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

<b>In the Matter of:</b>	<b>National Labor Relations Board</b>
<b>Profex, Inc.</b>	<b>Region 3</b>
<b>and</b>	<b>Before: David I. Goldman, A.L.J.</b>
<b>International Union of Operating Engineers, Local 825</b>	<b>Case No. 03-CA-259352</b>

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**International Union of Operating Engineers, Local 825's**

**Post-Hearing Memorandum**

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## **PRELIMINARY STATEMENT**

This matter concerns Profex, Inc.'s ("Profex") unlawful termination of Christopher Wood ("Wood"), who is a member of the International Union of Operating Engineers, Local 825 (the "Union"), in retaliation for Wood engaging in protected union activity in violation of both Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act"). The record establishes that the anti-union animus harbored by Charlie Pelella ("Pelella"), the part owner and vice president of Profex, served as the motivating factor for Profex's termination of Wood, which came only after Wood engaged in protected union activity by politely requesting Pelella – in accordance with hiring hall protocol – to clear his transfer to a different project at a different location with the Union. This is a fact which can hardly be disputed as not only was Profex's unabashed anti-union animus well displayed at the hearing by Pelella, but Profex conceded that they had no intention of terminating Wood prior to his request that his transfer be cleared with the Union. At the hearing, Profex was unable to establish any defense to its unlawful actions, resorting to offering only a contrived, after-the-fact explanation that lacked credibility and does not survive examination of the evidence of record.

The record in this matter supports only one – inescapable – conclusion: Profex terminated Wood in retaliation for his protected union activity in violation of both Sections 8(a)(1) and 8(a)(3) of the Act.

## **STATEMENT OF FACTS ESTABLISHED AT THE HEARING**

Profex is a construction firm performing general contracting services. (Tr. 101:19-101:22). Profex is co-owned by Ronald Bloomer (“Bloomer”) and Charles Pelella (“Pelella”). Bloomer is the President of Profex and Pelella is its Vice President. (Tr. 100:17-100:19; 171:23-172:2). Profex is a signatory to a collective bargaining agreement with the Union which permits – and requires – Profex to obtain and employ operating engineers from the Union’s hiring hall to operate equipment on their jobsites. (Tr. Hearing Exh. A and B).

Wood is and has been an active member of the Union for approximately seventeen years. (Tr. 79:11-79:16). As a member of the Union, Wood only performs work for companies that are signatories to a collective bargaining agreement with the Union. (Tr. 80:14-80:16). Throughout the seventeen years that Wood has been a member of the Union, he has routinely obtained employment through the Union’s hiring hall (Tr. 80:5-80:7); and, in doing so, he has respectfully followed the Union’s hiring hall protocols as is required of members to retain hiring hall eligibility. Wood’s understanding of one such protocol was that, prior to accepting an employer-mandated transfer to a new project at a location other than the one to which he had been dispatched, the employer (i.e. here, Profex) must first clear the intended transfer with the Union and obtain pre-approval for the same. (Tr. 82:12-83:8; 59:24-60:10; 65:23-66:7). The Union hiring hall protocol – and Wood’s understanding of the same – was confirmed by the Union’s Business Representative Michael Ham (“Business Representative Ham” or “Ham”) who explained that the employer-initiated pre-approval protocol for location transfers was required to ensure that the hiring hall’s open employment referral list is managed efficiently, fairly and impartially. (Tr. 59:24 - 60::10). Thus, absent the direction of the Union and/or its hiring hall, Union operators may not self-dispatch

themselves to a location and new project other than the one they were originally dispatched to. (Tr. 59:24-60:10; 65:23-66:7).

On or around October 16, 2019, Profex, as a Union signatory employer, submitted a request to the Union's hiring hall for an operator for the Ulster County Project. (Tr. 43:5-43:16). Wood was subsequently dispatched from the Union's hiring hall to the Ulster County Project. (Tr. 43:5-43:16). Once there, Wood was employed by Profex as an operating engineer performing site work and operating equipment, including, but not limited to bull dozers and excavators. (Tr. 81:4-81:9). In the roughly five weeks that Wood was employed as an operator on the Ulster County Project – by all accounts – Wood established himself as not only a talented equipment operator but also a “perfect gentleman.” (Tr. 186:25-187:2; 103:13-103:15; 173:3-173:4; 182:2-182:10).

