

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

NOVA BASEMENT SYSTEMS, INC.

and

Case 25-CA-250547

JOHN NAUGHTON,
AN INDIVIDUAL

POST-HEARING BRIEF OF COUNSEL
FOR THE GENERAL COUNSEL

Respectfully submitted by:

Ashley M. Miller, Esq.

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STATEMENT OF THE CASE

This case involves unfair labor practices that occurred at Nova Basement Systems, Inc. hereinafter referred to as Respondent, involving Respondent interrogating employees about their Union membership, activities, and sympathies and unlawfully discharging employee John Naughton, hereinafter referred to as Naughton, for engaging in Union and protected concerted activities.

Based upon the foregoing, Counsel for the General Counsel alleged in the Complaint that the Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act, hereinafter referred to as the Act. Specifically, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their Union membership, activities, and sympathies.¹ Respondent also violated Sections 8(a)(1) and (3) of the Act by discharging its employee John Naughton.²

STATEMENT OF FACTS

John Naughton worked for Respondent from April 2015 until he was unlawfully terminated on October 12, 2019. (Tr. 35). Respondent is a corporation with an office and a place of business in LaPorte, Indiana and is engaged in basement waterproofing, crawl space encapsulation, and foundation repair. Respondent is co-owned by President Dave Naughton, Vice President Terresa Draves, and General Manager Michael Flores. President Dave Naughton is John Naughton's younger brother, but John Naughton has no ownership in Respondent. (Tr. 134). Respondent has three departments: Production, Service, and Sales and approximately thirty employees which includes foremen, assistant foremen, installers, service technicians, salesmen, and an office staff. (Tr. 22). General Manager Mike Flores oversees the Sales Department and

¹ This allegation is alleged in paragraph 5 of the Complaint (GC Exhibit 1(e)).

² This allegation is alleged in paragraphs 6(a) through 6(b) of the Complaint (GC Exhibit 1(e)).

provides some assistance to the Production Department. President Dave Naughton oversees the Production Department. Mike Miller is the Production Manager and he reports to Dave Naughton. (Tr. 20).³ Naughton worked as a service technician and his daily duties included making service calls to customers' residences to make repairs or service Respondent's systems. (Tr. 134-135). Naughton's immediate supervisors were General Manager Mike Flores and Production Manager Mike Miller. (Tr. 136). Respondent maintains an Employee Handbook that governs employees' conduct. (GC Exh. 2). The Employee Handbook is signed by employees when they start their employment at Respondent as part of the onboarding process. (Tr. 23-24).

On October 4, 2019, Naughton and employee Kenny Rutland were called in to General Manager Mike Flores' office. Flores gave Naughton and Rutland written warnings for attendance violations they accrued in the month of September 2019 and informed them they would not receive their full quarterly bonus. (GC Exh. 11, Tr. 184, 275-276).

On October 9, 2019, Naughton, upset after exchanging messages with Mike Flores regarding the loss of his bonus, called Corey Campbell, Vice President of Laborers' Local Union Counsel 81.⁴ During that call Naughton asked Campbell what he needed to do to organize Respondent. Campbell instructed Naughton to contact all of Respondent's hourly employees to inquire who would be interested in meeting at the union hall to hear what the union had to offer. Naughton began calling employees immediately and called all but one employee. (Tr. 136-137, 139, 188-189, 197-198).

On October 10, 2019, Production Manager Mike Miller called Naughton between 7:00 and 7:30AM as Naughton was leaving the shop to make service calls. Naughton testified Miller

³ The parties stipulated that Mike Miller is a supervisor for the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act. (Tr. 8).

