

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

PROFEX, INC.

and

Case 03-CA-259352

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 825**

**GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

Alexander J. Gancayco
Counsel for the General Counsel
National Labor Relations Board, Region 3
Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, NY 14202-2387
Telephone: (716) 551-3609
Facsimile: (716) 551-4972
E-mail: Alexander.Gancayco@nlrb.gov

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. PROCEDURAL HISTORY AND STATEMENT OF THE CASE	3
III. STATEMENT OF FACTS	3
A. Background	3
B. Christopher Wood’s Hiring Hall Referral	4
C. Wood Requests Respondent Contact Union After Being Informed of Transfer.....	5
D. Respondent Disparages Union and Unlawfully Discharges Wood	7
IV. ANALYSIS.....	8
A. When in Conflict with that of Respondent's Witnesses, the Testimony of General Counsel’s Witnesses Should be Credited and Respondent’s Witnesses Should be Discredited.....	8
B. Respondent Violated Section 8(a)(1) and (3) of the Act by Discharging Wood	10
V. CONCLUSION.....	14
VI. PROPOSED CONCLUSIONS OF LAW.....	14
VII. PROPOSED ORDER.....	14
VIII. PROPOSED NOTICE TO EMPLOYEES.....	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Abbey's Transportation Services, Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988).....	10
<i>Abbey's Transportation Services</i> , 284 NLRB 698 (1987).....	10
<i>ADS Electric Co.</i> , 339 NLRB 1020 (2003).....	11
<i>Daikichi Corp. v. NLRB</i> , 56 Fed. Appx. 516 (D.C. Cir. 2003).....	8
<i>Daikichi Corp.</i> , 335 NLRB 622 (2001).....	8
<i>Farm Fresh Co., Target One, LLC</i> , 361 NLRB No. 83 (2014).....	8
<i>Fluor Daniel, Inc.</i> , 311 NLRB 498 (1993).....	10
<i>Hospital del Maestro</i> , 291 NLRB 198 (1988).....	10
<i>Interboro Contractors</i> , 157 NLRB 1295 (1966).....	12
<i>J.S. Troup Elec.</i> , 344 NLRB 1009 (2005).....	11
<i>Medeco Security Locks, Inc.</i> , 322 NLRB 664 (1996).....	8
<i>Meyers Industries</i> , 281 NLRB 882 (1986).....	11
<i>Montgomery Ward</i> , 316 NLRB 1248 (1995).....	11

<i>NLRB v. City Disposal Systems,</i>	
465 U.S. 822 (1984)	12
<i>NLRB v. Transportation Management Corp.,</i>	
462 U.S. 393 (1983)	10
<i>NLRB v. Warren L. Rose Castings, Inc.,</i>	
587 F.2d 1005 (9th Cir. 1978)	8
<i>NLRB v. Wright Line, a Div. of Wright Line, Inc.,</i>	
662 F.2d 899 (1st Cir. 1981)	10
<i>Omni Commercial Lighting, Inc.,</i>	
364 NLRB No. 54 (2016)	12
<i>Roadway Express,</i>	
327 NLRB 25 (1998)	10
<i>Shen Automotive Dealership Group,</i>	
321 NLRB 586 (1996)	8
<i>Tschiggfrie Properties Ltd.,</i>	
368 NLRB No. 120 (2019)	10
<i>Vulcan Waterproofing Co.,</i>	
327 NLRB 1100 (1999)	10
<i>Warren L. Rose Castings, Inc.,</i>	
231 NLRB 921 (1977)	8
<i>Wheeling-Pittsburgh Steel Corp. v. NLRB,</i>	
821 F.2d 342 (6th Cir. 1987)	11
<i>Wheeling-Pittsburgh Steel Corp.,</i>	
277 NLRB 1388 (1985)	11
<i>Wright Line,</i>	
251 NLRB 1083 (1980)	10

