

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

OZARK MOUNTAIN INTERIORS,
Respondent

and

17-CA-22224
17-CA-22228
17-CA-22240
17-CA-22303

CARPENTERS DISTRICT COUNCIL OF
KANSAS CITY & VICINITY, AFL-CIO,
Charging Party Union

Susan A. Wade-Wilhoit, Esq.,
for the General Counsel
Alvin Clifton, pro se,
for the Respondent¹
Michael J. Stapp, Esq.,
for the Charging Party Union

DECISION ²

Albert A. Metz, Administrative Law Judge. This case involves issues of whether the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.³ More specifically the issues involve alleged threats, creation of the impression that employees union activities were under surveillance, interrogation about employees' union activities, implementation of a discriminatory union sticker policy, the discharge of employees Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller and Tim Cotter, the failure to consider for hire and hire union applicants Stanley Campbell, Sterling "Jason" Hammons, Brian Morris, and Jeff Williams, and the subcontracting of Respondent's Springfield, Missouri installation work which resulted in the lay offs of employees Kelly Hall, Michael Corner and Jesse Hammer.

¹ The Respondent was originally represented by the law firm of Hulston, Jones and Marsh, whose counsel participated in part of the hearing. Thereafter, that firm's unopposed motion to withdraw as counsel was granted and the Respondent's President, Alvin Clifton, has thereafter represented the Respondent.

² This matter was heard at Springfield, Missouri on December 9-11, 2003 and February 24, 2004.

³ 29 U.S.C. § 158 (a)(1) and (3).

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the Parties' arguments and the briefs filed by the Government and the Charging Party Union, I make the following findings of fact.

10 **I. JURISDICTION**

The Respondent manufactures cabinets in its shop in Springfield, Missouri, and installs such products at the customer's designated location. Alvin Clifton is the Respondent's principal owner and his wife Grace, son Sam, and daughter Lori Mathews also have ownership interests in the Respondent. Lori Mathews is the wife of Todd Mathews, who is employed by Respondent as a project manager. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

20 **II. SERVICE OF THE CHARGES**

The Respondent denied that it received the charges in this case. The charge in case 17-CA-22224 alleges that Dave Carson was unlawfully discharged. This charge was originally filed in Region 28 as case 28-CA-18741 and then transferred to Region 17. The charge indicates that it was filed on May 20, 2004, and there is a letter serving the charge on Respondent which is dated May 20, 2003. Union agent Art Kessler testified without contradiction that he hand-delivered two separate copies of the charge in case 17-CA-22224 to Respondent's facility on May 20, 2004. The Government presented evidence regarding the service of the other charges including service letters. Marion Murphy, Region 17 Regional Attorney Secretary, credibly testified, without contradiction, that all service letters issuing from Region 17 are deposited in the mail on the date reflected on the letter, and then certified by Regional staff that this has been done. I find that the record evidence establishes that the Respondent was duly served with all of the charges in this case.

35 **III. TERMINATION OF DAVE CARSON**

Carpenter, Dave Carson, applied for a job with the Respondent in late May 2002. Carson's work experience included thirty years as a carpenter. He also has been a member of the Carpenter's Union, Local 978 for about twelve years. Carson did not disclose his union membership to the Respondent at the time he applied for work. Respondent's Shop Foreman, Ruben Care, initially interviewed Carson for employment. Care and Alvin Clifton then spoke with Carson and he was hired. Carson started his employment by working for two weeks in the shop. He was then assigned to work at installing cabinets on various job sites.

45 On approximately June 18, 2002, Carpenter's Union International Representative, John Beatty, went to a job site that the Respondent had in Columbia, Missouri where he met Carson and fellow employee, Richard Shumate. Beatty discussed the Union with the two men. Thereafter, Carson and Shumate continued to discuss union organization and Carson talked to other employees about the benefits of the Union.

5 At about the same time Local 978 Organizer, Art Kessler, talked with Respondent's
Project Manager, Tim Elliott, about Clifton signing a union collective-bargaining agreement.
Elliott told Kessler that Clifton was likely not interested in becoming a union contractor. On
October 23, 2003, Kessler telephoned Clifton and explained his views that the union could
benefit the Respondent's business. Kessler taped this telephone conversation. Clifton told him
10 that he was not interested in getting involved with the Union.

Clifton: I understand where you're coming from and I'd rather not get involved with the
union, third party in the shop, from my standpoint and I —and I don't know, my
employees maybe they want it.
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Kessler: Yeah. What if—what if that was the situation? What if your employees were
interested?

Clifton: You know what, I'd probably have to close down.
20

Kessler: Close down?

Clifton: You know, we bid these jobs, what we got. We've got a lot of work, but you
know, we have to be very competitive to get it. It's not that I'm making a lot of money,
I'm not. We're just barely keeping them open, couldn't keep my doors open. You know,
25 if I didn't have work for the guys, I'd have to send them home and right now, if I don't
have work, I keep them busy sweeping floors, doing whatever they can do just so they get
a paycheck every week. (G. C. Exh. 49(b))

30 Carson continued his zealous advocacy on behalf of the union and arranged a meeting
between the employees and the Union. The meeting was scheduled for October 29, 2002, at a
Shoney's restaurant in Springfield, Missouri. Only Carson and fellow employee, Kelly Hall,
attended the first union meeting. Carson continued his efforts to persuade his fellow employees
to become interested in the Union and scheduled a second union meeting at the restaurant for
35 November 12, 2002. Employees Carson, Hall and Shumate attended this meeting.

A few days before November 21, 2002, Carson scheduled a third union meeting for that
date at the Carpenter's Training Center in Springfield, Missouri. Carson invited approximately
12 of the 20 shop and installation employees to the meeting. Carson and fellow employees Kelly
40 Hall, Mike Corner, Jesse Hammer, Rick McCaslin and Richard Miller attended this meeting. All
of these employees, with the exception of Hammer, signed union authorization cards during this
meeting.

On November 20, 2002, Carson was informed by Clifton that he was being laid off
45 because several road superintendents were returning from completed projects and were being
assigned to perform installation work. Carson secretly taped recorded this conversation with
Clifton. Clifton stated that as a result of these reassignments there would be an excess of
installers and he would have to cut the work force. Carson asked if could work in the shop.
Carson testified that Clifton told him that he would not be able to come back to the shop because
50 he spent too much time talking to employees. Carson challenged Clifton's assertion and asked

5 why he had never been disciplined if he had engaged in excessive talking. Clifton told Carson that he should have known it was wrong. Clifton admitted there was not a problem with Carson's work or the quality of that work and that "the real problem is I've got too many guys with those guys coming back in." (G. C. Exh. 27, pp. 3-4)

10 On November 22, 2002, the Respondent distributed a newsletter to employees. Carson received a copy of that newsletter and noticed it contained a message welcoming a newly hired installer, Thomas Walker.

