

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

**PROFEX, INC.,**

**and**

**Case 03-CA-259352**

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

*Alicia E. Pender, Esq. (NLRB Region 3)*  
of Albany, New York, for the General Counsel

*Alexander J. Gancayco, Esq. (NLRB Region 3)*  
of Buffalo, New York, for the General Counsel

*Troy M. Stackpole, Esq. (DeCotiis, FitzPatrick, Cole and Giblin, LLP)*  
of Paramus, New Jersey, for the Charging Party

*Stephen P. O'Hare, Esq. (Stephen P. O'Hare, PLLC)*  
of Poughkeepsie, New York, for the Respondent

**DECISION**

**INTRODUCTION**

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a construction contractor employer that is party to a labor agreement covering operating engineers working on its construction projects. The case arose after the employer directed an operating engineer employee to transfer to another work site. The employee raised the question of who would perform his remaining work at the current worksite. The employer's vice-president indicated that he would do the work himself or have other (non-operating engineer) employees do it. The employee told coworkers he would not take the transfer without the approval of his union. He informed his union representative about the transfer and the union representative directed the employee not to go to the transfer location, but instead, to return to his current worksite. When he did, the employer's vice-president called the union representative and the two argued over whether the employer was required by the labor agreement to continue using an operating engineer at the site. The union representative linked the union's approval of the transfer to the employer's willingness to continue using an operating engineer at the first site. The contractor refused to agree to continue using an operating engineer, the union did not approve the transfer, and the contractor laid off the operating engineer whom it had sought to transfer. The employer then secured another operating engineer from the union hiring hall to fill the transfer position.

The government alleges that the layoff was an unlawfully motivated response to the employee's and union's assertion of contractual rights under the labor agreement. As discussed herein, that is a mischaracterization of events. As the government recognizes, the employer's initial decision to transfer the employee was a nondiscriminatory decision, not motivated by

antiunion animus. Rather, the decision to transfer the operating engineer was motivated by the employer's determination that it was not going to continue to employ an operating engineer at the first site. The union contends this violates the collective-bargaining agreement. It may. And it may be that work remained for the operating engineer and he is entitled to backpay under the contract for his layoff. But in any event, the layoff was not retaliation, but followed from the employer's decision—right or wrong—that it was going to transfer the remaining operating engineer and not continue employing him at the work site. When the transfer was not accepted, the employee was laid off. The layoff was an action the employer would have taken even in the absence of the employee and union's protected activity of asserting contractual rights, had the transfer been turned down for reasons unrelated in any way to protected activity. There is no violation of the Act as alleged

### STATEMENT OF THE CASE

On April 21, 2020, the International Union of Operating Engineers, Local 825 (Union or Local 825) filed an unfair labor practice charge alleging violations of the Act by Profex, Inc., docketed by Region 3 of the National Labor Relations Board (Board) as Case 03-CA-259352.

Based on an investigation into this charge, on August 6, 2020, the Board's General Counsel, by the Regional Director for Region 3 of the Board, issued a complaint and notice of hearing in this case for October 1, 2020. Profex filed an answer to the complaint denying all alleged violations of the Act on August 20, 2020.

The case was tried October 1-2, 2020.<sup>1</sup> Counsel for the General Counsel, the Respondent, and the Charging Party filed posthearing briefs in support of their positions.

On the entire record, I make the following findings, conclusions of law, and recommendations.<sup>2</sup>

### JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Newburgh, New York, where it operates a commercial contracting business. Annually, in conducting its operations, the Respondent provides services valued in excess of \$50,000 for Ulster County, New York, an enterprise directly engaged in interstate commerce. It is alleged and admitted that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is further alleged and admitted that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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<sup>1</sup>At the commencement of the hearing, counsel for the Respondent admitted the Union's status as a labor organization under the Act, alleged in para. 4 of the complaint and previously denied in the Respondent's answer.

<sup>2</sup>At points in the transcript the last name of Christopher Wood is misspelled (or misstated) as "Woods." All references in the transcript to "Woods" are hereby corrected to "Wood."