I. INTRODUCTION

After being referred to a job site in Kingston, New York through his union's hiring hall, Operating Engineer Christopher Wood (Wood) worked for several weeks running construction equipment at the job site. When he was approached by his employer Profex, Inc. (Respondent) to transfer locations on November 19, 2019, Wood asked Respondent's Vice President Charles Pelella (Pelella) to contact his union and to communicate with the union under its "protocols" and as a courtesy prior to transferring him to the other site.¹ Despite being a model employee with a great work history, Wood was callously and unlawfully fired a few days later, after his manager became belligerent about Wood's request for the manager to talk with the union, and reacted negatively to some basic contractual questions from the union about who would be replacing Wood to perform bargaining unit work at the original site. Offended by the Union's reasonable and good faith questions, Respondent's Vice President Pelella proceeded to denigrate the Union, the Union's Business Agent, and Wood's request in a series of angry and profane tirades. He later chose to openly terminate Wood simply because Wood had taken the basic step of asking them to talk with the union. Although work had been steady that same morning at the Kingston site, when the union's Business Agent asked the company if work would be available for an operating engineer at the site for the following day, Pelella appeared to retaliate by spitefully and ominously telling him that there wouldn't be any work for operating engineers.

The Complaint and Notice of Hearing alleges Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging Wood because he engaged in union activity on November 19 by asking Respondent to call the Union regarding the company's

¹ All dates referenced herein refer to dates in 2019, unless otherwise noted.

proposal to transfer him to a different site. The International Union of Operating Engineers, Local 825 (the Union) has represented Respondent's operating engineer employees for collective bargaining for almost twenty years. The most-recent collective bargaining agreement covering their relationship was in effect from July 1, 2019 through June 30, 2020. In October 2019, Respondent requested an operating engineer from the Union's hiring hall and the Union dispatched its member Wood to the job site in Kingston, New York (Respondent's facility). Wood worked successfully on the job site for several weeks. On November 19, Respondent approached Wood at work and stated that they wanted to transfer Wood to an alternate project in West Point, New York. After Wood asked Pelella if he could call the Union about the transfer before implementing it, Pelella responded by directly and viciously disparaging Wood's request, the Union, and the Union's Business Agent Michael Ham (Ham), telling Wood that the Union and Ham could "fuck" themselves. When Pelella called the Union a day later, he continued his behavior and repeatedly disparaged the Union's Business Agent directly, including by repeating his earlier statements and telling Ham that he was "fucking delusional" to ask questions or expect any input about who would operate construction equipment on the site. A few seconds later, after making these statements and hanging up the phone with Ham, Pelella walked over to Wood and told him he was firing him, that he was "done," and to "get out of [his] machine." Pelella would later tell Ham there was "no work for operating engineers" at the site.

Based on these facts, Counsel for the General Counsel (General Counsel) respectfully asks that the Administrative Law Judge find Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wood because he engaged in union activity on or about November 19 by requesting that Respondent contact the Union in relation to his transfer. The General Counsel requests make-whole relief for the discriminatee, including an Order that the Respondent furnish

payroll records to the General Counsel, as outlined in the Complaint, and for all other relief as may be just and proper to remedy the unfair labor practices alleged.

II. PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This matter was heard by Administrative Law Judge (ALJ) David I. Goldman (the Administrative Law Judge) from October 1-2, 2020 in Buffalo, New York. By prior order from the Administrative Law Judge, the hearing was conducted remotely through the Zoom Video Conference platform. (Tr. 5). A Complaint and Notice of Hearing issued in Case 03-CA-259352 on August 6, 2020. (G.C. Ex. 1(c)).² The Complaint alleges Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wood because Wood assisted the Union, including by asking Respondent's Vice President to talk with the Union about his transfer, and to discourage employees from engaging in union activity. Respondent filed an Answer to Complaint on August 20, 2020. (G.C. Ex. 1(e)). In its Answer, Respondent admits the allegations contained in paragraphs 1, 2(a), 2(b), 3, and 5 of the Complaint, and denies the allegations in paragraphs 6(a), 6(b), 7, and 8 of the Complaint. *Id.* Supplementing its Answer, Respondent also admitted to the Union's labor organization status as alleged in paragraph 4 of the Complaint on the record at hearing. (Tr. 7).

