

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

**JEFFREY TAYLOR, AN INDIVIDUAL
d/b/a OGDEN VALLEY DRYWALL**

and

**Cases 28-CA-18803
28-CA-18925
28-CA-19195**

**SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA**

Winkfield F. Twyman, Jr. Atty., Counsel for the
General Counsel, Las Vegas, Nevada.

Daniel M. Shanley, Atty., DeCarlo, Connor, and
Selvo for the Charging Party, Los Angeles,
California.

Norman H. Kirshman, Atty., Kirshman, Harris,
& Rosenthal, Counsel for Respondent,
Las Vegas, Nevada.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Las Vegas, Nevada on March 22 through April 1, and April 20 through April 8, 2004 upon a Second Consolidated Complaint (the Complaint) issued January 23, 2004¹ by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by the Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union.) The Complaint, as amended, alleges Jeffrey Taylor, an individual, d/b/a Ogden Valley Drywall (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act).² Respondent essentially denied all allegations of unlawful conduct.³

¹ All dates herein are 2003 unless otherwise specified.

² At the hearing, Counsel for the General Counsel amended the Complaint as follows: included the name of "Leonard Orel" in paragraph 6(b), deleted the name of Joshua Taylor from paragraph 4, withdrew paragraph 6(f), and added paragraphs 5(w) and 5(x) to paragraph 8 as conduct violating Section 8(a)(3) of the Act.

³ At the hearing, Respondent amended its affirmative defenses to include the defense that all individuals employed by the Union and named as applicants in paragraph 6(b) of the Complaint are professional union organizers and not employees within the meaning of the Act and ineligible for employment with Respondent because of "disabling conflict" with the company.

II. Issues

1. Did Respondent independently violate Section 8(a)(1) of the Act by interrogating employees, disparaging the Union, interfering with employees union organization rights by taking away union authorization cards, informing employees it would be futile for them to select the Union as bargaining representative, promulgating and enforcing an overly broad and discriminatory rule prohibiting employees from discussing wages, threatening employees with discharge, creating impression of surveillance of employees' union activities, engaging in surveillance of employees' union activities, telling employee-applicants they were not hired because of their union membership, promising continued employment if employees abandoned union activities, asking employees to ascertain and disclose the union membership, activities, and sympathies of other employees, telling employees they were being laid off because of their union activities, promising a pay raise if employees refused to support a strike against Respondent, disparaging employees because of their union activities, threatening employees they would not be rehired because of their union activities, threatening employees with harm if they returned to work after participating in a strike?
2. Did Respondent discharge employees Michael Jordan, Joel Lemke, and Medardo Lugo because they engaged in concerted, protected activities?
3. Did Respondent discharge employees Robert Janecek, Josue Solis Fierro⁴, Javier Gonzalez, Finee Layna Morales, Joniel Layna Morales, Leland Coake, Robert Preston, and Alfie Feliciano because they engaged in union or other concerted protected activities and to discourage other employees from doing likewise?
4. Did Respondent refuse to consider for hire or to hire Paul Apao, David Benadum, Daniel Bevier, Jacob Clark, Jose Luis Deleon, Ronald Garner, Rafael Gomez, Elmer Griggs, Glen Harless, Sr., Connie Heleman, Gustavo Hernandez, Jose Luis Hernandez, Noel Hernandez, Gerald Jennings, Sr., Gerald Jennings II, Marcel D. Lamothe, Oscar Martinez, Saul Martinez, Daniel O'Shea, Robert Pike, Jose Carmen Ruiz, Robert Scercy, Jr., Mark Sheehan, Dwayne Speed, Lenny Taylor, Adrian Young because they engaged in union or other concerted protected activities and to discourage other employees from doing likewise?

III. Jurisdiction

Respondent, a sole proprietorship owned by Jeffrey Taylor, with an office and place of business located in Las Vegas, Nevada (the office) and jobsites located in and around Clark County, Nevada, has been engaged in business as a commercial lathe and plaster contractor in the construction industry. During the 12-month period ending June 6, Respondent, in connection with its construction business annually received at the office and its jobsites, goods valued in excess of \$50,000 directly from points outside the State of Nevada. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.⁵

⁴ Josue Solis Fierro identified himself as Josue Solis when he gave testimony, and I have referred to him by that name herein.

⁵ Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, in which the Charging Party joins, and Respondent, I make the following

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IV. Findings of Fact

A. Respondent’s Jobsites and Supervisory Structure

10 During 2003 Respondent maintained various construction jobsites in and around Clark County, Nevada: Tahiti (the Tahiti job), utilizing approximately 130-150 workers at its peak and the largest construction job Respondent had ever done; Asian Pacific (the Pacific job), one of Respondent’s larger jobs utilizing about 35 employees at peak; Courtesy/Mazda (the Mazda job) utilizing 25-30 employees at peak; one restaurant and two churches utilizing 15-20 employees each, and other smaller jobsites the bulk of which involved tenant improvement
 15 construction with two to five workers at each jobsite. Except for minor pick-up work, the Tahiti job concluded in late July. The Mazda job ran concurrently with the Tahiti job. The Pacific job commenced toward the end of the Tahiti job. Respondent was not signatory to a collective-bargaining agreement with any labor organization at any of the jobs.