## UNFAIR LABOR PRACTICES

### Findings of Fact

5 Profex is a general contractor. Ronald Bloomer is Profex’s president. Charles Pelella is its vice-president. Bloomer and Pelella are owners of Profex.

10 Local 825 (along with IUOE locals) is party to a multi-employer collective-bargaining agreement with employer signatories, including Profex. Pursuant to the agreement, Profex hire employees for covered work from a hiring hall operated by Local 825.

15 Profex began a construction project in August or September 2019, in Kingston, New York, at the Ulster County firemen training center. Pelella was “[p]retty much [ ] up there every day running” the job. Bloomer was there weekly. In October 2019, Bloomer called the Local 825 hiring hall for an operator and Chris Wood was referred by the Union to work for Profex at the Kingston site. Wood worked steadily from October 16 through November 21.

20 Originally, the sitework on the Kingston project had been scheduled to be completed before the end of November, with the whole job to be completed by February 2020. However, various problems arose and with winter coming the completion date was pushed off until sometime in Spring 2020.

25 According to Bloomer, there was insufficient work for Wood by mid-November, but Bloomer, and particularly Pelella, had identified Wood as talented and easy to work with, someone whom Profex should “hold on to.” According to Bloomer, despite the decline in work, “we kept him on anyway waiting for other things to open up.” When the opportunity for operating engineer work at a job in West Point opened up, Pelella and Bloomer decided to move Wood to the West Point project with the intent of bringing him back to Kingston “when things get moving again.” Pelella asked Wood about it, perhaps on or about November 19, “and he was okay with it, didn’t say anything negative.”

35 Bloomer worked out the clearances, background checks, and other preliminary arrangements necessary for Wood to begin work at West Point, and on November 20, he approached Wood and Pelella and told Wood that “we’ve got another job,” and that he was “cleared to go to West Point.” Wood testified that Pelella led the conversation, with Bloomer present, and told him to show up for the job in West Point the next day. Bloomer testified that the plan was to meet Wood at the sign-in shed the next morning at West Point at 6:30 AM.<sup>3</sup>

40 During his conversation with Pelella and Bloomer, Wood asked Pelella, “if I go to West Point who is going to run equipment here?” Pelella said that he and laborers would run it. Wood

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<sup>3</sup>There is some confusion in the record about the precise dates of events. Witnesses, and counsel questioning witnesses, sometimes suggested that events occurred one day before or after that suggested by the weight of the evidence. The differences are not material, nor particularly important, but for clarity, and based on the record as a whole, my best judgment is and I find that the conversation described above occurred on Wednesday, November 20, 2019, and that Wood was directed on that day to show up at the West Point job site the next morning, Thursday, November 21, 2019. As discussed below, he did not, and returned to Kingston instead and worked for a portion of the day there on November 21, which was his last day at Kingston. It is also likely, and I find, that Pelella first mentioned the possibility of a transfer to Wood on November 19, 2019, before Pelella and Bloomer confirmed with Wood in their November 20 conversation that the transfer had been arranged.

told Pelella that Pelella “would have to call Mike Ham or the Union hall and . . . let them know you’re going to transfer me to West Point.” According to Wood, Pelella said “fuck the Union, fuck Mike Ham. I’m not calling. You’re going to show up in West Point tomorrow.”<sup>4</sup>

5           At some point on November 20, presumably after work, Wood called Michael Ham, the servicing business representative for Local 825 “to let him know what was going on.” According to Wood, Ham asked him who would operate the equipment at the Kingston worksite if Wood went to West Point. Wood testified that he told Ham that Pelella had said that he (Pelella) “was going to run the equipment and all the laborers were going to run the equipment.”