III. STATEMENT OF FACTS

A. Background

Respondent is a general contractor in the building and construction trades industry. (Tr. 100). The Union is a labor union representing some of Respondent's employees, including operating engineers at its job sites covered by its contract. (Tr. 18; G. C. Ex. 2). In the time

² "Tr. __" refers to pages of the transcript from the hearing held from October 1-2, 2020. "G.C. Ex. __" refers to exhibits introduced by the General Counsel at the hearing.

period of October 2019, Respondent was employing workers at a construction site in the area of Kingston, New York. (Tr. 100-101). The job involved work on the Ulster County Fire Training Center in Kingston. (Tr. 18). Respondent is a signatory contractor for the Union, meaning that they have signed or are a party to the Union's multi-employer collective bargaining agreement. (Tr. 19-20; G. C. Ex. 2). The Union maintains a copy of the agreement and its signature pages as part of its regular business records at its offices in Springfield, New Jersey. (Tr. 20; G.C. Ex. 2, 3, 4). Workers are referred to the company through the Union's hiring hall program, which sends workers directly to various job sites. (Tr. 34-35). Ham as a Business Agent for the Union and is responsible for administering its hiring hall system to fill requests for operating engineers, monitoring the work sites, and completing any associated tasks. (Tr. 35). As part of those duties, Ham receives phone calls from employers when they must reallocate workers from an original work site to a different location due to work requirements. (Tr. 66). Respondent has placed multiple orders for labor requests through the hiring hall in the past, which is supported in the record by the Union's submission forms demonstrating contributions into the Union's benefits system by Respondent. (Tr. 35-40; G.C. Ex. 5).

B. Christopher Wood's Hiring Hall Referral

On October 16, the Respondent placed a hiring hall request to the Union for one equipment operator at its Kingston, New York work site. (Tr. 35-36, 43). The Union dispatched operating engineer and union member Christopher Wood to the Kingston work site in response to the call. (Tr. 43). At the site, Wood was responsible for working as an equipment operator and operating bulldozers, excavators, and any other equipment on the work site. (Tr. 81.). Wood was the only operator at the site. (Tr. 43). Respondent's Vice President Pelella acted as a superintendent for the company on the work site. *Id.* Ronald Bloomer (Bloomer) is an owner of

the company who is also present at times on its job sites. (Tr. 81-82). From October 16 through November 19, Wood worked at the site performing bargaining unit union work under the terms of the collective-bargaining agreement. (Tr. 81). Wood was described as a “talented” worker and “very good operator” that the company was impressed with and had “no issues with” on the job. (Tr. 103).

C. Wood Requests Respondent Contact Union After Being Informed of Transfer

On November 19, Pelella and Bloomer approached Wood at the work site. (Tr. 81-82). Wood, Pelella, and Bloomer were the only people present for the conversation. *Id.* During the conversation, Pelella spoke to Wood and told him he wanted him to show up on a different job site in West Point, New York the next day because they “needed an operator there.” (Tr. 82). In response, Wood spoke and asked Pelella who would be operating the machines at the Kingston location if he, the only operating engineer on site, was reassigned to a different work site some distance away. *Id.* In response, Pelella spoke and simply said, “I’m going to run it, and all the labor is going to run it,” demonstrating a disregard for having operating engineers performing their designated work under the collective bargaining agreement. (Tr. 82). Wood responded to Pelella and stated that there was a union “protocol” for transferring workers to a different site, and that he should call “Mike Ham or the Union hall and just let them know that you’re going to transfer me to West Point.” (Tr. 82). In Wood’s experience as a union member, employers had always followed the protocol of contacting the Union before transferring a worker between distinct work site. (Tr. 83). In a direct response to Wood’s mention of union protocol and his Business Agent, Pelella responded with vicious disparagement, stating “fuck the Union” and

“fuck Mike Ham.” *Id.* Pelella said he was “not calling” the Union and that Wood needed to “show up in West Point tomorrow.” *Id.* The conversation ended at that point. *Id.*