15 Clifton testified at the hearing that the primary reason Carson was terminated was that he was talking to employees. He did not mention the other reason he had stated to Carson at the time of his layoff, i. e., that traveling supervisors were returning to town and needed to be employed. Clifton did testify that he had had complaints from employees in the shop that Carson was talking to them but Clifton could not recall specifically the identity of the complaining employees. Clifton also testified that he had complaints about Carson talking to employees while
20 working as an installer in the field. Clifton recalled that those complaints came from Carson's supervisor, Josh Bollin and employee Joe Mueller. Additionally, Clifton recalled that Carson talked to Spanish speaking employees on a Wal-Mart job. No specifics were given as to how the talking interfered with Respondent's work or when these multiple events took place in relation to his discharge. The Respondent presented no evidence as to what Carson was discussing when he
25 was allegedly talking to employees. The Respondent's records contain no mention of any of talking problems or of any warnings, counseling or discipline issued to Carson for any reason. None of the persons who allegedly complained to Clifton about Carson testified at the hearing to corroborate his testimony.

30 IV. ANALYSIS OF CARSON'S DISCHARGE

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of
35 discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980),
40 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); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd., 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478-1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302, fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either
45 did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

50 The evidence shows that Carson had been talking to more than half of the employees about the benefits of unionization and, shortly before he was terminated on November 20, he had

5 invited them to attend a union meeting on November 21. The Respondent employed approximately 20 employees at the time. The Board has held under its “small plant” doctrine that knowledge may be reasonably inferred from the fact that there is a small work force involved in the business where the union activity is taking place. *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1123 (2002); *Weise Plow Welding Co.*, 123 NLRB 616, 618 (1959). Carson was clearly
 10 the leader of the union movement and he had spoken to approximately half of the employees about the Union and the meetings. The timing of Carson’s discharge preceded the third union meeting by one day. Additionally, Clifton was aware through his conversation with union representative Kessler that the Union was interested in organizing his business and Clifton’s comment that maybe his employees wanted the union. The Respondent had no rule against
 15 employees talking to each other during work. Carson had never been disciplined or warned that he was interrupting work with his alleged excessive talking. The Respondent’s records contained no mention of his being a problem employee in any regard.

The Respondent’s employee handbook sets forth a progressive disciplinary procedure. (G. C. Exh. 6, pp. 18-19). The Manual also notes that if problems arise with an employee’s
 20 performance, “your supervisor will coach and counsel you in mutually developing an effective solution.” For unexplained reasons, none of these procedures were followed in Carson’s case. Although there was allegedly no work for him as an installer, a new installer was hired shortly after his discharge. I infer that the reasons given for Carson’s discharge were a pretext. I
 25 conclude that on the record as a whole the Respondent was aware or suspected Carson of engaging in union activity. Given the other violations of the Act discussed below, the pretextual nature of his discharge, Clifton’s knowledge of the Union’s interest in organizing his business, and his statement that he would probably close his business if the union organized it, I find that the elements of knowledge and animus have been shown to support the Government’s burden of
 30 establishing that Carson’s discharge was motivated by his union activities. Based on the record as a whole, the somewhat shifting reasons that Clifton assigned for terminating Carson, the lack of corroboration of Clifton’s testimony and Clifton’s demeanor while testifying, I do not credit his reasons for terminating Carson. I thus find that the Respondent has failed to overcome this Government’s showing that Carson’s termination violated the Act. I conclude that the November
 35 20, 2002, discharge of Dave Carson was the result of his union activities and was a violation of Section 8(a)(1) and (3) of the Act.

V. TERMINATION OF RICK McCASLIN

40 Employee Rick McCaslin has been a carpenter for about eight years. He applied for work with the Respondent on November 1, 2002. McCaslin credibly testified that he was interviewed by Clifton who told him that there was a lot of work and that overtime was available if McCaslin was interested, but it was optional. McCaslin was hired and began work in the shop on
 45 November 4, 2002.

In his first week on the job McCaslin was told by his supervisor, Greg Harbin, that he would have to work overtime that week. McCaslin asked if the overtime was optional, and Harbin said that it was not optional and if he wanted to work he would be there the next day for the overtime. McCaslin sought out Clifton and asked him about the overtime not being optional.
 50 Clifton told him that the employees at Respondent were team players and as part of the team he

5 was required to work the overtime. McCaslin gave uncontroverted testimony that he in fact did work the assigned overtime and that he never refused to work overtime during his employment with the Respondent.

10 Shortly after his being hired McCaslin was approached about the union organizing effort by fellow employee Kelly Hall and invited to attend a union meeting at the Carpenter’s Training Center on November 21, 2002. McCaslin attended the meeting and signed an authorization card.

15 On November 27, 2002, McCaslin was told by Shop Foreman, Ruben Care, that he was being terminated. Care told McCaslin that he did not know the reason for his discharge but did ask McCaslin if he had a confrontation with Clifton regarding overtime. McCaslin said there had been no confrontation, but that he had asked Clifton about having to work overtime. McCaslin received no disciplinary action or complaints about his work while working for the Respondent.

20 Although McCaslin was not given a reason for his termination, Clifton testified that he chosen McCaslin for discharge because McCaslin was still in his 90-day probationary period and that at one point in time he had refused to work overtime. Clifton gave no specifics of the circumstances concerning this alleged refusal to work overtime and none of Respondent’s records were introduced into evidence to substantiate the alleged overtime refusal. McCaslin was never counseled or disciplined under the Respondent’s progressive disciplinary system for refusing to work overtime or for any other reason. McCaslin’s personnel file did contain one memo that stated:

To whom it may concern:

30 Rick McCaslin was terminated from Ozark Mountain Interiors, Inc. on 11/27/02. Ruben and Alvin said that he had a poor attitude and was discharged during his 90-day probationary period. He had begun work on 11/4/02. (G.C. Exh. 17).

35 The memo is dated May 29, 2003 – approximately six months after McCaslin’s discharge. The unfair labor practice charge alleging his firing to be a violation of the Act was filed with the Board on May 20, 2003 – nine days before the memo was prepared. There are no contemporaneous records in McCaslin’s personnel file to reflect that he had any job deficiencies. Ruben Care, McCaslin’s supervisor, did not testify at the hearing.

40 Based on demeanor, the comparative detail of testimony and the record as a whole, I found that McCaslin was more persuasive in his testimony and I credit him that he had never refused to work overtime. I further find that the Respondent failed to substantiate its assertion in the delayed memo that McCaslin had a “poor attitude.”