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In his testimony, Wood denied (Tr. 83–84) that he contacted Ham for the purpose of getting “permission” to go to West Point. I do not believe that.<sup>5</sup> In any event, Ham did not grant

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<sup>4</sup>I credit Wood’s testimony that Pelella told Wood that Pelella and laborers would run the equipment in Wood’s absence. For one thing, Ham corroborated it, testifying that when Wood called later that day Wood relayed those statements by Pelella to Ham. For another, the statement is consistent with Pelella and others’ statements during the hearing about how the remaining excavator work was accomplished after Wood was laid off—i.e., Pelella operated the excavator. While Bloomer denied hearing any of this, it seems likely that Wood did have such a conversation with Pelella, but simply misstated or misremembered that it had occurred with Bloomer present. In this regard, Bloomer testified that Pelella told him that “he had talked to Chris when we—I guess at the end of the day, and Chris was going to be calling Mike Ham to let him know what was going on.” Wood also told coworkers while saying goodbye the afternoon of November 20, that he had to talk to the union representative about the transfer. This all suggests that Pelella and Wood may have had an additional conversation later in the day on November 20, for which Bloomer was not present, and during which the subject of Mike Ham came up.

However, I do not credit Wood’s testimony that Pelella said “fuck the Union, fuck Mike Ham. I’m not calling. You’re going to show up in West Point tomorrow.” Not only did Pelella deny it (“That never happened”), but no one else testified that they heard it, including Bloomer, who testified credibly in demeanor that he never heard it in the conversation for which he was present. Recall that Wood’s account placed both Pelella and Bloomer at that conversation. But it also feels made up—manufactured to fit the litigation posture of the Charging Party. That feeling is compounded by the fact that Ham’s account of his conversation with Wood, following Wood’s encounter with Pelella, did not include Wood relaying this provocative conversation. If it occurred, it is hard to imagine that Wood would not have told Ham, or that Ham would not have referenced it in his testimony recalling his conversation with Wood.

<sup>5</sup>Not only did Ham contradict it (Tr. 47: “Didn’t he call you to ask you if he can get moved to the West Point job? A He did.”), but in addition, two employees credibly testified that Wood told them at the end of the day on November 20, that he had been asked to go to West Point and that he would if he got the “okay” from his business agent. Wood told coworker Jeffrey Atkins that “If he gives the okay, he would go to West Point. If not, then he’d possibly be able to see us again the next day, come back to the same job.” Wood told Atkins, “I’ll go to West Point if I have to, but I have to check it out. I can’t just make that call, you know. I’ve got to—I’ve got to find out one way or another if I can go with my business agent.” Coworker Anthony Zappone was with Wood and Atkins when Wood made these comments. Zappone recalled Wood saying that “[t]hey want me to go to West Point . . . but I have to clear it with the hall.” This testimony from Wood’s coworkers was offered and received over hearsay objections. I note that I do not rely on the testimony to establish the truth of Wood’s assertions that he needed Ham’s approval in order to transfer to West Point. However, the testimony does provide evidence that Wood *believed* that he needed Ham’s approval, and corroborates that he acted consistent with that belief, something, incredibly, he denied in his testimony (Tr. 83–84).

Wood permission to take the transfer. Instead, Ham told Wood to return the next day to the Kingston site.

5 In his testimony, Ham explained—linking the availability of work at Kingston to the transfer—that he told Wood to return to Kingston because he had not heard from the Employer that muddy conditions, or a redesign of the project left a lack of work for Wood at Kingston:

10 No one from the company ever called and said, the reason we can't have Chris Wood at Kingston was because of mud or a redesign or anything to that nature. No one called me. I didn't think I had to call anybody. I referred the West Point job to the business agent that represents our account.

15 An important point: in their briefs, both the General Counsel and the Union go to some effort to deny and deflect any conclusion that Ham blocked or withheld permission for Profex to transfer Wood. The Union goes so far (CP Br. at 12) as to argue that Ham "approved" Wood's transfer. I find otherwise. Indeed, Ham directly admitted that he did not approve the transfer, and that he did not approve it because there was work for an operating engineer at Kingston:

20 Q Okay. And why did—what—so you did not approve the transfer to West Point, correct?

A That's correct.

25 Q Okay. Why did you not approve the transfer to West Point?

A Because there was still activity at that job, and it required an operating engineer.

(Tr. 47-48).