⁴ The parties stipulated that at all material times, Laborers Local Union No. 81, Laborers' International Union of North America, has been a labor organization within the meaning of Section 2(5) of the Act.

informed him that he needed to “knock the union crap off.” Miller also stated that General Manager Flores had stopped him and asked what he knew about Naughton trying to set up a meeting at the Union Hall with Respondent’s employees. (Tr. 139, 175). After his call with Mike Miller ended, Naughton immediately called Union Vice President Corey Campbell and relayed to Campbell the conversation he just had with Miller. Naughton also informed Campbell that he talked to all but one employee, and they all agreed to listen to what the union had to offer. (Tr. 139). Naughton testified that he immediately called Campbell because he felt that there would be repercussions because the owners were aware of his attempts to organize Respondent. Naughton testified that he felt there were going to be repercussion because while working at a job in Michigan City several years ago, he asked President Dave Naughton and General Manager Mike Flores why the company did not unionize so it could bid on union jobs, and the response from President Naughton and Flores was that they wanted nothing to do with union jobs or being a unionized company. (Tr. 140-141).

During the week of October 7, 2019 and prior to Respondent making the decision to terminate Naughton, owners Naughton, Draves, and Flores had two separate meetings about Naughton’s union activity. (Tr. 240-241). Vice President Draves testified the first meeting occurred in the office at Respondent’s facility and only the owners were present. During that meeting, Mike Flores told Draves and Dave Naughton that he had received phone calls from two employees concerned about John Naughton’s attempts to unionize Respondent’s employees. (Tr. 241, 269, 277-278). During the next meeting, Production Manager Mike Miller came into the office and told owners Dave Naughton, Draves, and Flores about a conversation he had with Naughton about unionizing. Draves testified that Miller said, “I basically told him that he doesn’t

know what he is getting into. I explained to him how unions work, and he is making a mistake.” (Tr. 236, 243-245).

On October 11, 2019, Naughton called Union Vice President Corey Campbell to inquire about the next steps in unionizing Respondent. Campbell told Naughton that he wanted to speak to the employees individually and asked Naughton to recontact the employees and ask them if it would be okay for Naughton to pass along their cell phone numbers to the union. (Tr. 141-142). Nicholas Gray, a Service Technician for Respondent, testified that during this time frame, Naughton called and asked his permission to pass along his contact information to the Union and he agreed. (Tr. 214).

On October 11, 2019, President Dave Naughton, Vice President Terresa Draves, and General Manager Mike Flores met in Dave Naughton’s and Mike Flores’ office because Naughton allegedly overbid a project for a customer on October 7, 2019. All the owners testified that it was during this meeting that they made the collective decision to terminate Naughton due to the overbidding issue and other conduct related to his driving, failure to clean his truck, and attendance. The owners did not review any documents when they made their decision to terminate Naughton. (Tr. 36-42, 237-238, 264, 267).

On October 12, 2019, Naughton was scheduled to be at work at 7:00AM, but he arrived approximately thirty minutes late due to family car troubles. (Tr. 142). Naughton worked his entire shift and returned to the shop. When Naughton arrived at the shop, he noticed that all three owners’ vehicles were at the shop. Naughton found this unusual because only General Manager Mike Flores worked on Saturdays. When Naughton arrived at the office, he saw President Dave Naughton, Vice President Terresa Draves, and General Manager Mike Flores. Flores informed Naughton that they needed to talk. Naughton asked what they needed to discuss, and Flores

started listing write ups that Naughton had received regarding tardiness, not cleaning out his truck and overbidding a job. Naughton interrupted Flores and asked if he was being fired. Flores responded that Naughton was indeed being fired. Naughton cut the meeting short, clocked out, and left the office. (Tr. 143- 144). As Naughton was leaving, he told all three owners that it was not over, and they could not terminate him for exploring his rights to unionize. (Tr. 195). Naughton immediately called Union Vice President Corey Campbell and told him that he had just been terminated by Respondent. (Tr. 145, 203). On Naughton’s final counseling memo and in its position statement, Respondent stated that Naughton’s tardiness on October 12, 2019 was the final basis for Naughton’s termination. (GC Exh. 12: 64-65, Tr. 47).

On October 13, 2019 and October 15, 2019, Naughton sent Corey Campbell text messages containing the names and numbers of employees who were interested in hearing what the union had to say. (GC Exhs. 14,15).

Approximately, a week and a half after his termination, Naughton called Production Manager Mike Miller to see how things were going at Respondent. Miller told Naughton that if he had not been messing around with the union, Naughton would not have lost his job. Miller stated that he told the owners he had worked with unions for years and they will “screw up a company” so the last thing they needed was the union. (Tr. 155).