Disturbed by the statements, tone, and disparagement for the Union shown by Pelella, Wood contacted the Union himself and informed Ham about what the Respondent’s Vice President had said about the intended transfer. (Tr. 83). The call was a courtesy to inform Ham about the company’s lack of adherence to normal union protocol and was not seeking any type of permission from the Union. (Tr. 83-84). The “Hiring Hall Procedure” is expressly laid out within Article II of the collective-bargaining agreement, including the process for calling the Union and stating the job location and the amount and type of workers needed, so that the Union can make appropriate referrals. (G.C. Ex. 2, 2-3). Wood told Ham that he had asked Pelella and Bloomer simply to contact the Union and that he had told them about the normal protocol. *Id.* Even in cases of simply reassignments of existing hiring hall referrals, under the terms of its labor agreement, the protocol for transferring a worker in and between separate job sites involves making a phone call to the hiring hall and notifying them about the reassignment. (Tr. 66-68). Concerned that the company was removing the only Operating Engineer from an active job site, Ham responded to Wood and asked him who was going to operate the equipment on the Kingston site. (Tr. 84). Wood stated that Pelella had told him that he was going to operate the equipment himself and that “all the laborers were going to run the equipment.” *Id.*

Having not heard from Respondent about any proposed transfer, either in general or as a specific request, and having received no work requests through the hiring hall, Ham let Wood know it was okay to proceed to the job site he was dispatched to through the hiring hall. (Tr. 47-48). On November 20, Wood arrived at the Kingston job site at around 10:00 a.m. and was approached by Pelella. (Tr. 84-85). Pelella spoke to him directly and stated, “fuck 825, fuck the

Union, fuck Mike Ham,” and said he was going to “call that motherfucker right now.” *Id.* Wood witnessed Pelella walk away, place a phone call, and begin “yelling and screaming.” (Tr. 85).

D. Respondent Disparages Union and Unlawfully Discharges Wood

The Union received the phone call from Respondent’s Vice President Pelella on November 21. *Id.* During the phone call, which took place around mid-morning, Pelella called Ham and stated that the company intended to transfer Wood, who was the only operating engineer sent by the Union to this work site, to a different work site in West Point, New York. (Tr. 44). In response, Ham spoke and said, “that wouldn’t be an issue, but who would be performing the work at the current site?” (Tr. 44). Ham had been to the site multiple times by this point in time and was aware that the project in Kingston had “extensive work to be done” until it was finished. (Tr. 75). Pelella responded to this question with a bitter anger, stating it would be none of Ham’s “fucking business who was working on that site,” overstating the Union’s question and making an additional remark that the Union could not “tell him” about how to run his business. *Id.* Ham responded calmly by saying that the protocol for a transfer involved the company informing the Union about the transfer. *Id.* Pelella responded again with contempt, stating that Ham was “fucking delusional,” and stated that if “Chris Wood was not allowed to go to that site, he would be getting rid of him today.” (Tr. 75, 187-189). Ham told Pelella that it would not be a problem to send Wood to the other site and asked him about who he intended to have performing the operating engineer work in Kingston. *Id.* Pelella responded simply by stating that “well, then he’s done,” in a clear reference to Wood being fired from the company. (Tr. 44-45). Ham asked Pelella if there would be operating engineer work available in Kingston the next day and Pelella said “not for an operating engineer.” (Tr. 45). Pelella made this statement despite the fact that there was likely “two months of site work” remaining on the

project that required the use of construction equipment and operators, and despite Wood working the entire morning normally and running construction equipment on various projects at the site. (Tr. 74, 86-87).