30 More generally, Ham's testimony artfully attempted to bolster the General Counsel and Union claim that he approved the transfer, but Ham's full testimony, including his cross-examination, does not leave reasonable doubt that—even if "[t]hat's not how it was said," (Tr. 57)—he told Wood not to go to West Point, then later would not approve the transfer when Pelella contacted him.

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Because the issue is important, and disputed by the General Counsel and the Union, it is worth quoting Ham's cross-examination testimony on the point at length:

40 Q Didn't he [Wood] call you to ask you if he can get moved to the West Point job?

A He did.

45 Q Okay. And—

A He—

50 Q And—and—and did you tell him that he should not go to the West Point job, he should go to the Kingston job?

A I did tell him he was dispatched to the Kingston job.

Q Right. Did you tell him to go to the Kingston job on November 21st, because that's where he was dispatched to?

A Yes, I did.

5

Q Okay. And Mr. Wood told you that Profex directed him to go to West Point, correct?

A That's correct.

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Q In your experience, do employees call you to notify you that they've been moved?

A Yes, they do.

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Q Okay. Why did you tell Mr. Wood to go to Kingston instead of West Point?

A Because that's—that's the job he was dispatched to.

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Q Okay. But isn't it typical for the employer to transfer an employee to another job? Isn't it—doesn't that typically happen?

A It happens.

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Q Okay. And did you overrule that transfer?

A I told him to report to the job that he was dispatched to.

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Q Okay. And why did—what—so you did not approve the transfer to West Point, correct?

A That's correct.

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Q Okay. Why did you not approve the transfer to West Point?

A Because there was still activity at that job, and it required an operating engineer.

(Tr. 47-48).

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Later in his cross-examination testimony the same point was made:

Q Okay. So you spoke to him and Mr.—Mr. Woods told you that he was told to report to West Point, correct? We've already gone through this; is that correct?

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A Yes.

Q Okay. And you told him, don't go to West Point, go to Kingston, correct?

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A That's not how it was said.

Q Well, how did you say it?

A I said you were dispatched to the Kingston site.

Q Right. In response to Mr. Woods telling you that he's been told by the Employer to go to West Point, correct?

A Correct.

Q And then despite the fact that he was sent to—he was told to go to West Point, you told him to report to the dispatch site which was Kingston, correct?

A That's correct.

(Tr. 57-58).

Although there is some indirection in Ham's testimony, I have no doubt and I find—based on the foregoing text of the transcript and also the impression that his demeanor made on me as he testified—that Ham did not approve the transfer and that Wood showed back up the next morning at Kingston—instead of West Point—because Ham indicated he should go back to Kingston and not to West Point.<sup>6</sup>

Ham's thwarting of the transfer continued the next day. When Wood did not show up to meet Bloomer at West Point, Bloomer called Pelella and told him that Wood was not at West Point. Pelella said he would drive to Kingston to find out what happened. Pelella arrived at Kingston, according to Wood, at 10 or 11 AM. Pelella testified that he asked Wood what happened and Wood said that "Mike Ham told him not go down there. That there had to be an operator on that job in Kingston." According to Wood, Ham responded "fuck 825, fuck the Union, fuck Mike Ham. I'm going to call that motherfucker right now."

Pelella called Ham. They had a heated exchange. Pelella testified that Ham told him "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." Pelella told Ham he was "fucking delusional. There doesn't have to be an operator on the job."

Ham testified that Pelella called "to explain to me that they would be relocating Chris Wood to a project that they had down at West Point." Ham testified that he told Pelella:

that wouldn't be an issue, but who would be performing the work at the current site?" This sparked Pelella who, according to Ham, told him "it would be none of my fucking business who was working at that site, and I don't tell him . . . . 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 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.

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<sup>6</sup>I need not and do not intend any comment as to whether Ham was right or wrong to do this. But it is a fact and useful for understanding what happened here.

I asked Charlie 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 Fire Training Center, and he told me not for an operating engineer. And that was the end of our discussion.