45 Despite the limited “attitude” reason cited in the May 29 memo as being the basis for McCaslin’s termination, Clifton testified at the hearing that he also terminated McCaslin because the Respondent had hired too many employees and needed to lay off some of them. The Respondent’s hiring records show that Steven Cobel was hired to work in the shop two days after McCaslin’s termination. The Respondent hired five more shop employees over the following three weeks. Several other employees, including Harith Jones, Thomas Walker, and Paul Phillips, were
50 hired to work in the shop between the time of McCaslin’s hire and his termination. None of these

5 individuals were laid off at the time McCaslin was terminated. Consistent with the record evidence
of Respondent’s hiring and retention of employees, I further note that McCaslin gave
uncontroverted testimony that when he interviewed for the job, less than a month before he was
terminated, Clifton told him that the Respondent had plenty of work through 2003, including lots
of overtime. I do not credit Clifton’s testimony that he had too many employees and thus had to
10 lay off McCaslin. Comparing the Respondent’s file memo and Clifton’s testimony, I find that the
Respondent sought to buttress the reasons for McCaslin’s termination after the unfair labor
practice charges were filed with the Board.

VI. ANALYSIS OF MCCASLIN’S TERMINATION

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The Respondent, as set forth above, is a small business and the Union’s interest in
organizing employees was made known to Clifton. As discussed infra, on November 25
supervisor Care warned employee Robert Slavens that Clifton was aware of employees’ union
activities. I find from the record as a whole that the Respondent did have knowledge of the
20 employees union activities, including McCaslin’s union activities, at the time of his discharge. I
also find that the timing of his termination shortly after he attended the Union meeting and
signed an authorization card does establish his support for the Union. In analyzing McCaslin’s
firing I have taken into consideration the reasons advanced by the Respondent. I find that these
reasons are not supported by the evidence. I conclude that the reasons were a pretext and I find
25 that the real reason for his discharge was his union activity. I conclude that McCaslin’s
termination is a violation of Sections 8(a)(1) and (3) of the Act.

VII. THE TERMINATION OF ROBERT SLAVENS

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Robert Slavens started work for the Respondent on December 7, 2000. Slavens was
employed as a painter. Approximately the first week of November 2002 Dave Carson talked to
Slavens about the union organizing campaign and invited him to the November 21, 2002, union
meeting. Slavens was not able to attend the meeting but did subsequently discuss it with fellow
employees Tim Cotter and Kelly Hall in the parking lot outside the paint shop. Respondent
35 monitors this parking lot with surveillance cameras. During their discussion, Hall gave union
authorization cards to Cotter and Slavens. Slavens signed his card later that day and gave it to
employee Cotter. Slavens then began speaking to other employees about the union and soliciting
them to also sign authorization cards. Slavens testified that he spoke to four or five employees in
the shop about the Union.

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On November 25, 2002, three days after signing his authorization card, Slavens was
clocking in from lunch when Shop Foreman, Ruben Care, approached him and told him to watch
his back “because Alvin [Clifton] knows.” Slavens asked what it was that Alvin knew. Care did
not answer and walked away. Care did not testify at the hearing. I find that Care’s reference to
45 Clifton knowing something was a reference to Clifton knowing of Slavens and other employees’
union activities.

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Two days later Slavens was working in the paint department when Care came in with a
new employee. Care told Slavens that the new employee was going to work the coming
Thanksgiving weekend and asked Slavens to write the pump pressures on the pump. Care told

5 Slavens that Respondent was going to give him four days off. Slavens had been working 50-70 hours per week.

10 On December 2, 2002, as Slavens reported to work Care came up to him and said, “I’m sorry but I have to let you go.” Care told Slavens that Alvin did not need his services any more. That same day Tim Cotter, who had been working with Slavens in the paint department, was contacted by Respondent’s employee Cindy Jones, and told that Robert Slavens had been fired and that he (Cotter) was being moved back to the shipping department. Slavens was ultimately recalled to work on about December 19, 2002, and recommenced work for the Respondent on January 2, 2003.

15 Clifton testified at the December session of the hearing in this case that Slavens was terminated because he allegedly refused to work overtime and because of deficiencies on the Le Cruset and Rocky Mountain Chocolate Factory jobs. The Government then questioned Clifton about the Respondent’s position statement that had been provided to the Board during the investigation of this case. That statement did not include work deficiencies on the Le Cruset or Rocky Mountain Chocolate Factory jobs as reasons for Slavens’ discharge. Clifton had no explanation why the position statement failed to include these as reasons for Slavens’ discharge. The evidence shows that Slavens was never warned or disciplined for any such alleged errors in workmanship, nor was his personnel file noted with deficiencies in performance.

25 When the hearing resumed in February 2004 Clifton once again testified concerning Slavens. This time Clifton stated that Slavens was not terminated, but rather had quit. The Respondent offered no additional evidence to support this revised version of why Slavens left the Respondent’s employment.

30 **VIII. RESPONDENT’S DEFENSES TO CARE’S WARNING**

The Respondent argues that Ruben Care’s warning to Slavens that Clifton knew of the employees’ union activities is barred by Section 10(b) of the Act and because Care was not a supervisor.

A. Section 10(b) defense

40 The Respondent argues that the Board’s decision in *Air Contract Transport, Inc.*, 340 NLRB No. 81 (2003), should be controlling in dismissing the allegations concerning the alleged warning that Care gave to Slavens. I find that *Air Contract* is not dispositive of the situation because in that case the Government sought to amend the complaint at hearing to add an 8(a)(1) coercive statement regarding the discriminatee’s alleged *union* involvement. The complaint alleged only a Section 8(a)(1) violation based on discipline and termination for *protected-concerted activity*. The Board rejected the amendment because the union activity was not related to the reasons asserted in the complaint for the discriminatee’s discipline and discharge: protected, concerted comments during a meeting with the Employer. The Board reasoned that the protected concerted comments did not involve a union, and therefore the coercive comment about the discriminatee’s union involvement was not part of the same legal theory and would not be defended in the same manner as the discipline and discharge allegations.

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The amendment in the instant case deals with Care's threat of unspecified reprisal and the creation of the impression that Slavens' union activities were under surveillance. I find that this conduct was part of the Respondent's efforts aimed at discouraging its employees' union activities. This conduct was not isolated and as found throughout this decision was part of broad conduct violative of the Act that sought to discourage employees' union activities. I find that the allegation was closely related to the union activity discharge allegation in the original charge and that paragraphs 5(a) and (b) of the complaint are not precluded by Section 10(b) of the Act. *Fred'K Wallace & Son, Inc.*, 331 NLRB 914 (2000).