ARGUMENT

I. Respondent violated Section 8(a)(1) of the Act when Production Manager Mike Miller interrogated John Naughton about his Union membership, activities, and sympathies.

General Counsel presented sufficient evidence to prove Respondent violated Section 8(a)(1) of the Act when Production Manager Mike Miller called John Naughton on October 10, 2019 and interrogated him about his Union membership, activities, and sympathies.

In determining whether an interrogation is unlawful under the Act, the Board looks at whether, under all the circumstances, the questioning would reasonably tend to coerce the employee at whom it is directed. *Rossmore House*, 269 NLRB 1176, 1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The interrogation need not take the form of a question to be unlawful. Thus, statements designed to elicit a response may constitute an unlawful interrogation. *See, e.g., Grass Valley Grocery Outlet*, 338 NLRB 877, 882 fn. 1 (2003), *affd.* sub nom. *NLRB v. Cubitt*, 121 Fed. Appx. 720 (9th Cir. 2005); and *Medcare Associates*, 330 NLRB 935, 941 fn. 21 (2000). In *Advancepierre Foods, Inc.*, 366 NLRB No. 133 (July 19, 2018), the Board held that the Employer engaged in unlawful interrogation when a human resources manager told an employee that employees had complained about her, remarked that she and another manager had seen video of the employee engaged in union activity in the employee break room, and accused the employee of distributing union literature. The Board reasoned that this accusation by the human resources manager was designed to elicit a response, either confirmation or denial, from the employee, and thus violated 8(a)(1).

On October 10, 2019, Production Manager Mike Miller called John Naughton and informed him that he needed to “knock the union crap off.” The conversation appears to have come after two employees contacted General Manager Mike Flores and informed him they were concerned about Naughton’s attempt to unionization efforts. Similar to the employer in *Advancepierre Foods, Inc.* Miller informed Naughton that General Manager Flores was aware that Naughton was engaging in union activity. Miller told Naughton that General Manager Flores had stopped him and asked what he knew about Naughton trying to set up a meeting at the Union Hall with Respondent’s employees. The record shows the purpose of Miller’s call to Naughton

was to elicit additional information or seek confirmation or denial of his activities; specifically, Respondent was seeking additional information about the union meeting that Naughton was trying to set up with employees. This was an improper inquiry which was designed to elicit Naughton's reactions and sympathies to a new union organization effort.

Naughton's testimony should be credited because it is corroborated by Flores' testimony that two employees informed him that Naughton was trying to unionize employees. Union Vice President Corey Campbell further corroborates Naughton's version of the event testifying that Naughton called and told him about his conversation with Mike Miller. Based on the foregoing, the General Counsel introduced sufficient evidence to prove Respondent interrogated Naughton about his Union membership, activities, and sympathies.

II. Respondent violated Section 8(a)(1) and 8(a)(3) of the Act when it discharged employee John Naughton after he engaged in Union and protected concerted activities.

General Counsel presented sufficient evidence to prove Respondent violated Sections 8(a)(1) and (3) of Act when the evidence showed after Respondent became of John Naughton's union activity that began on October 9, 2019 and continued until Respondent terminated him on October 12, 2019. To prove that disciplinary action, including discharge, violates the Act under *Wright Line*, the General Counsel must initially show that the employee's Section 7 activity was a motivating factor in the employer's decision to discipline and discharge the employee. The elements required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. 251 NLRB 1083, 1089 (1980). "The evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." *Mondelez Glob., LLC*, 369 NLRB No. 46 (Mar. 31, 2020)

quoting *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019). If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Wright Line*, *supra*; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* mem. 127 F.3d 34 (5th Cir. 1997).

To meet its burden under *Wright Line* in disciplinary cases, it is not enough for an employer to show that an employee engaged in misconduct for which the employee could have been discharged or otherwise disciplined. As the Board has emphasized, the employer must demonstrate that it “*would have*” discharged, or otherwise disciplined, the employee for the misconduct in question. *Structural Composites Industries*, 304 NLRB 729, 730 (1991) (emphasis original). In *Electrolux Home Prod., Inc. & Jvada Mason*, 368 NLRB No. 34 (Aug. 2, 2019), the Board held that even when the Employer “has offered a pretextual reason for discharging or disciplining an alleged discriminatee” the General Counsel must prove that the motivating factor for the discharge or disciplines was animus against the union or protected concerted activities.