Witnessing the phone call come to an end from his place on the work site, Wood remembers that Pelella walked up to him and told him he was “done,” “you’re laid off,” and to “get out of my machine.” (Tr. 85). The conversation took approximately two minutes. *Id.* Wood left the job site shortly thereafter. *Id.* Respondent called the Union the next day for another operating engineer to be sent to the West Point, New York work site where they had wanted to transfer Wood prior to his references to the Union and prior to the Union’s involvement. *Id.*

IV. ANALYSIS

A. When in Conflict with that of Respondent’s Witnesses, the Testimony of General Counsel’s Witnesses Should be Credited and Respondent’s Witnesses Should be Discredited

Credibility determinations may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) (same); *Medeco Security Locks, Inc.*, 322 NLRB 664 (1996); accord *Warren L. Rose Castings, Inc.*, 231 NLRB 921, 923 (1977); enfd. 587 F.2d 1005 (9th Cir. 1978). Corroboration of testimony and consistency of testimony with the record, including documentary evidence, are other factors to be considered in evaluating the credibility of statements made under oath. See *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. mem. sub nom. *Daikichi Corp. v. NLRB*, 56 Fed. Appx. 516 (D.C. Cir. 2003), quoting *Shen Automotive*, 321 NLRB at 589.

The General Counsel's witnesses, including Ham and Wood, should be credited because they testified in a forthright and honest manner, have no reason to harbor bias against Respondent, and expressed openness, consistency, and cooperation when presented with cross-examination questions from Respondent's counsel. In their testimony, they answered questions openly and honestly, even digressing into irrelevant matters about other companies and hypothetical scenarios during their cross-examinations by Respondent's counsel. During the direct examination and cross examination of both witnesses, Ham and Wood testified clearly and consistently about the derogatory statements made by Pelella about the Union.

By contrast, Respondent's witnesses were simply not credible in their testimony. In a somewhat contradictory fashion, Pelella admits on transcript pages 177, 186-187, and 189 in his testimony that he was "pretty mad" at the Union and at Ham, admits telling Ham that he was "fucking delusional," yet denies having even a single contradictory word with Wood about Ham because he considered Wood a gentleman. Similarly, Respondent's counsel had to resort to numerous leading questions when eliciting its answers from witnesses Bloomer and Pelella during their testimony at the hearing, including on the question of whether Pelella told Wood to get out of the machine at the time of his firing and what took place during Pelella's conversation with Ham on November 21. Pelella's testimony was scattered, inconsistent, and unreliable as a result of these leading questions and his contradictory answers, and Bloomer's responses were placed in front of him in the form of leading questions. Close examination of the credible facts, the reasonable inferences and inherent probabilities of the respective versions of the events, and the record as a whole show that credibility issues should be resolved in favor of General Counsel's witnesses and against Respondent's witnesses.

B. Respondent Violated Section 8(a)(1) and (3) of the Act by Discharging Wood

Respondent's words and conduct in this case demonstrate that they fired Wood because he engaged in union activity by asking the company to contact the Union about his proposed transfer to the West Point work site. To establish a violation of Section 8(a)(3) of the Act, the General Counsel must make a prima-facie showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). This prima facie showing involves four elements: union or protected activity, knowledge, animus, and adverse action. *Roadway Express*, 327 NLRB 25, 26 (1998). The *Wright Line* burden of proof may be sustained with evidence that is short of direct evidence of motivation, such as inferential evidence arising from a variety of circumstances, including union animus, timing, and pretext. *Id.*; *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1109-1110 (1999); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Association Hospital del Maestro*, 291 NLRB 198, 204 (1988); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). Although proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence, the Board has recently explained that, to meet this initial burden, the evidence must support a connection or relationship between the antiunion animus and the alleged unlawful act. *Tschiggfrie Properties Ltd.*, 368 NLRB No. 120, slip op. at 6 (2019). If the General Counsel meets this burden, then the burden shifts to the Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Finally, the Board will infer an unlawful motive where the employer's action is "'baseless, unreasonable, or so

contrived as to raise a presumption of unlawful motive.” *J.S. Troup Elec.*, 344 NLRB 1009, 1021 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003)).