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B. Care's Supervisory/Agency Status

The Respondent denies that Ruben Care is its supervisor or an agent. Section 2(11) of the Act defines a supervisor in the following terms:

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The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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It is well established that only one of the indicia specified in Section 2(11) of the Act needs to exist to prove that an individual is a supervisor, provided that the authority is exercised with independent judgment and discretion on behalf of management and it is not a routine matter. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

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The evidence shows that Ruben Care was designated by the Respondent as the Shop Foreman and was in charge of the entire shop workforce. He informed employees of their terminations. He participated in interviewing employees for employment and signed employee evaluations. Care signed an Equipment Operation Certificate as the individual's supervisor. Care sent one employee home after a confrontation at work. Care attended regular management meetings. He had the authority to direct employees to work overtime. Clifton during his testimony referred to Care as the supervisor of employees Tim Cotter and Richard Miller and noted that he directed Care to discipline those employees. Other than its bare denial that Care was a supervisor or agent, the Respondent offered no evidence to rebut the Government's evidence that he in fact was the Respondent's agent and supervisor. I find that the Government has established that Care's duties show that he was the Respondent's supervisor and agent within the meaning of the Act.

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The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). I find that Care's statement to Slavens to watch his back because Clifton knew of his union activities interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act. *Mingo Logan Coal Co.*, 336 NLRB 83 (2001); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462-463 (1995).

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IX. ANALYSIS OF SLAVENS' TERMINATION

In its answer, Respondent asserts that Slavens was discharged on November 27, 2002, and the claim should therefore be barred by Section 10(b) of the Act. Respondent offered no evidence to support this contention and witnesses Robert Slavens, Richard Miller and Tim Cotter credibly testified that Slavens' discharge occurred on December 2, 2002. The charge alleging Slavens illegal discharge was filed on June 2, 2003, within the 10(b) period. I find that the allegations alleging Slavens discharge are not precluded by Section 10(b) of the Act. *Geiger Read-Mix*, 315 NLRB 1021, 1029 (1994); *MacDonald's Industrial Products*, 281 NLRB 577 (1986). I deny, therefore, the Respondent's motion to dismiss Slavens' discharge as being outside of the Section 10(b) statute of limitations.

Slavens' union activities, the timing of his discharge in relation to those activities, and the Respondent's knowledge of his union activities have all been established by the evidence. In defense of the termination the Respondent offers inconsistent reasons for its action. *Black Entertainment Television*, 324 NLRB at 1161, quoting *Sound One Corp.*, 317 NLRB 854, 858 (1995). The Respondent never warned Slavens' about any work deficiencies and his personnel record is void of any mention of such concerns. Clifton's vacillating reasons why Slavens left the Respondent's employment are not credited. I find that Slavens did not quit the Respondent's employment and find that he was discharged. Additionally, I note that the record is not enlightening as to why, if Slavens was such a poor employee, he was rehired within a month of his termination. In sum, I find that the Respondent has failed to overcome the Government's showing that Slavens was terminated because of his union activities. I find that his December 2, 2002, discharge is a violation of Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), approved, *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

X. THE UNION APPLICANTS

On December 9, 2002, union members Stanley Campbell, Sterling "Jason" Hammons, Jeff Williams and Brian Morris went to the Respondent's Springfield, Missouri facility to apply for employment. When they arrived at the office they observed a sign that stated the Respondent was hiring experienced cabinet makers and installers. Each of the men was wearing clothing that was decorated with Carpenter union logos. The applicants were accompanied by union organizer Art Kessler. The men went into the office and asked for applications. They filled out these documents and they all listed under "previous employment" the union contractors for whom they had recently worked. They also listed Union representative Danny Hyde and Union organizer Art Kessler as references on their applications.

Shop Foreman, Ruben Care, came into the reception area and spoke with some of the applicants while they were filling out their paper work. Brian Morris asked Care if he would be reviewing the applications, and Care said that they had just hired an individual, and that that may be the last hire for a while, but they were always hiring people. The men were told that they could call Care to check on the status of their applications. Kessler gave the receptionist his card and told her that she could contact him if they need more information about the applicants. None of the applicants were ever offered employment with Respondent.

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Subsequent to submitting their applications, each of the men telephoned and spoke with either Care or Clifton about the status of their applications. Campbell, Hammons, and Williams were told that there were no positions available. The Respondent asserted that its applications for employment were only good for one week and that it did not hire any employees within that one-week period of time after the union men applied. The evidence shows, however, that the Respondent did hire employees after the union applicants applied and that it kept applications for periods much longer than a week. Additionally, the union applicants were never advised of any one week policy and were never told they would have to reapply if they wished to be considered for employment.

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Morris testified that he telephoned Care in about mid-December. Morris had previously been employed by Respondent and knew Care personally. Morris queried Care as to why he had not been called about an interview. Care told him that they were not going to call him because of how he left the Respondent's employment and what he was. The Respondent noted in a June 12, 2003, position statement to the Board's Regional Office that Morris had "quit without notice and for that reason was not eligible for rehire. There was a smell of alcohol on his breath." Care's cryptic comment that a reason Morris was not being rehired was because of what he was is not satisfactorily explained on the record. I thus do not determine whether the comment referred to his union activity, alleged drinking or some other matter. I conclude that the nebulous comment is thus not supportive of either party's position relative to Morris.

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The evidence shows that Morris had abruptly left employment with the Respondent in 1999, the last time he worked there, because he was dissatisfied with the way he was treated. Morris testified that he came to work one day and Clifton had demanded that Morris immediately finish certain tasks he was performing on a home that Clifton was building. Morris testified, "...that was the final blow. I just handed the keys to Travis Foster and I said I'm out of here and I walked out." Clifton credibly testified that because of the unceremonious way Morris had quit his employment, the Respondent would not consider rehiring him.

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35 **XI. ANALYSIS OF RESPONDENT'S CONSIDERATION OF UNION APPLICANTS**

The Board in *FES*, 331 NLRB 9 (2000) set forth the standards for judging discriminatory refusals to consider individuals for hire and for assessing illegal refusals to hire. To establish a discriminatory refusal to consider case, it is necessary to show:

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1.) that the respondent excluded applicants from a hiring process; and 2.) that antiunion animus contributed to the decision not to consider the applicants for employment.