20 During relevant periods in 2003, the following individuals were admitted supervisors and agents of Respondent at the jobsite(s) indicated below:

25	Jeffrey Taylor	Owner
	Jeffrey Nathan Taylor (Nathan Taylor)	Project Manager
	Jeremiah Taylor	Foreman
	James Nicholas Taylor (Nick Taylor) ⁶	Foreman
	David Adams (Mr. Adams)	Foreman, Mazda and Tahiti jobs.
	Scott Avondat (Mr. Avondat)	Foreman
	Gary Partington (Mr. Partington)	Foreman
30	Tom Kohl (Mr. Kohl)	Foreman or superintendent
	James D. Crocker (Mr. Crocker) ⁷	Field Supervisor, Tahiti and Pacific jobs.

35 The General Counsel alleged, and Respondent denied, that during relevant periods in 2003, the following individuals were supervisors and/or agents of Respondent:

40	Richard Isitt (Mr. Isitt)	Foreman
	Hector Rivera (Mr. Rivera)	Foreman
	Francisco “Paco” Sandoval (Mr. Sandoval)	Foreman
	Paul Tingey (Mr. Tingey)	Foreman/timekeeper
	Taci Linn Nielson (Ms. Nielson)	Secretary/receptionist

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⁶ Jeffrey Taylor is the father of Nathan, Jeremiah, and Nick Taylor (collectively the Taylors).

50 ⁷ Respondent hired Mr. Crocker in May and terminated him in November. Although in the past he had been dropped from union membership for dues nonpayment, he resumed union membership shortly before the hearing. He testified under subpoena by the Union.

Mr. Isitt worked primarily at the Mazda job as a leadman under Mr. Adams' supervision. He was responsible for seeing that job instructions were carried out and transmitted information from Mr. Adams to employees. In Mr. Adams' absence from the jobsite, Mr. Isitt issued the foreman's work instructions to employees. Employees communicated problems to Mr. Isitt, which he conveyed to Mr. Adams. Mr. Isitt reported to Mr. Adams on work quality when Mr. Adams visited the jobsite, which was at least twice a day. When Mr. Janecek was transferred to the Mazda job, Mr. Adams told him to report to Mr. Isitt.

Mr. Rivera worked as a taping leadman under Nick Taylor. He performed Spanish/English translations for foremen as requested. Mr. Rivera communicated employee concerns to management as needed. After about a month of doing taping work, Mr. Rivera spent his work time overseeing the work of other employees. In June, when employee Leland Coake (Mr. Coake) told him he had no work, Mr. Rivera directed him to "hang lids" in another area. When that proved impracticable, Mr. Rivera told Mr. Coake he might as well go home.

Mr. Sandoval oversaw work on the Tahiti jobsite and directed employees to hang drywall, frame, or clean up. He performed construction work only a "couple" of hours a week. As needed, he instructed employees not to stand around but keep working, checked employee work for conformance to company standards, and could tell employees to redo obviously substandard work without consulting a supervisor. He sometimes independently decided which employees would work in various areas and kept work notes or logs that he turned into the supervisor daily. On one occasion at the Tahiti job, Mr. Sandoval told employee Mario Madrid (Mr. Madrid) work was slow and he should not come in the following day. When Mr. Madrid protested, Mr. Sandoval told him to come in and he would see if he could put him to work. When Mr. Madrid reported the following day, Mr. Sandoval sent him home, saying there was no work.

Mr. Sandoval testified he was a "regular" employee, that he did not attend management meetings, and that he never recommended workers for hire or discipline. However, he also testified other workers on the jobsite directed jobseekers to him, after which he "maybe...[could] call the company, or recommend them to the company." Sometimes Mr. Sandoval was the only one in charge on a jobsite and workers reported work problems to him. When work slowed, Mr. Kohl or Mr. Avondat told him how many workers were to be terminated, leaving the selection to him because he "was the one that [knew] pretty much how much work [the company] had left on Tahiti." Mr. Sandoval made his choice, saying, "Okay Lugo, Pena, Melendez, they got to go."

During 2003, Mr. Tingey, a personal friend of Jeremiah Taylor, worked as a forklift driver on the Tahiti and then the Pacific jobsites. He had no authority to hire or discipline employees, but he occasionally directed employees to perform such tasks as moving building materials. In late June, in the company of some of Respondent's workers and Nick Taylor at a local bar, Mr. Tingey announced he was a supervisor and employees who did not follow his orders would be fired.⁸ Following the October strike, Mr. Crocker told employees Mr. Tingey was the "safety guy" and directed employees to let him check their tools. In the course of tool checking, Mr. Tingey told employee Robert Preston (Mr. Preston) he could not use his screw gun on the job until he got it fixed.

⁸ Mr. Tingey appears to have been trying to impress the female entertainers at the bar.