The testimony and evidence in the record meet and exceed every element needed to show that Respondent unlawfully fired Wood because he engaged in union activity. First, Wood’s conduct constitutes clear union activity within the meaning of the Act, and Respondent’s knowledge of that activity cannot be questioned because they were direct participants in each aspect of the dialogue between Respondent, Wood, and the Union. In particular, the admitted conversations between Wood, Bloomer, Pelella, and Ham, all involved a reasonable discussion of union hiring hall “protocol,” the procedures set forth in Article II of the collective-bargaining agreement, and a direct request by Wood that the company communicate with his union representative. Consequently, these statements fall squarely within the definition of union activity under the Act. See *Wheeling-Pittsburgh Steel Corp.*, 277 NLRB 1388, 1394 (1985), *enfd.* 821 F.2d 342 (6th Cir. 1987) (employee’s attempts to contact a union representative and implement the terms of the contract constitute protected activity). Wood directly raised union protocol and hiring hall procedures with Pelella on November 19 at the Kingston work site. When Pelella approached Wood and told him “to show up on a job in West Point the next day,” Wood responded to Pelella by asking questions about whether union protocol had been followed, and asking Pelella to call Business Agent Ham or the Union’s hiring hall about the transfer. This conduct constitutes union activity within the meaning of the Act, and the Respondent has clear knowledge of that activity because Pelella was a participant in the conversation. There is no requirement that these types of reasonable questions and contractual requests by Wood ultimately prove meritorious for them to qualify for Section 7 protection. *Meyers Industries*, 281

NLRB 882, 884 (1986) (recognizing as concerted activity an individual employee's reasonable and honest invocation of a collective-bargaining right); see also *Interboro Contractors*, 157 NLRB 1295, 1298 (1966); *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Employees are protected from retaliation even if their questions turn out to be misguided, incomplete or wrong. *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3 (2016).

Likewise, animus has been abundantly demonstrated in the record. In response to Wood's union activity, the Respondent berated Wood with a string of derogatory comments about the Union, about his request, and about the Union's Business Agent Ham. Pelella spoke directly to Wood and told him "fuck the Union, fuck Mike Ham, [and] I'm not calling [the Union]." (Tr. 83). This is further supported in the record by the testimony of Ham, who was told that it was "none of his fucking business" who worked on the job site and that he was "fucking delusional" to inquire about whether or not the Respondent was treating Wood properly and more generally respecting the collective-bargaining agreement at its work site. (Tr. 44-45). The testimony in the record is uncontested that Pelella told Ham he was delusional and that he was "mad" at the Union's representative immediately prior to instructing Wood that he was fired and needed to leave the job site. (Tr. 176-177).

Wood's support for the Union led directly to adverse employment action when he was discharged from the company on November 21 shortly after his assertion of union protocol and request to involve Ham as a union representative. Pelella's words during his phone call with the Union, stating that "well, then he's done," in relation to Wood's employment is direct evidence of a causal relationship between union activity and the discharge. Likewise, the timing of this discharge, which occurred nearly simultaneously after Pelella had repeatedly disparaged the Union on a phone call with Ham, and days after the initial assertion of union rights by Wood, is

clear evidence to show a direct causal relationship between the union activity and the adverse employment action.

The company has no legitimate basis for its actions. The company has not presented any valid non-discriminatory basis for taking this action against Wood apart from a strained, weak, and confusing theory about the Union interfering or somehow involving itself in denying a transfer request. Ham's straightforward testimony demonstrates that he had a series of mundane and straightforward questions for Respondent's Vice President Pelella that would have helped him ensure that collective-bargaining rights and the rights of Wood were maintained, and even that small inquiry resulted in an over-the-top and vicious tirade from Pelella. Ham credibly testified that he made it clear to Pelella that he was not approving or denying the transfer, but that he was merely asking reasonable contract-related questions about the company's delegation of bargaining unit work at the Kingston work site. Both Wood and Ham were both engaged in protected union activity and any action taken against them on that basis is unlawful discrimination. Consequently, Respondent's conduct is demonstrably unlawful and violated Section 8(a)(1) and (3) of the Act.