The Board has established the following as elements of establishing a discriminatory refusal-to-hire:

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1.) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; 2.) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer has not adhered uniformly to such requirements, or that the

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5 requirements were themselves pretextual or were applied as a pretext for discrimination; and 3.) that antiunion animus contributed to the decision not to hire the applicants. Once this is established the burden will shift to respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

10 The complaint originally alleged only that the Respondent had unlawfully refused to consider the union applicants for employment. On the first day of the hearing the Government and the Charging Party moved to amend the complaint to add an allegation that the Respondent had also unlawfully refused to hire the union applicants. The Respondent opposed the amendment and argued that such an allegation had been included in the original charge in the case, but eventually had been withdrawn by the Union. Respondent's counsel cited the Board's decision in *Benfield Electric*, 331 NLRB 590 (2000), in support of not allowing the amendment. I denied the motion to amend the complaint at that time. The Government and the Charging Party in their post-hearing briefs renewed their motion to amend the complaint. I have reconsidered my original ruling and believe that it was in error. Upon reexamination of the issue
15 I find that the Board's decision in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1998) is the applicable authority to assess the matter. First, the charge alleging the failure to consider for hire remained extant throughout these proceedings. That allegation in the complaint involved the same legal theory as the amendment's assertion that the Respondent also unlawfully refused to hire the applicants because of their union affiliation. Second, I find the proposed amendment involved
20 the same factual sequence of events, i.e., the union men applying for employment and the Respondent's reaction to those applications. Finally, the Respondent's assertion that it did not discriminate against any applicant because of their union activities or affiliations applies equally to both a refusal to consider and a refusal to hire allegation. These are the elements that *Redd-I* mandates for determining the legitimacy of an amendment to a complaint. I find that the
25 Government has met its burden in establishing the foundation for the amendment, and I grant the amendment to allege that the union men were also refused employment because of their union affiliation and activities.

30 Brian Morris admitted that he had abruptly left his prior employment with the Respondent because he was dissatisfied with his work assignments. I find that the Government has not shown by a preponderance of the evidence that the Respondent's refusal to consider Morris for employment or to employ him, in light of its previous experience with him, was a pretext. I find that the evidence supports the conclusion that the Respondent would have refused to consider Morris for employment or to hire him regardless of his union affiliation or activities.
35 I conclude, therefore, that the Respondent did not violate Section 8(a)(1) and (3) of the Act by refusing to consider for hire or to hire Brian Morris.

40 Clifton testified that the remaining union applicants were not considered for employment because they were applying for positions as installers, and the company was not hiring installers at that time. Clifton also testified that he did not consider the union applicants for work in the shop. Clifton inconsistently admitted, however, that applicants are considered for whatever position might be available, depending on qualifications, regardless of the position which they may have stated on the employment application. The discrepancy in how the union applicants were viewed for employment versus the Respondent's regular practice was not explained.
45 Additionally, as noted above, the Respondent's assertion that applications are considered valid
50

5 for only a week was proven not to be its actual practice. I find that the Respondent failed to show that applications became null after a week.

10 The evidence shows that when Campbell, Hammons, and Williams applied for employment the Respondent had a large sign outside its facility stating that it was hiring cabinetmakers and installers. The Respondent's hiring records demonstrate that it hired employees to work in the shop around the time that the union men applied for work. It is not disputed that all of the union applicants had extensive experience in carpentry and cabinet making. The Respondent does not contend that these applicants were denied employment because they did not possess the requisite skills need for installation or shop jobs at the company. The Respondent's union animus is detailed in this decision and is characterized by Clifton's pronouncement that he would have to close his shop if the employees joined the Union. I do not credit Clifton's explanation as to why union applicants Campbell, Hammons, and Williams were not considered or hired for employment. I find that the Government has shown by a preponderance of the evidence that the Respondent was hiring individuals for shop and installation work, that the Respondent excluded Campbell, Hammons, and Williams from the hiring process and that antiunion animus contributed to the decision not to consider these applicants for employment. I further find that the Respondent was hiring, or had concrete plans to hire, at the time the Union men applied for work, that they had the experience or training relevant to the announced or generally known requirements of the positions for hire, and that Respondent's antiunion animus contributed to the decision not to hire them.

15 Clifton testified that he decided not to hire the union applicants because he had decided to subcontract out all installation work. As set forth in this decision, that subcontracting is found to have been discriminatorily motivated because of the employees union activities. Additionally, the Respondent did hire some employees after the Union men applied for work. Thus, the combination of discriminatorily subcontracting installation work and hiring other employees shows that the Respondent not only had plans for employment but did hire or subcontract to fill its employment needs. Respondent hired eleven individuals after the union applicants applied. Respondent offers no reasonable explanation as to why it hired these eleven individuals as opposed to the union applicants. Clifton admits he failed to consider the union applicants for shop positions, contrary to his normal practice. Based on the record as a whole I find that the Respondent failed to consider Campbell, Williams and Hammonds for employment and refused to hire them because of their union affiliation. *Fluor Daniel, Inc.*, 333 NLRB 427 (2001). I conclude, therefore, that on and after December 9, 2002, Campbell, Hammons, and Williams were unlawfully refused consideration for employment and were refused employment and the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

XII. THE TERMINATIONS OF RICHARD MILLER AND TIM COTTER

45 Tim Cotter began working for Respondent in August 2001. On the morning of November 22, 2002, Cotter talked to employee Kelly Hall in the paint shop parking lot about the Union. Other employees were also present and Cotter signed a union authorization card that time. The Respondent monitors the parking lot by video cameras.

5 Subsequent to signing the card Cotter began speaking to fellow employees about the advantages of unionizing. Cotter ultimately talked to approximately half of the employees about the Union. Cotter had no history of discipline with Respondent and he testified that Clifton had told him in approximately April 2002 that he was a valuable asset and the company did not want to lose him.

10 Richard Miller began working for Respondent in July 2002. Dave Carson spoke to Miller about the union organizing campaign and Miller attended the November 21, 2002, union meeting along with employees Rick McCaslin, Dave Carson, Kelly Hall, Jesse Hammer, and Mike Corner. They discussed the benefits of becoming union members and signed authorization cards at that time. Miller subsequently spoke about the Union with employees Cotter and Slavens. Miller had no history of discipline with Respondent. Miller testified without contradiction that he had received a number of compliments from supervisors about his work.

15 Miller and Cotter gave uncontroverted testimony that in December of 2002 they attended a Christmas dinner the Respondent gave for the employees. Clifton spoke at the dinner and said that three to four million dollars worth of work was pending and no one should fear for their job.

20 On the afternoon of January 7, 2003, Miller and Cotter returned to the Respondent's shop at the end of the work day. Ruben Care reported to them that they were being laid off because Clifton needed to make some cuts. Care told Miller and Cotter that it was not associated with their work performance, which was excellent, and offered to give them recommendations. Care told the employees that there were others who should be let go instead of them.