Proof of an employer's unlawful motivation can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Janus of Santa Cruz & Nat'l Union of Healthcare Workers*, 2019 WL 3072670 (July 12, 2019). Circumstantial evidence such as the timing of employer's action, shifting defenses, failure to issue disciplines to employees, and failure to follow established disciplinary policy support the inference on unlawful motivation.

On October 9, 2019, Naughton engaged in union activity when he called Union Vice President Corey Campbell and asked what he needed to do to begin unionizing Respondent and

began calling employees to see if they were interested in listening to a union representative. Naughton's union activity continued on October 10, 2019 when he called Campbell and informed him that he contacted all but one employee, and all agreed to listen to what the union had to offer. On October 11, 2019, Naughton called Campbell again asking what he should do next. After Campbell requested Naughton contact the employees again to get permission to pass their contact information to the union, Naughton contacted employees once again and transmitted the contact information to Campbell on October 13, 2019 and October 15, 2019.

Respondent was aware of Naughton's union activity. General Manager Mike Flores testified that two employees contacted him and informed him that Naughton was trying to unionize Respondent. Flores later discussed those conversations with President Dave Naughton and Vice President Terresa Draves. Draves testified that on a separate occasion, Production Manager Mike Miller came into the office and told the Owners Dave Naughton, Draves, and Flores asked about the conversation he had with Naughton about his union activity. Lastly, Naughton testified that Mike Miller called him and told him that Flores was aware that he was trying to set up a union meeting.

Respondent had animus toward the Union in general and John Naughton specifically. Direct evidence of animus was shown when Production Manager Mike Miller told Naughton to "knock the union crap off" during the October 11, 2019 phone call. (Tr. 139, 175). During a phone call after Naughton's termination, Miller told Naughton he would not have lost his job if he had not messed around with the union. (Tr. 155). In a meeting with the owners, Production Manager Miller described Naughton's union activity as a "mistake" and Naughton "didn't know what he was getting into. (Tr. 136). President Dave Naughton described Naughton's attempts to unionize as a "scheme or angle" or "a way to make money without working." (Tr. 270, 271).

The timing of Naughton's Union activity and the Respondent's retaliatory conduct is evidence of the Employer's unlawful motive. It is well-settled Board law that "the timing of an adverse action shortly after an employee has engaged in protected activity will support a finding of unlawful motivation." *See Real Foods Co.*, 350 NLRB 309, 312 (2007); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004)). Here, Naughton engaged in union activity October 9, 2019, October 10, 2019, and October 11, 2019, Respondent made the decision to terminate Naughton on October 11, 2019, and Respondent effectuated the termination on October 12, 2019.

Respondent's shifting reasons for Naughton's discharge is evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct". *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action).

In this case, Respondent's documented reason for Naughton's termination was an attendance policy violation that occurred on October 12, 2019. However, during testimony President Dave Naughton, Vice President Terresa Draves, and General Manager Mike Flores all testified that they made the decision to terminate Naughton on October 11, 2019 primarily for overbidding a job for a customer, but also because he failed to keep his truck clean, had attendance problems, and driving issues. President Dave Naughton, Vice President Terresa Draves, and General Manager Mike Flores all admitted to these inconsistencies on the record and failed to provide an explanation for them.