Counsel for the General Counsel respectfully submits that the record evidence in this case demonstrates clearly and unequivocally that the Respondent discharged Wood because he engaged in union activity by asking the Respondent to contact the Union regarding his transfer between different hiring hall referral sites, and that Respondent's blatant retaliatory actions violate Section 8(a)(1) and (3) of the Act. Counsel for the General Counsel respectfully requests that the ALJ find Respondent has violated the Act and hold them responsible under the Act for a remedy making the discriminatee whole for the negative consequences of its actions.

V. CONCLUSION

Based on the foregoing, General Counsel respectfully requests the ALJ find Respondent's conduct violates Section 8(a)(1) and (3) of the Act, as alleged in the Complaint and Notice of Hearing, and order Respondent to cease and desist from further unlawful conduct, make the affected employee Christopher Wood whole for the damages he incurred as a result of the unlawful discrimination, and post the proposed Notice to Employees at Respondent's facility, and order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

VI. PROPOSED CONCLUSIONS OF LAW

1. Respondent, Profex, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Union of Operating Engineers, Local 825 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Christopher Wood on or about November 21, 2019.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VII. PROPOSED ORDER

Respondent, Profex, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:
 - (a) Discharging employees because they form, joint, or assist a union and engage in concerted activities, or to discourage employees from engaging in these 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 following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of the Board's Order, offer Christopher Wood the position at issue or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.
- (b) Make Christopher Wood whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.
- (c) Compensate Christopher Wood for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, 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 for discriminatee Christopher Wood.
- (d) 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, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order. If requested, originals of such records shall be provided to the Board or its agents in the same manner.
- (e) Immediately expunge from its files and records any reference that Christopher Wood was terminated for cause and prohibiting Respondent from using the termination against him in any way and notify Wood, in writing, that it has done so.
- (f) Post at its facility and place of business in Newburgh, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 Employer's place of business is currently closed and a substantial number of employees are not reporting to the facility due to the Coronavirus pandemic or is operating with less than a substantial complement of employees, the 60 consecutive day period for posting will begin when the Employer's place of business reopens and a substantial complement of employees have returned to work. For purposes of the notice posting, a substantial complement of employees is at least 50% of the total number of employees employed by the Employer prior to closing its business due to the Coronavirus pandemic.
- (g) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

VIII. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us 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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fire you because of your union activity or support.

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

WE WILL within 14 days from the date of this Order offer Christopher Wood full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Christopher Wood whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and **WE WILL** make Christopher Wood whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Christopher Wood for the adverse tax consequences, if any, of receiving lump-sum backpay awards and we will file with the Regional Director for Region 3 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Christopher Wood, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

Dated at Buffalo, New York, this 13th day of November 2020.

Respectfully Submitted,

/s/ Alexander J. Gancayco

Alexander J. Gancayco
Counsel for the General Counsel
National Labor Relations Board, Region 3

Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2387
Telephone: (716) 551-3609
Facsimile: (716) 551-4972
E-mail: Alexander.Gancayco@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in PROFEX, INC., Case 03-CA-259352**, was served via E-Gov, E-Filing, and E-Mail, on November 13, 2020, on the following:

Via E-Gov, E-Filing:

The Honorable David I. Goldman
Administrative Law Judge
National Labor Relations Board
Division of Judges, Washington, D.C. Office
1015 Half Street SE,
Washington, D.C. 20570-0001

Via Electronic Mail:

Stephen P. O’Hare, Attorney at Law
Stephen P. O’Hare, PLLC
327-329 Main Street, Suite 200
Poughkeepsie, NY 12601
E-Mail: sohare@oharelaw.attys.pro

Troy M. Stackpole, Esq.
DeCotiis, Fitzpatrick, Cole, and Giblin LLP
61 South Paramus Road, Suite 250
Paramus, NJ 07652
E-Mail: tstackpole@decotiislaw.com

/s/ Alexander J. Gancayco

Alexander J. Gancayco
Counsel for the General Counsel
National Labor Relations Board, Region 3
Niagara Center Building
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2387
Telephone: (716) 551-3609
Facsimile: (716) 551-4972
E-Mail: Alexander.Gancayco@nlrb.gov