However, on or around November 20, 2019, despite “a lot of site work” still required on the Ulster County Project, Wood was informed by Pelella that he was being moved to a different location, the West Point Project, and was to start there the very next morning. (Tr. 81:19-82:9; 87:22-88:4). Prior to this, Profex had not expressed to either Wood or the Union that there was a lack of work or any issues at all on the Ulster County Project, let alone that the project would be shut down due to site and/or weather conditions. (Tr. 110:17-110:24). Nevertheless, when advised by Pelella of Profex's desire to relocate him to the West Point Project, Wood – true to form – politely responded that he did not have any problem with being transferred. However, he also respectfully informed Pelella that, per hiring hall protocol, Profex would have to notify Business Representative Ham or the Union's hiring hall of Profex's intention to transfer Wood to a different project at a different location and obtain Union pre-approval before Wood could report to the new location. (Tr. 82:12-82:20).

Perplexingly, Wood's simple request that Profex abide by the protocol of the hiring hall from which it had hired Wood was immediately met with hostility on the part of Pelella who responded "fuck the Union, fuck Mike Ham. I'm not calling." (Tr. 83:12-83:17). That evening, Wood contacted Business Representative Ham and informed him that Profex wanted to transfer him to the West Point Project. (Tr. 83:25-84:9).

The following day, November 21, 2019, in the absence of any confirmation that the Union had been contacted by Profex concerning his transfer to the West Point Project, Wood returned to the Ulster County Project. (Tr. 84:10-84:13). That day, Wood continued to perform site work relating to, among other things, the construction of a retaining wall on the Ulster County Project until mid-morning when he was approached by Pelella. (Tr.141:9-141:16; 84:21-84:24; 156:7-156:13). At some point, Pelella asked Wood why he had reported to the Ulster County Project. To which Wood responded that Profex had not contacted Business Representative Ham concerning his transfer, so he returned to the jobsite to which he had been originally dispatched. Wood, once again, politely reminded Pelella that Profex would have to contact the Union before he was permitted to report to a new jobsite at a different location. (Tr. 84:21-84:24). Pelella responded with another outburst of overt hostility to the Union: "**fuck 825, fuck the Union**, fuck Mike Ham. I'm going to call that motherfucker right now." (Tr. 84:25-85:2) (Emphasis added). Pelella then walked away from Wood and called Business Representative Ham. (Tr. 85:3-85:5; 44:3-45:6).

Pelella, admittedly, was heated and mad at Ham when he called him. (Tr. 174:14-174:23; 176:14-176:20). During the phone call, Pelella informed Business Representative Ham that Profex sought to transfer Wood to the West Point Project yet offered no explanation as to why Profex desired to remove Wood from the on-going Ulster County Project and have him start anew at the West Point Project. Nonetheless, Business Representative Ham responded that he did not have any

issue with the transfer of Wood but felt the contract between the Union and Profex required Profex to then request another operator from the hiring hall to operate the equipment on the Ulster County Project that Wood had been operating for the past five weeks. (Tr.177:9-177:13; 85:3-85:5; 44:3-45:6). Surprisingly, Business Representative Ham's simple request that Profex abide by its contract with the Union, enraged Pelella, resulting in Pelella berating Business Representative Ham and telling Ham that he was "fucking delusional" and that it "was **none of [the Union's] fucking business**" who operates the equipment on the Ulster County Project. (Tr. 44:3-45:6; 177:22-177:25; 179:21-179:25; 189:6-189:23) (Emphasis added). Pelella then promised Business Representative Ham that Wood was "done" and there would no longer be jobs for Union operators on the Ulster County Project. (Tr. 44:3-45:6). After hanging up the phone, Pelella walked back over to Wood and informed him that he was laid off. (Tr. 85:10-85:11).

