Appendix) None of the remedial language refers to Marolf’s discipline.

While the intent of the Administrative Law Judge’s recommendation is clear when read in context, Counsel for the General Counsel requests that the Board conform the Conclusions of Law, Remedy, and Order with the overall decision and clarify that Stephen Marolf’s March 27, 2019 discipline will be rescinded and not be used against him in any way. (See generally, ALJD pp. 50-51)

Dated: February 11, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

February 11, 2020

The undersigned hereby certifies that the foregoing document, Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Counsel for the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision, were served by electronic mail to the following:

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