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While Ham's testimony was couched in a manner intended to preserve a claim by the Union that he had "approved Wood's transfer" (CP Br. at 12), and—only separately—disputed the manning issue at Kingston, I reject that interpretation of Ham's testimony and discredit the testimony to the extent it can be so interpreted. To the contrary, as referenced above, Ham admitted in other testimony that he did not approve the transfer precisely because he believed there was still work requiring an operating engineer at the Kingston job. (Tr. 48.) Ham linked the issue of operating engineers working at Kingston to Wood's transfer, effectively conveying that approval of the latter was conditioned on Profex's agreement to the former. In his conversation with Pelella, Ham made the linkage again: Pelella called about the transfer, and when Pelella told Ham that Wood would be laid off if not allowed to go to West Point, Ham claimed that he told Pelella that sending Wood to West Point "was not a problem," but immediately added that there was a problem—it was "whether or not you have work at this site [Kingston] where Chris [Wood] was dispatched." Ham did not establish with Pelella that he could move forward with the transfer without regard to whether the manning issue was resolved at Kingston. More importantly, Ham did not tell Wood that he could accept the transfer. It was obvious, even from Ham's account of his conversation with Pelella, that the transfer was, indeed, "a problem," as long as Pelella was intent on not having an operating engineer at Kingston. Ham's linkage of the transfer to the manning issue was not lost on Pelella or Bloomer, or Wood. In any event, and decisively, Wood made clear that he was not going to take the transfer without Ham's approval, and no approval was ever conveyed to Wood by Ham.<sup>7</sup>

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Wood claimed that two minutes after Pelella left to call Ham, Pelella hung up the phone and came back to tell Wood he was "done; you're laid off, get out of my machine." Wood testified that he then walked to [his] car and waited for my check."<sup>8</sup>

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<sup>7</sup>Finally, the conclusion that Ham blocked Wood's transfer is corroborated by the unobjected to testimony of Bloomer about his conversation with the Union hiring hall dispatch office, discussed below. Bloomer contacted the union hiring hall in order to secure a union operating engineer to perform the work at West Point that Wood turned down. In that conversation, the union hiring hall dispatchers evinced a clear understanding that Ham was not permitting Wood to take the transfer. (Tr. 111-112.).

<sup>8</sup>While there is no dispute that Wood was laid off that day, the weight of the evidence does not support Wood's account that he was laid off so abruptly. Pelella testified that after speaking to Ham, he worked for much of the rest of the morning, with Wood on the skid steer and Pelella and others in the retaining wall trench setting stone. Around 10:30 AM "or somewhere in that area" after setting the third block, they realized that the shipment did not contain the corner block, and Pelella left for the supply store to see if the block might have been left off the shipment there. Pelella testified that when he returned Wood was still there, using the skid steer. In addition, Jeffrey Atkins corroborated that that on Thursday, November 21, Wood ran the excavator, using it to supply wall blocks for the retaining wall, with Pelella working alongside them, until they ran out of corner blocks and Pelella left for the supply store to see if the corner blocks mistakenly had been left there. Atkins denied seeing Pelella have words with Wood or seeing Wood leaving to go sit in his car. Anthony Zappone testified that he saw Wood working that last day with Pelella assisting on the retaining wall. Carpentry Foreman Otto Poser testified that he handed Wood his layoff check while standing by the retaining wall and that this was not near the parking lot where Wood's car was parked. They exchanged pleasantries. Poser told Wood that "in the future, if

Pelella called Bloomer and told him that he had talked to Ham. In Bloomer's words, "[t]hat conversation didn't go very well. I guess Mike's idea of what needs to get done and ours as business owners are two different things." According to Bloomer, Pelella told him that

5 from what he understands, they're not going to send Christopher down to West Point. And if we want a man, we got to call the hall to get a man. . . .

10 As a result of his conversation with Pelella, Bloomer contacted the Union hiring hall dispatch office to obtain a union operating engineer to perform the work at West Point. The dispatch office "knew the whole situation that Mike wasn't releasing Christopher to West Point":

15 So I called over to dispatch, and I forget exactly who I talked to over there. They were expecting my phone call. They knew the whole situation that Mike wasn't releasing Christopher to West Point. I started explaining my situation with them and they told me that really didn't want to get into it because, you know, that's a Mike Ham thing. Whatever. . . .