Subsequent to Wood's termination, Profex submitted a request to the Union's hiring hall for an operator to be dispatched to the West Point Project. (Tr. 45:7-45:18). Union operator, Pete Rode ("Rode"), was then dispatched from the Union's hiring hall to the West Point Project. (Tr.45:7-45:18). Profex, however, did not request a Union operator to perform work on the Ulster County Project and equipment operations, nevertheless, continued on the Ulster County Project without interruption and with site work performed regularly, until the project's conclusion in or around May of 2020. (Tr. 135:21-136:4). Despite the abundance of equipment operations required to complete the site work on the Ulster County Project, after terminating Wood, Profex completed the project void of Union operators. (Tr. 120:19-120:22).

## **ARGUMENT**

### **POINT I**

#### **Profex Violated Section 8(a)(3) of the National Labor Relations Act by Terminating Christopher Wood for Engaging in Protected Union Activity**

Section 8(a)(3) of the National Labor Relations Act (the “Act”) makes it an unfair labor practice when an employer, such as Profex, acts with “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C.A. § 158. As such, “[a]n employer violates Section 8(a)(3) of the Act by disciplining or discharging an employee for engaging in Section 7 union activity.” N.L.R.B. v. Sprain Brook Manor Nursing Home, LLC, 630 F. App’x 69, 71 (2d Cir. 2015). Specifically, Section 8(a)(3) protects against work transfers or firings due to anti-union animus. See Textile Workers Union of America v. Darlington Manufacturing Co., 380 U.S. 263, 268-269 (1965).

The test for determining whether an employer has violated Section 8(a)(3) of the Act involves a two-step burden-shifting framework. Wright Line, 251 NLRB 1083 (1980); see also Sprain Brook Manor Nursing Home, LLC, 630 F. App’x at 71 (applying the Wright Line test as the standard for analyzing Section 8(a)(3) violations). The National Labor Relations Board (the “Board”) must first show that the employer had knowledge that the employee was engaged in protected union activity and then that the employer’s decision to discipline or discharge the employee was motivated, at least in substantial part, by hostility toward that union activity. Id. However, once the Board makes this showing, the burden shifts to the employer to demonstrate, by a preponderance of evidence, that it would have taken the same action absent the protected union activity. Id.; see also Tito Contractors, Inc., 366 NLRB No. 47 (2018).

**A. The Board has Established that Profex had Knowledge that Wood was Engaged in Protected Union Activity**

The record conclusively established that Profex was aware of Wood's protected union activity. There is no genuine dispute that Wood is an active member of the Union (Tr. 79:11-79:16) and Profex had full knowledge of the same. This is evidenced by the fact that Wood was dispatched to the Ulster County Project from the Union's hiring hall at Profex's request. (Tr. 43:5-43:16). Wood was not hired off the street and did not show up by happenstance at Profex's Ulster County Project looking for work as a trained and skilled non-union operator. He was dispatched there only after Profex contacted the Union's hiring hall to request a Union operator to operate equipment and perform site work on Profex's Ulster County Project.

The credible hearing evidence established that Wood, when informed by Pelella that Profex was going to transfer him to a different project at a different location (the West Point Project), as a member of the Union, informed Pelella that hiring hall protocol required Profex clear his transfer with the Union. (Tr. 82:12-82:20). In other words, Wood asked Profex to comply with the Union's hiring hall procedures by which both Profex and Wood were bound. In doing so, Wood was exercising his protected Section 7 right to support the Union. The hearing evidence further established, the following day, Wood once again engaged in protected union activity when he reiterated his request to Pelella that Profex follow hiring hall protocol with regard to his transfer. (Tr. 84:21-84:24). Therefore, as it is unequivocally supported by the record, the Board has established that Profex had knowledge of Wood's protected union activity.

**B. The Board has Established that Profex's Decision to Terminate Wood was Motivated by Hostility toward the Union**

The record established that prior to Wood engaging in protected union activity on November 21, 2019, Profex had no intention of laying off Wood (Tr. 110:17-110:24). Rather,