25 Clifton testified that he selected Miller and Cotter for lay off because: 1.) he observed them in October and November standing around talking to one another approximately ten to twelve times; 2.) that once they both went on a delivery run that should have only needed one employee to make the delivery, and 3.) they had refused to bring back a cabinet from a job at the Cox Hospital. Clifton testified that additionally Cotter was laid off because he once refused to take a load to a Rocky Mountain Chocolate Factory in Texas. This incident occurred more than a year prior to Cotter's termination and he was not disciplined over the matter. The Respondent provided a position statement to the Regional Office during the course of the investigation of the charges concerning Cotter. That statement made no mention of the Texas delivery as a reason for his lay off.

30 There is no contemporary record of any of these alleged work problems in either Miller or Cotter's personnel files and neither employee was ever disciplined for such conduct. The Respondent eventually did put memos in their personnel files on May 29, 2003, several months after their terminations, that noted the reasons for their lay offs. The charge alleging Miller and Cotter's terminations as a violation of the Act was filed on May 20, 2003, and received by Respondent on or before May 23, 2003. The Respondent offered no explanation for the belated creation of the memos concerning the discharges of Cotter and Miller, why they were not warned of their alleged work deficiencies or why it did not follow the progressive discipline system outlined in its employment handbook in regard to Miller and Cotter.

5 Cotter and Miller testified that they were never instructed by the Respondent to bring back
the work materials from the Cox Medical Center. Cotter testified that an unidentified man talked
to them about transporting a large nurses' station back to the Respondent's shop, however, that
station would not fit in the elevator, their truck was full and he had not received authorization from
the Respondent to deliver the station to the shop. The Respondent did not offer any evidence to
10 rebut Cotter and Miller's testimony.

In approximately the first week of March 2003, employee Robert Slavens was talking to
Shop Foreman Care about pending jobs and how much work Respondent was doing. Care
mentioned that he hoped Tim Cotter, a personal friend, was doing okay. Slavens said that Cotter
15 had moved to the east coast. Care told Slavens, "I wish he hadn't got mixed up in that Union
stuff." Slavens asked what Union stuff and Care walked away. As previously noted, Care did not
testify at the hearing.

XIII. ANALYSIS OF DISCHARGES OF MILLER AND COTTER

20 The Government has shown that Miller and Cotter engaged in union activity from the
earliest stages of the Union's organizing campaign. The record shows that the Respondent was
well aware of the employees' union activities and the Union's interest in organizing its
employees. Moreover, Care's statement to Slavens regarding Cotter's union activities
25 demonstrates the Respondent's specific knowledge of his union activities. I find that the
evidence is sufficient to show that the Respondent knew of Miller and Cotter's union activities
prior to their terminations. The record evidence outlined above in this decision shows the
Respondent's violations of the Act and demonstrates the requisite union animus. Thus the
Government has proven the necessary elements supporting its allegations that Miller and Cotter
30 were terminated because of their union activities. The Respondent's defense offers
unsubstantiated and inconsistent reasons for their firings. I do not credit the Respondent's
reasons for the terminations and I find that the Respondent has not met its burden of establishing
that it would have terminated these two men regardless of their union activities. I conclude that
the terminations of Miller and Cotter are a violation of Section 8(a)(1) and (3) of the Act.

XIV. ADDITIONAL SECTION 8(a)(1) ALLEGATIONS

A. January 2003

40 In early January 2003 Kelly Hall was at the Respondent's Wesley United Methodist
Church job site. Project Manger, Todd Mathews, who is also Alvin Clifton's son-in-law,
engaged him in conversation. Hall mentioned that union organizer Art Kessler had been by
earlier that morning. Mathews told Hall that that Clifton would close the shop if it went union.
Hall tape recorded the part of this conversation where Mathews stated that Clifton would shut the
45 doors if the shop went union. Mathews did not testify at the hearing.

5 The Respondent denied that Mathews is a supervisor or agent of Respondent and thus
asserts that the statement he made about Clifton closing the business is not a violation of Section
8(a)(1) of the Act. Mathews' job title is admittedly Project Manager (PM) and the record shows
10 that PMs employed by the Respondent, including also Josh Bollin, and Tim Elliott, are
responsible for laying out work on the various jobs and directing the work of the project
employees. Employees turned in their time cards to the PMs and the PMs could grant employees
time off without further approval. PMs signed off on employees' request for extended leave.
15 Mathews could authorize overtime and the evidence shows he did so at the Wesley United
Methodist Church job site. Mathews also informed employees that he had the authority to fire
them. PMs only spend about 5% of their time working with their tools. Mathews, Bollin and
20 Elliot regularly attended weekly management meetings, and maintained company credit cards.
Clifton referred to Mathews, Bollin, and Elliott as supervisors during his testimony. It is also
noted that Mathew's wife Lori, is an owner of Respondent. The evidence shows Elliott
interviewed and recommended employees for hire. Respondent offered no affirmative evidence
to support its claim that PMs are not its supervisors or agents. None of the three PMs testified at
25 the hearing. I conclude that the record as a whole is sufficient to prove that Mathews, Elliot and
Bollin are supervisors and agents of the Respondent within the meaning of the Act. *PNEU
Electric*, 332 NLRB 616 (2000); *U.S. Service Industries, Inc.*, 319 NLRB 231 (1995); *Southern
Bag Corp.*, 315 NLRB 725 (1994); *Broyhill Co.*, 210 NLRB 288, 294 (1974), enfd. 514 F.2d
655 (6th Cir.1975).

25

I find that supervisor Mathews' threat that Clifton would close the shop if the employees
selected the Union as their collective-bargaining representative is a violation of Section 8(a)(1)
of the Act. *MPG Transport, Ltd.*, 315 NLRB 489, 492 (1994); *Equitable Resources Energy
Co.*, 307 NLRB 730, 731 (1992).

30

B. March 2003

In approximately March 2003 Kelly Hall was in the Respondent's shop where he was
engaged in a conversation with Project Manager Tim Elliott. The two men were discussing how
35 disorganized a particular job was and Hall remarked that it would be nice if the Respondent was
Union as that might make a difference. Elliott told Hall that Clifton would not stand for the
Union to come into the Respondent's business and Clifton "would shut the doors, no question
about it."

40 I find that Elliott's threat that Clifton would close the facility if the employees selected
the Union as their collective-bargaining representative is a violation of Section 8(a)(1) of the
Act.

45

C. April 14, 2003

On April 14, 2003, Kelly Hall was again talking to Tim Elliott at the Respondent's shop.
Hall asked Elliott to think about signing an authorization card. Hall said that it would be their
little secret and he would not tell Clifton. Elliot replied that "It'd get out. It'd get out." The tape
recorded conversation then continued:

50

5 KELLY: How would it get out?

TIM: I'm sure it'd get out.