20 That it was a Mike Ham thing, and they weren't getting into it. And I said, well, there's no reason to lay this guy [Wood] off. I mean, we don't have any work up there for him to continue with, we've been trying to keep him. He said it's not—not up to him. It's a Mike—Mike Ham thing, and he didn't want to discuss it anymore. He says, I can get you a good guy down there and get you taken care of at West Point.

25 (Tr. 111–112.)<sup>9</sup>

The Union found an employee to start at the next day at West Point. He was hired by Profex to do the work that Profex had wanted Wood to perform at West Point.

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there was any more work and he was available, that it would be good to work with him again." The weight of the evidence is, and I find, that after Pelella's call with Ham, Wood continued working for several hours. However, it is undisputed that he was laid off that day.

<sup>9</sup>This testimony of Bloomer's, set out in the text, was received without objection. Thus, any hearsay claim is waived. *Alvin J. Bart and Co., Inc.*, 236 NLRB 242, 243 (1978) (citing "the well-established doctrine that hearsay is admissible in the absence of objections"), enf't. denied on other grounds, 598 F.2d 1267, 2d Cir. (1979); *U.S. Ecology Corp.*, 331 NLRB 223, 224 (2000) (because testimony was received without objection, hearsay arguments as to it have been waived); *NLRB v. Cal-Maine Farms*, 998 F.2d 1336, 1343 (5th Cir. 1993); see, Fed.R.Evid. 103(a). Moreover, hearsay may be relied upon if, as here, it is corroborative. *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance") (citations omitted); *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994). See also, *A.S.V. Inc.*, 366 NLRB No. 162, slip op. at 1 fn. 4 (2018) (finding hearsay report admissible under FRE 807 residual exception to the hearsay rule and that it strengthens finding of discrimination). Bloomer's conversation with the union hiring hall dispatchers corroborates the evidence that Ham thwarted Wood's transfer.

## Analysis

5 The General Counsel and the Union contend that Wood was discharged in retaliation for union activity, specifically, asserting contractual rights and involving Business Representative Ham in his transfer, and similarly, for Ham asserting the Union's contractual rights. According to the General Counsel and the Union, all of this angered Pelella and he retaliated by converting Wood's transfer to a layoff, and effectively, a discharge, which, if proven, is a discriminatory discharge in violation of Section 8(a)(3) of the Act.<sup>10</sup>

10 The Supreme Court-approved standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). The framework established by the Board in *Wright Line* is inherently a causation test. See *Wright Line*, supra, 251 NLRB at 1089. In *Wright Line*, the Board determined that the General Counsel carries this burden by persuading by a  
15 preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019)  
20 ("More often than not, the focus in litigation under this test is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision'" (quoting *Wright Line*, supra at 1089); *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006).

25 When the General Counsel satisfies his initial *Wright Line* burden, such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the  
30 absence of the protected conduct." *Wright Line*, supra at 1089. In order for the employer to meet this standard, it is not sufficient to produce a legitimate basis for the adverse employment action or merely to show that legitimate reasons factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733  
35 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting claim that employer rebuts General Counsel's case by demonstration of a legitimate basis for the adverse employment action).

40 In this case, I will assume, without deciding, that protected conduct was a motivating reason for the decision to convert Wood's transfer to a layoff.<sup>11</sup>

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<sup>10</sup>It would also be a derivative violation of Sec. 8(a)(1) of the Act. *Bemis Co.*, 370 NLRB No. 7, slip op. at 1 fn. 3 (2020); *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 14 (2018), enfd. 976 F.3d 30 (D.C. Cir. 2020).

<sup>11</sup>Thus, for purposes of this analysis I will assume truth of the hostile comments by Pelella about Ham and Local 825, some of which I have, in fact, discredited. I note that apart from Pelella's conversations with Wood, there is also other evidence in the record of a longstanding dislike between Profex's owners and Mike Ham, based on his union representation. But, for reasons discussed herein, whether or not antiunion animus played a role in the layoff makes no difference in the outcome of the case.