Profex planned to transfer Wood to the West Point Project where he would continue his employment as a Union operating engineer. (Tr. 81:19-82:9; 87:22-88:4). A decision that Wood neither opposed nor refused; all that he asked was for Profex to clear the transfer with the Union – a request well within his protected Section 7 rights. (Tr. 82:12-82:20). Wood’s first request, on November 20, 2019, that his transfer to the West Point Project be cleared with the Union was answered with raw hostility by Pelella who responded “**fuck the Union**, fuck Mike Ham. I’m not calling” – a clear warning that Wood’s protected Section 7 activity was unwelcomed by Profex. (Tr. 83:12-83:17) (Emphasis added). It appears that Profex was confident that Pelella’s overt hostility toward the Union and Wood’s protected union activity was a sufficient “warning shot” to discourage Wood from further engaging in such protected activity and to persuade him to violate his hiring hall’s protocol and report to the West Point Project absent the Union’s approval. The record established that despite Wood’s request, no one from Profex reached out to the Union and/or the hiring hall prior to November 21<sup>st</sup>. Pelella, acknowledging that he had ignored Wood’s request to contact the Union, nevertheless, claimed to be surprised when informed that Wood had not reported to the West Point Project on November 21<sup>st</sup>. (Tr. 173:9-173:14).

Conversely, due to Pelella’s and Profex’s refusal to contact the Union and/or its hiring hall, Wood remained in the dark as to his status and did not receive any instruction from the Union that he had been cleared to transfer to the West Point Project. Hence, Wood returned to the Ulster County Project on November 21, 2019. (Tr. 84:10-84:13). That day, Wood continued to perform site work on the Ulster County Project, until he was approached by Pelella who inquired as to why he had not reported to the West Point Project. Wood responded that he had not been cleared by the Union to report to the West Point Project and politely reminded Pelella that Profex would need to

contact the Union before he could be transferred to a different project at a different location. (Tr. 84:21-84:24).

The credible hearing testimony showed that Union-member Wood's second request, like his first to Pelella the day before, enraged Pelella catapulting him into another anti-Union tirade: **"fuck 825, fuck the Union, fuck Mike Ham. I'm going to call that motherfucker right now."** (Tr. 84:25-85:2) (Emphasis added). Pelella – heated and mad at the Union – then called Business Representative Ham. (Tr. 174:14-174:23; 176:14-176:20). By all accounts, this phone call was short and profanity-laden, concluding with Pelella telling Business Representative Ham that he was "fucking delusional" and that it **"was none of [the Union's] fucking business" who operates the equipment on the Ulster County Project.** (Tr. 44:3-45:6; 177:22-177:25; 179:21-179:25; 189:6-189:23) (Emphasis added). Pointedly, Pelella exclaimed to Business Representative Ham that Wood was "done" (T 44:3-45:65), and further vowed that there would no longer be work for Union operating engineers on the Ulster County Project going forward. (Tr. 62:7-62:15). Significantly, there is an absence of any evidence in the record that Pelella, Bloomer, or anyone else offered any explanation to either Wood in the first instance or later to Business Representative Ham that Profex had made the decision to discontinue operator work on the Ulster County Project on account of inclement weather, poor terrain conditions, or any other reason. Indeed, Pelella's own testimony regarding the missing corner block for the retaining wall is more credible and consistent with the reality that site work was on-going on the Ulster County Project and the plan was to perform such work utilizing non-Union operators concurrently with the performance of site work on the West Point Project. (Tr. 174:12-175:5).

The record, as recited above, established that Wood's protected union activity was the motivating factor in Profex's decision to terminate him. This is apparent as Wood's transfer

quickly became a termination after he exercised his Section 7 protected right to support the Union by requesting that Profex follow hiring hall protocol. Coupled with Pelella's overt hostility toward the Union, the conclusion that Pelella demonstrated anti-union animus toward the Union and such animus was Profex's motivation for terminating Wood becomes inescapable.

**C. Profex has Failed to Demonstrate, by a Preponderance of Evidence, that it would have Terminated Wood Absent his Protected Union Activity**

As discussed above, the record clearly established both that Profex was aware of Wood's protected activity and that Union-member Wood was terminated as a result of animus thereto under the Wright Line test. Given that, the burden shifted to Profex to demonstrate, by a preponderance of evidence, that Profex would have taken the same action absent Wood's protected union activity. Wright Line, 251 NLRB 1083. To meet this burden, Profex "cannot simply present a legitimate reason for its actions but must instead prove that the actions were predicated solely on those grounds, and not by a desire to discourage [protected] activity." Tito Contractors, Inc., 366 NLRB No. 47 (Mar. 29, 2018) (quoting Toll Mfg. Co., 341 NLRB 832, 847 (2004) (internal quotations omitted)). Profex has failed to do so here.