10 KELLY: Have you got -- has anything gotten out yet?

TIM: No.

KELLY: Who knows, I could have three-quarters of these guys already.

15 TIM: Yeah you could have. Mike, he probably would -- well, Mike was in the union before, wasn't he. Did he rejoin? (Michael Corner was one of Respondent's three installers at the time of this conversation.)

KELLY: Mike was -- I think he was --

20 TIM: Wasn't he in the union up north somewhere?

KELLY: -- in hauling for years, something Teamsters or something.

25 TIM: Really?

KELLY: He was hauling beer or something. I don't know. I don't ask him whether he's joined and he don't ask me. I'm not for sure, maybe kind of obvious with me, but I don't know.

30 TIM: I just suspected it, is all. It was kind of obvious.
(Tr. 518, G. C. Exh. 47 (a) and (b))

35 Elliott is a supervisor who previously informed Hall that Clifton would close the facility if the employees selected the Union as their collective-bargaining representative. He questioned Hall concerning Corner's union sympathies and activities and I conclude that under all the circumstances Elliott's questioning thus tended to interfere with, restrain and coerce employees within the meaning of Section 8(a)(1) of the Act. *Cumberland Farms*, 307 NLRB 1479 (1992) (Board found that the interrogation of open union supporters by a low-level supervisor regarding
40 the attitude of other employees toward the union was a violation of Section 8(a)(1).)

D. June or July 2003

45 On May 21, 2003, the Union filed its first representation case petition seeking to represent the Respondent's employees. This petition was subsequently withdrawn.

In about June or July 2003 Kelly Hall put a "union yes" sticker and an American flag sticker on Respondent's gang box at Respondent's Cox Medical Center job site. Shortly thereafter

5 Mathews approached Hall and told him that he could not put any union stickers on the gang box, but told him the American flag sticker was okay. ⁴ I find that Mathews' promulgation of rule that discriminatorily prohibited employees from placing union stickers on gang boxes is a violation of Section 8(a)(1) of the Act.

10 **E. June 12, 2003**

On about June 12, 2003, Todd Mathews and Tim Elliott were at Respondent's St. Johns Ambulatory job site. Installer Michael Corner walked into the room where they were working and Mathews asked him if he had signed one of those cards. Corner told Mathews that he had gotten a pencil from union organizer Art Kessler, then walked away and went back to work.

The Respondent offered no evidence in rebuttal of this incident. I find that Mathew's questioning of Corner concerning his signing a card was a query as to whether he has signed a union authorization card. Under all of the circumstances, including the Respondent's other unlawful conduct, the posing of the question in the presence of two supervisors and the unexplained inquiry to one who was not shown to be an open union supporter, mandate the conclusion that the interrogation would tend to restrain and coerce employees from engaging in union activities. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). I find Matthews interrogation of Corner was a violation of Section 8(a)(1) of the Act.

25 **XV. SUBCONTRACTING OF THE INSTALLATION WORK**

Installer Kelly Hall testified that in about November of 2002, which was contemporaneous with the commencement of the union campaign, he began to notice the Respondent was subcontracting some of its installation work on Springfield area jobs. The Respondent's records show that Respondent had not used any subcontractors to perform Springfield area jobs until about October or November of 2002. Hall asked Clifton about the subcontracting. Clifton said that he was going to be sending over some subcontractors to help the installers get caught up. Clifton said that he had been trying to hire installers, but he was having trouble getting enough employees to work for him so he was going to use subcontractors on some projects. Hall's testimony was uncontroverted. At the time the Respondent was using Cox Quality Construction to perform its subcontracting services.

Clifton's explanation of the reasons for the subcontracting is inconsistent with the record evidence. As discussed *infra*, on December 9, 2002, four union applicants made application at Respondent's facility. At the time the Respondent had a sign posted outside its office that it was

⁴ The Complaint alleged in paragraph 5(e) that in about March 2003 Mathews promulgated a discriminatory prohibition regarding the placement of union stickers on gang boxes. Counsel for the General Counsel moved in her post-hearing brief to conform the pleadings to the proof to allege this incident occurred as testified to by Hall as having occurred in June or July 2003. The Motion is unopposed and I grant the motion to change the date to June or July 2003.

5 hiring installers and cabinetmakers. Yet the men were not hired. Shortly thereafter, the Respondent amplified the amount of its subcontracting to such companies as Robert Leeper, Magic Store Fixture Installers, R&R Custom, Lyndon K. Pitcock, Jacobson Millworks, and Leon Turner. Despite all this subcontracting however, Respondent kept on its contingent of installers consisting of Kelly Hall, Michael Corner, and Jesse Hammer.

10

On May 21, 2003, the Union, filed a petition to represent a unit of Respondent's installation employees. On about June 4, 2003, Clifton spoke to his assembled employees about the petition filing. During the speech Clifton noted that the Respondent employed about four persons who regularly performed installation work and he did not mention anything about any plans the Respondent had to subcontract installation work. Clifton did speak to the possibility of a sale of Respondent's business to another company but assured all employees, including the installers, that there would be no adverse affect on their jobs.

15

The Union ultimately withdrew the May 21, 2003, petition. On June 16, 2003, the Union filed its second representation petition seeking to represent the Respondent's installers. A hearing was held concerning this petition commencing on June 25, 2003. Employees Kelly Hall and Michael Corner testified in that hearing on behalf of the Union.

20

On July 2, 2003, Hall and Corner were conversing with Clifton in the shop and asked him where he wanted them to work the next day. Clifton told Hall and Corner that there was no place to send them. Hall asked about going and working in the shop as they had often done on occasion, and Clifton told Hall there was no place for them in the shop. Hall asked about doing some subcontracting, and Clifton told him he would have to get his own insurance and W-9.⁵

25

Clifton testified that the decision to subcontract work was based on trying to save costs on such things as insurance. The Respondent presented no independent evidence to support this assertion.

30

XVI. ANALYSIS OF THE RESPONDENT'S SUBCONTRACTING

35

It is unlawful for an employer to close all or part of its operation in order to chill union organizing efforts. *Textile Workers Union of America v. Darlington Mfg.*, 380 U.S. 263, 275 (1965). The General Counsel has the burden of establishing that antiunion sentiment was a substantial or motivating factor in the decision to subcontract work. *Carter & Sons Freightways, Inc.*, 325 NLRB 433, 438 (1998). Once antiunion motivation has been established, the burden of persuasion shifts to Respondent to show that it would have taken the same action absent the employees' union or other protected, concerted activities. *Id.*

40

The evidence shows that the Respondent's decision to begin subcontracting work was contemporaneous with the Union's organizing campaign. Clifton told Hall in November of 2002, that the Respondent began subcontracting only because it was having trouble hiring qualified

45

⁵ It is unclear if employee Jesse Hammer was laid off the same day, but he was ultimately laid off by Respondent, thereby eliminating all installation positions.