Assuming *arguendo* that Respondent's documented reason terminating Naughton on October 12, 2019 for attendance is true, Respondent's failure to follow its own established attendance policy would also be evidence of the Employer's unlawful motive. *See Stoddy Co.*, 312 NLRB 1175, 1182-1183 (1993) (failure to timely document or follow established disciplinary policies); *Baptist Hospital, Orange*, 328 NLRB 628, 635 (1999) (failure to comply with established disciplinary procedure). Respondent's Employee Handbook contains an attendance policy with an effective date of September 1, 2019. (GC Exh. 2). The Disciplinary Outline of the Attendance Policy is as follows:

1. Three (3) Attendance Violations (*Unexcused Absences or Tardiness*) in one (1) calendar month, employee loses half (1/2) of their quarterly Condition Bonus
2. Six (6) Attendance Violation in a 6 month period (*sliding scale*), employee is suspended without pay for one (1) week and loses their Condition Bonus as outlined in #1.
3. Nine (9) violations total in one (1) calendar year will result in termination of employment.

General Manager Flores testified that the attendance policy was not retroactive and only applied to attendance violations accrued after September 1, 2019. (Tr. 30-31). The Employer's documented reason for Naughton's termination was an attendance policy violation. On the date of his termination, Naughton had eight attendance violations from September 1, 2019 through October 12, 2019, which was one short of the policy's rule about termination. (R Ex. 5). Thus, Respondent violated its own attendance policy when it terminated Naughton for an attendance violation on October 12, 2019. According to Respondent's attendance policy, Naughton was subject to suspension not termination. This departure from company policy is further evidence that Respondent terminated Naughton because of his union activity.

Respondent also asserts that it terminated Naughton because he overbid a job for a customer. However, Respondent's failure to present this discipline to Naughton is also evidence

of animus and unlawful motive. Evidence of animus and unlawful motive can be inferred when an Employer seeks to “pad” an employee’s personnel file. See Lord Industries, Inc., 207 NLRB 419, 422 (1973) (failure to present discharged employees with copies of written disciplines contained in their personnel files supports finding of pretext). An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful. *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987); *In Re W. Maul Resorts*, 340 NLRB 846, 849 (2003).

In the current case, General Manager Flores asserts that Naughton overbid a job for a customer. Naughton testified that he inspected the job and because he was not sure how to bid the job, he met with Mike Flores in his office to discuss the bid. Flores instructed Naughton to bid the job as a total replacement or just a repair. Naughton followed Flores instructions, but testified that the customer was not happy with either bid. (Tr. 161-162). General Manager Flores admits that he never discussed the overbidding with Naughton and never issued him a verbal or written warning which is further evidence of Respondent’s unlawful motive. (Tr. 127)

The record establishes that Respondent was unlawfully motivated by John Naughton’s union activity when it discharged him on October 12, 2019 in violation of Sections 8(a)(1) and (3) of the Act.

CONCLUSION

For the above-stated reasons, the Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that the Respondent interrogated and discharged John Naughton in violation Sections of 8(a)(1) and (3) of the Act as set forth in the proposed findings and conclusions based upon the language found in “Attachment A”. The Counsel for the General Counsel also respectfully requests that the Administrative Law Judge order Respondent to post at

its offices, notices containing assurances that Respondent shall not repeat the unfair labor practices found herein, and shall remedy them as ordered. The Counsel for the General Counsel further requests that such notice include the language found in "Attachment B".

Respectfully submitted,

/s/ Ashley M. Miller

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Attachment A

Proposed Findings and Conclusion

1. The Respondent, Nova Basement Systems, Inc., is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The Laborers' Local Union No. 81, a/w Laborers' International Union of North America has been a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees about their Union membership, activities, and sympathies, Respondent, Nova Basement Systems, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Sections 2(6) and (7) of the Act.
4. By discharging employee John Naughton, Respondent, Nova Basement Systems, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Attachment B

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 ask you about your support for Laborers' Local Union No. 81, a/w Laborers' International Union of North America or any other union.

WE WILL NOT discharge you because of your union membership or support.

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

WE WILL offer John Naughton immediate and full reinstatement to his former job without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay John Naughton for the wages and other benefits he lost because we discharged him.

WE WILL compensate John Naughton for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Regional Director allocating the payment(s) to the appropriate calendar year.

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

CERTIFICATE OF SERVICE

I, Ashley M. Miller, Counsel for the General Counsel, hereby certify that on January 20, 2021 at 3:30 PM CST, I served this Post-Hearing Brief of Counsel for the General Counsel by electronic mail on the parties below:

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