**i. The Record Established that Profex's Overt Hostility Toward the Union was the Motivating Factor in Their Decision to Terminate Wood**

It is undisputed that, prior to Wood requesting that hiring hall protocol be followed and his transfer be cleared with the Union, Profex had no intention of terminating him. (Tr. 110:17-110:24). Nevertheless, shortly after Wood engaged in his protected union activity, Pelella's hostility toward the Union became apparent and, after a short phone call with Business Representative Ham, Pelella terminated Wood. Indeed, the truth of the matter is put to rest based upon the November 21<sup>st</sup> phone call between Pelella and Business Representative Ham. Pelella's testimony concerning the call is as follows:

And I called Mike Ham. I got heated with Mike Ham because of what had happened because it was all set up for [Wood] to go to West Point and work, and [Bloomer] was down there waiting at the center to get [Wood] in. And [Wood] had never gone down there, he never showed up. And that's –  
(Tr. 173:19-173:24)

I called Mr. Ham, definitely mad because my partner was down there. We were waiting on -- we needed him to go down there because everything was set up with what he was doing down there for closing roads and whatever we had to do, digging on a duct bank. So it kind of messed us up pretty good. I was very -- I was pretty mad at him. I was.  
(Tr. 176:14-176:20)

[Business Representative Ham] told me that we couldn't be on that job without any operators. There had to be ... an operator on that job. And then he asked me who's going to operate the equipment. And I was mad because he doesn't even know what's going on on the job. It's not for him –  
([Tr. 177:9-177:13)

And I -- I told him he was effing delusional. There doesn't have to be an operator on the job.  
(Tr. 177:22-177:25)

Business Representative Ham's testimony concerning the same call was as follows:

[Pelella] called me to explain to me that they would be relocating Chris Wood to a project that they had down at West Point. I said that wouldn't be an issue, but who would be performing the work at the current site?

[Pelella] explained to me it would **be none of my fucking business who was working on that site, and I don't tell him (audio interference) operating engineer**. Well, not even an operator, but anyone. And I told him, well, you know, you have a contract with us. That explains how it works.

He told me once again, I was fucking delusional, and he said if Chris Wood was not allowed to go to that site, he would be getting rid of him today. And I said, well, it's not a problem sending him to that site. It's whether or not you have work at this site where Chris was dispatched to, the job site.

And at that time, he said, well, then he's done.

I asked [Pellela] if there would be work for an operating engineer the next day -- or I asked him if there would be work the next day at the Ulster County [Project], and he told me not for an operating engineer. And that was the end of our discussion.  
(Tr. pg. 44-45)

Taken together, Pelella's and Business Representative Ham's recollection of and testimony concerning the phone call which culminated in Wood's termination are generally in agreement. This testimony, in no way established that Business Representative Ham vetoed or refused Wood's transfer. Rather, the record establishes that Business Representative Ham approved Wood's transfer but was concerned about who then would be operating the equipment on the Ulster County Project as he felt that the contract between Profex and the Union required a Union member operate the equipment on the job site. Pelella disagreed with Business Representative Ham's position but provided no explanation beyond telling Business Representative Ham that he was "fucking delusional" and that it was none of his business who operates the equipment on the Ulster County Project. Pelella then concluded this call by promising Business Representative Ham that Wood was "done" and that there would no longer be positions for Union operators on the Ulster County Project. Pelella followed through with his threat and, shortly thereafter, terminated Wood (Tr.85:10-85:11).

Here, the record established that Pelella was overtly hostile toward the Union and was enraged by Wood's protected union activity. By way of consequence, Profex, through Pelella's actions, terminated Wood in retaliation for such protected activity. The record is unable to support any contrary conclusion. As such, Profex is unable to meet their burden under the Wright Line test.