5 installers. When qualified union applicants sought employment they were not hired but instead the Respondent increased its subcontracting while retaining its core of installers. After the Union's petition was filed, however, the evidence shows that the Respondent began to subcontract all of the work associated with the petitioned for unit. I find that this action was consistent with Respondent's threats to close the business if the Union organized the employees, and
 10 contemporaneous with the Union's organizing activities. The Respondent offered no evidence to support its bare assertion that it was subcontracting to save costs. The Respondent offered no explanation as to why it did not produce evidence within its control to support its defense that subcontracting was economically advantageous to the business. This absence of supporting evidence leads me to conclude that such evidence did not exist or, if it did, it was not supportive of
 15 the Respondent's defense to the subcontracting allegations. *Martinson Elec. Co.*, 319 NLRB 1226, 1227 (1995); *Adair Standish Corp.*, 290 NLRB 317, 318-319 (1988); *International Automated Machines*, 285 NLRB 1122, 1123 (1987); *Master Security Services*, 270 NLRB 543, 552 (1984).

20 The layoff of Hall, Corner and Hammer was the direct result of Clifton's decision to subcontract installation work. Moreover, Clifton admitted that the Respondent's normal practice was to allow laid off field employees to work in the shop. The Respondent admittedly did not provide the shop work alternative for Hall, Corner or Hammer. I thus find that the Respondent has failed to rebut the Government's showing that the subcontracting was, at least in significant part,
 25 motivated by the employees' union activities and was designed to encumber such activities. I conclude, therefore, that the Respondent did violate Section 8(a)(1) and (3) of the Act by, on or about July 2, 2003, subcontracting its remaining installation work and laying off employees Hall, Corner and Hammer.

30 **CONCLUSIONS OF LAW**

1. Ozark Mountain Interiors, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 35 2. Carpenters District Council of Kansas City & Vicinity, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) and (3) of the Act.
- 40 4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not violated the Act except as herein specified.

45 On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the

5

ORDER

The Respondent, Ozark Mountain Interiors, its officers, agents, successors, and assigns, shall

10 1. Cease and desist from:

(a) Refusing to consider Stanley Campbell, Sterling “Jason” Hammons, and Jeff Williams for hire or to hire them, or any other employee, because of their union or other protected concerted activity.

15

(b) Discriminatorily terminating the employment of Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer because of their union activities.

20

(c) Threatening closure of Respondent’s business if its employees selected the Carpenters District Council of Kansas City & Vicinity, AFL-CIO, or any other labor organization, as their collective bargaining agent.

(d) Interrogating employees concerning their union sympathies or activities.

(e) Creating the impression that employees union activities are under surveillance.

25

(f) Discriminatorily promulgating rules against the posting of union stickers on Respondent’s gang boxes.

(g) 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.

30

(a) Within 14 days from the date of this Order, offer Stanley Campbell, Sterling Hammons, and Jeff Williams instatement to the positions for which they applied or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges. *FES*, 331 NLRB 9 (2000).

35

(b) Within 14 days from the date of this Order, offer Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Stanley Campbell, Sterling Hammons, Jeff Williams, Dave Carson, Robert

Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse
 Hammer whole for any loss of earnings and other benefits suffered as a result of the
 discrimination against them, computed on a quarterly basis, less any net interim earnings, as
 prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New*
 10 *Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the
 unlawful refusal to consider for hire or to hire Stanley Campbell, Sterling Hammons, and Jeff
 Williams and, within 3 days thereafter notify them in writing that this has been done and that the
 refusal to consider them for hire or to hire them will not be used against them in any way.

15 (e) Within 14 days from the date of this Order, remove from its files any reference to the
 unlawful discharges of Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim
 Cotter, Kelly Hall, Michael Corner and Jesse Hammer, and within 3 days thereafter notify these
 employees in writing that this has been done and that their discharges will not be used against
 them in any way.

20 (f) 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
 25 electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Springfield,
 Missouri, copies of the attached notice marked "Appendix." ⁷ Copies of the notice, on forms
 provided by the Regional Director for Region 17, after being signed by the Respondent's
 30 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. In the event that,
 during the pendency of these proceedings, the Respondent has gone out of business or closed the
 35 facility involved in these proceedings, the Respondent shall duplicate and mail, at its own
 expense, a copy of the notice to all current employees and former employees employed by the
 Respondent at any time since November 20, 2002. *Excel Container, Inc.*, 325 NLRB 17 (1997).

⁷ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the
 notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"
 shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT
 OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS
 BOARD."

5 (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10 **IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: June 25, 2004

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Albert A. Metz
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

10

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

15 The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

20

- Form, join, or assist a union
- Choose representatives 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

25 **WE WILL NOT** refuse to consider Stanley Campbell, Sterling “Jason” Hammons, and Jeff Williams, or any other employee, for hire or refuse to hire them because of their union or other protected concerted activity.

30 **WE WILL NOT** discriminatorily terminate Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer because of their union activities.

WE WILL NOT threaten our employees with the closure of our business if they select the Carpenters District Council of Kansas City & Vicinity, AFL-CIO, or any other labor organization as their collective bargaining agent.

35 **WE WILL NOT** interrogate our employees concerning their union sympathies or activities.

WE WILL NOT create the impression that our employees union activities are under surveillance.

WE WILL NOT discriminatorily promulgate rules against the posting of union stickers on our gang boxes.

40 **WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

45 **WE WILL**, within 14 days from the date of this Order, offer Stanley Campbell, Sterling Hammons, and Jeff Williams full reinstatement to the positions for which they applied or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

5 WE WILL, within 14 days from the date of this Order, offer Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

10 WE WILL make Stanley Campbell, Sterling Hammons, Jeff Williams, Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

15 WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to consider for hire or to hire Stanley Campbell, Sterling Hammons, and Jeff Williams and, within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for hire or to hire them will not be used against them in any way.

20 WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Dave Carson, Robert Slavens, Rick McCaslin, Richard Miller, Tim Cotter, Kelly Hall, Michael Corner and Jesse Hammer, and within 3 days thereafter notify these employees in writing that this has been done and that their discharges will not be used against them in any way.

25

Ozark Mountain Interiors

(Employer)

Dated _____ By _____
(Representative) (Title)

30 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

40 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.