In other words, I will assume without deciding that counsel for the General Counsel has met her initial *Wright Line* burden.

5 Even granting these assumptions, the complaint must be dismissed. This is so, because it is clear and I find that, even in the absence of the protected activity, the Respondent would have laid off Wood for failing to accept the transfer.

10 The initial effort to transfer Wood was motivated by the Respondent's decision not to continue employing an operating engineer at the Kingston site. Whether that was because the Respondent sincerely believed that there was not sufficient work at Kingston to require it to keep an operating engineer, or because it just didn't want to abide by the contract, is not particularly relevant. Either way, the General Counsel does not claim that the Respondent's decision to transfer Wood was unlawfully motivated or related in any way to animus. Indeed, the General  
15 Counsel not only does not challenge the transfer decision but, to the contrary, faults the Respondent for not sticking to it in the face of Woods' refusal to accept it and the Union's failure to go along with it.

20 Unwilling to keep Wood working at Kingston, the Respondent devised the transfer as a way to keep Wood working. The transfer was the Respondent's non-discriminatory effort to avoid laying off Wood. When Wood did not take the transfer, and when the Union conditioned the transfer on the Respondent's agreement to keep an operating engineer working at Kingston, the layoff followed, motivated, as was the transfer, by the Respondent's pre-determined decision that it was not going to keep an operating engineer working at Kingston. This decision may have  
25 been a breach of contract, but it was not discrimination. Ham testified that Pelella told him that "if Chris Wood was not allowed to go [West Point], he would be getting rid of him today." This lines up with the facts of the situation. Wood was laid off—and would have been laid off even in the absence of the protected activity—because he would not or could not take the transfer to the job in West Point. In other words, had there been no protected activity but Wood had refused to  
30 accept the transfer for reasons unrelated to protected activity—for instance, because he felt West Point was too far a drive—the Respondent would have laid him off. The Respondent had determined—before the conflict with Ham—that it was not going to continue to use an operating engineer at Kingston.

35 I recognize that the Union argues (CP Br. at 15) that Wood did not want to turn down the transfer. That may be, but the record is clear that Wood did not take the transfer and would not take the transfer without the Union's agreement to it.

40 And, contrary to the contentions of the General Counsel and the Union, in fact, Ham did thwart the transfer, effectively linking it to and conditioning it on the Respondent's agreement to keep an operating engineer working at the Kingsport site.

45 The Union contends (CP Br. at 15) that enforcing the union contract is what a union business agent is supposed to do—and I agree with that. Though I do not reach the issue, Ham may well have been right, as a contractual matter, that Profex was contractually required to keep an operating engineer working at Kingston. It is a dispute, I was given to understand, that is being litigated in another, appropriate forum. Wood may, in fact, be entitled to backpay and damages under the contract. But that is not this case. The Union was free to require the Employer to abide by the contract as the price of approving the transfer, but the Respondent's  
50 refusal to pay that price does not transform the resulting layoff into a discriminatory one prohibited by the Act.

Woods' layoff was the product of a contractual dispute. The Respondent took the position that there was no work for an operating engineer at the Kington site. That decision motivated the transfer but also the layoff when the transfer was thwarted and not accepted. It is an action the Respondent would have taken without regard to the reasons the transfer was turned down, and even in the absence of the protected activity associated with the decline of the transfer. There is no violation as alleged.<sup>12</sup>

**CONCLUSIONS OF LAW**

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

**ORDER**

The complaint is dismissed.

Dated, Washington, D.C. December 7, 2020



David I. Goldman  
U.S. Administrative Law Judge

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<sup>12</sup>I note that there is no allegation, claim, or argument that Wood's layoff constituted an unlawful unilateral change, or other violation of the Respondent's obligation to bargain pursuant to Sec. 8(a)(5) of the Act. The only issue presented is whether the layoff constituted unlawful discrimination under Sec. 8(a)(3) of the Act, and derivatively, a violation of Sec. 8(a)(1) of the Act.

<sup>13</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.