**ii. Profex Proffered an After-the-Fact False Exculpatory Explanation in an Attempt to Justify its' Termination of Wood; this False Explanation Warrants an Inference that Profex Acted with Unlawful Motivations**

Profex's ability to meet its burden under the Wright Line test is further undermined by their own false explanations for their actions. See Southside Hosp. & New Yorks Health & Human Serv. Union 1199, Serv. Employees Int'l Union, AFL-CIO, 344 NLRB 634, 635 (2005) (holding

that under the Wright Line analysis, a party “supports, rather than rebuts, the inference that it acted for unlawful reasons when it proffers false explanations for its actions.”). As the record here demonstrates, Profex’s attempt to justify its termination of Wood is contradicted and actually undercut by the testimony of Bloomer, Pelella, and the Profex employees called as witnesses at the hearing.

After-the fact, Profex has asserted a purported lack of site work at the Ulster County Project as an explanation for its decision to transfer Wood and ultimately to terminate him. The record, however, established that, among other things, Wood was engaged in the construction of a retaining wall on the Ulster County Project. (Tr. 88:1-88:4). This retaining wall had been an ongoing project; Pelella testified that he himself was working on the retaining wall with Wood on the morning of November 21<sup>st</sup> – the day after Wood was scheduled to be transferred due to a lack of work – and that the work on the retaining wall temporarily halted only upon the realization that they were missing a piece of block needed to continue. (Tr. 174:12-175:5). This testimony is corroborated by the testimony of Wood, as well as that of Richard Atkins whom testified that he and Wood were working on the wall together on November 21<sup>st</sup> (Tr. 141:9-141:16) and that of Anthony Zappone who testified that they were “busy working on the retaining wall” on November 21<sup>st</sup>. (Tr. 156:7-156:13). Tellingly, the testimony of Profex’s president, Bloomer, revealed that the decision to transfer Wood was made “earlier in that week” or “at the end of the week before” and that such advance decision was required as it took “a couple of days” for Wood to be cleared by West Point security. (Tr. 103:11-104:7). As such, the record renders Profex’s position that lack of site work was the motivating factor in transferring and ultimately terminating Wood untenable. In this regard, the record established that at the time Profex determined it would transfer Wood, site work (the construction of the retaining wall) was on-going and would have continued beyond

Wood's November 20, 2019 transfer date. Indeed, subsequent to Wood's termination, Business Representative Ham regularly observed equipment being operated and site work being performed on the Ulster County Project. (Tr. 70:20-71:12). Yet, notwithstanding the high praise for Wood's skill and ability as an operator and model employee, Profex never sought to recall Wood as an operator and never requested another Union operator for employment on the Ulster County Project. (Tr. 124:15-124:24). Quite simply, Profex's attempt to justify their decision to transfer and subsequently terminate Wood by claiming a lack of equipment operations and site work on the Ulster County Project is nothing more than a false explanation proffered to conceal their unlawful actions.

It is well established that under the Wright Line analysis, when an employer offers only pretextual or false explanations for their actions, even in the absence of direct motivation, the trier of fact may infer unlawful motivation. See Apex Linen Serv., Inc. & Int'l Union of Operating Engineers, Local 501, 2020 WL 2813205 (NLRB 2020); see also Roadway Express, Inc., 327 NLRB 25, 26 (1998) (Holding "it may be found that where the [e]mployer proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation."); Limestone Apparel Corp., 255 NLRB (1981) ("For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the [the Board's] General Counsel.").

The record here, consisting of the documents and credible testimony present, show Profex's proffered justifications for its termination of Wood to be false and pretextual. Thus, the Wright Line test commands, at a minimum, that the wrongful motive on the part of Profex established by the Board in the first instance remain undisturbed.

**iii. Even Assuming for Argument's Sake that Profex's Purported Explanations Are Accepted, the Record Evidence Still Established that Profex Violated Section 8(a)(3) of the Act by Terminating Wood**

Even if accepted, Profex's purported explanations for abruptly informing Business Representative Ham that Union-member Wood "is done" as a Profex employee, the record evidence still established that Profex violated Section 8(a)(3) of the Act by terminating Wood. The explanations offered at the hearing by Profex, at best, show that Pelella terminated Wood in retaliation for Business Representative Ham attempting to enforce the Union contract. The logical inferences to be drawn are that Pelella – fueled by animus toward the Union – terminated Wood for supporting the Union. This is not a situation where Wood refused to be transferred to the West Point Project and was terminated for his refusal. Here, Wood had no objection to the transfer. His only request was that the transfer be made in accordance with the proper hiring hall protocol. (Tr. 82:12-82:20). It wasn't until Pelella "got heated" with Business Representative Ham for attempting to enforce the Union contract – an unsurprising revelation as this is required of Business Representative Ham's job duties (Tr. 17:22-18:1) – that Profex determined that Wood would be terminated. Profex then terminated Wood and, despite – a substantial amount – of site work resuming on the Ulster County Project, completed the project free of Union operators; sending a clear message to the Union and all other unionized employees that protected union activity will not be tolerated. This retaliatory conduct aimed at discouraging union activity on the Ulster County Project constitutes a clear violation of Section 8(a)(3) of the Act.

## POINT II

### **Profex Violated Section 8(a)(1) of the National Labor Relations Act as the Termination of Wood had a Reasonable Tendency to Coerce and Intimidate Employees from Exercising Protected Section 7 Rights**

An employer violates Section 8(a)(1) of the Act when it interferes with, restrains, or coerces, employees in the exercise of their rights guaranteed in Section 7 of the Act. 29 U.S.C.A. § 158(a)(1). Among the rights guaranteed under Section 7 of the Act are employees' rights to "form, join or assist labor organizations." 29 U.S.C.A. § 157. Where an employer acts against an employee who is engaged in protected Section 7 activity, the employer's actions violate Section 8(a)(1) if they would have "a reasonable tendency to coerce or intimidate employees, regardless of whether they are actually coerced." N.L.R.B. v. Sprain Brook Manor Nursing Home, LLC, 630 F. App'x 69, 71 (2d Cir. 2015) (citing N.Y. Univ. Med. Ctr. v. NLRB, 156 F.3d 405, 410 (2d Cir.1998)). When determining whether or not an employer has violated Section 8(a)(1) of the Act, the Board must determine whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. Am. Freightways Co., 124 NLRB 146 (1959). Further, "it is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." Am. Tissue Corp., 336 NLRB 435, 441 (2001) (citing NLRB v. Ill. Tool Works, 153 F.2d 811, 814 (7th Cir. 1946)). In situations where violations of both Section 8(a)(1) and Section 8(a)(3) of the Act are alleged, the Board has held that conduct found to be a violation of Section 8(a)(3) of the Act would also discourage employees from exercising their

Section 7 rights and, thus, constitute a derivative violation of Section 8(a)(1) of the Act. Napleton 1050, Inc., 367 NLRB No. 6 (2018).

In the instant matter, the record established that Wood was terminated by Profex in retaliation for his protected union activity in violation of Section 8(a)(3) of the Act. This finding alone supports a finding of a derivative violation of Section 8(a)(1) of the Act. Further support for a finding that Profex's actions interfered with the free exercise of employees Section 7 rights is evidenced in Profex's post-termination conduct. It is undisputed that at some point after Wood's termination, machines were operated and substantial site work was performed on the Ulster County Project. (Tr. 70:20-71:12). Nonetheless, Profex neither requested nor hired a Union operator to perform such work completing the project void of Union operators. Such conduct, in the wake of their unlawful termination of Wood, sent a clear message to other employees that protected union activity would not be tolerated and any employee who engaged in such conduct would be terminated and the jobsite cleansed of members of their union. Thus, Profex's unlawful termination of Wood undoubtedly discouraged other Profex employees from exercising their protected Section 7 rights. Therefore, Profex's conduct directed at discouraging union activity on the Ulster County Project amounts to a clear violation of Sections 8(a)(1) of the Act.

### **CONCLUSION**

It cannot be disputed that Profex, and specifically Pelella, harbored an animus toward the Union and such animus was fully demonstrated by Pelella's overt hostility toward the Union. The record makes clear that Profex's anti-union animus was the motivating factor for the termination of Wood. Prior to November 21, 2019, Profex had no intention of terminating Wood and, rather regarded him as a talented operator and "perfect gentleman." However, this quickly changed once