Respondent employed Ms. Nielson on May 5 to work in the office where she performed ordinary clerical tasks. On October 29, she signed employee safety certifications over the title "Personnel Manager."

5 B. Union Organizing Campaign

Beginning in January, the Union commenced a minor organizing campaign among Respondent's employees, the first in the Company's history. In about April, the Union stepped up its efforts. Union representatives, including Mark Sheehan (Mr. Sheehan) and Daniel O'Shea (O'Shea), visited Respondent's jobsites, talked to the workers during breaks, and distributed union paraphernalia and flyers.

10 One employee work issue concerned Respondent's failure to provide water to jobsite employees in spite of the high desert temperatures. During its campaign, the Union distributed a flyer that read, in part:

GOT WATER?

...

If your employer wants the work to get done without water for workers he should hire **CACTUSES!**

...

IF YOU'RE ON ANY OGDEN VALLEY JOB THAT DOES NOT HAVE COLD WATER CALL US AND WE WILL GET COLD WATER TO YOU!

25 Thereafter, the Union delivered cold water to Respondent's jobsites on several occasions. Many employees openly accepted the water and talked with union representatives.

30 By facsimile transmission and by certified mail, the Union sent Respondent a notice dated June 6, naming twenty employees as members of the Union's organizing committee, including Alvaro Segovia (Mr. Segovia), Javier Gonzalez (Mr. Gonzalez), Finee Layna-Morales (Finee Layna), Joniel Layna, Josue Solis (Mr. Solis), Michael Jordan (Mr. Jordan), Joel Lemke (Mr. Lemke), and Mr. Coake.

35 The Union continued organization efforts through the fall. The Union picketed Respondent from October 2 until October 27. According to Respondent's employee records, nineteen employees participated in the strike. Employee records show that six strikers were returned to work on October 29.

40 C. Refusal to hire Adrian Young

On May 28 at Respondent's office, Adrian Young (Mr. Young) asked to fill out an application. A secretary told him that although Respondent was hiring, she was just taking names and numbers at that time. Mr. Young returned several times. On one of his return visits, he filled out an employment application and on yet another visit spoke to Mr. Partington who told him to check back in a day or two. Mr. Young returned on June 9. Mr. Partington and an unidentified young man about 20 years old were at the office. After interviewing Mr. Young, Mr. Partington told him he was hired subject to the owner's approval and to check back.

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On the following day, Mr. Young returned to Respondent's office. The young man he had previously seen with Mr. Partington was the only person at the office. He told Mr. Young "they" had learned he was "union," and "they weren't hiring union people." Mr. Young "figured [the young man] worked for the Company, that he knew what was going on...because he was in the office...the time I interviewed with [Mr. Partington]...and I'd seen him outside once before, but I'd never seen him inside before." There is no evidence Mr. Young contacted Respondent thereafter.

D. Mass Application on June 11

Pursuant to Charging Party coordination, early in the morning of June 11, at least 23 individuals wearing identical blue union logo-inscribed tee shirts (mass applicants) appeared in concert at Respondent's office and applied for work (the mass application).⁹ Present at the office were Randall Fierstein (Mr. Fierstein), estimator, Nathan Taylor, and Jeffrey Taylor who remained in his office located in the back area. Receptionist Ms. Nielson arrived at work shortly after the applicants gathered. Witnesses to the mass application supplied varying accounts of who was present at the office and what was said. The following account is an amalgam of credible testimony.

Daniel O'Shea (Mr. O'Shea), senior organizer for the Union, entered the office as vanguard. Mr. Fierstein, who heard the front door opening, came into the front office through a door into the back office area and asked what the group wanted. Mr. O'Shea said he was a union member applying for work. Mr. Fierstein said Respondent was not hiring, and they should leave.¹⁰ Mr. Fierstein went into the back office and told Nathan Taylor that people were in the front office. Nathan Taylor came into the waiting area and shook hands with union representatives Raphael Gomez and Efren Hernandez. Mr. O'Shea explained that the group, who were all experienced and serious about working, wanted to fill out applications. Nathan Taylor and Ms. Nielson distributed applications. In answer to questions from the group, Ms. Nielson said the applications would remain on file for 30 to 60 days. Some applicants variously recalled Ms. Nielson saying Respondent was hiring, or had a lot of work, or had a lot of jobs coming.¹¹ Most of the group went outside to fill out the applications, all of which were then turned into Respondent and filed by Ms. Nielson. Testimony varied as to what Nathan Taylor told applicants about Respondent's hiring plans. According to Gerald Jennings, Nathan Taylor said Respondent needed carpenters at the Tahiti job but that it was not going to be hiring them at that time. Some applicants testified, variously, that Nathan Taylor said Respondent was not hiring at that time but would be in a couple of weeks or that Respondent had work coming up. I accept Nathan Taylor's testimony that he told the group Respondent was not hiring at that time.

⁹ The Charging Party limited the group to individuals with drywall hanging and framing experience who were willing to work for Respondent if hired.

¹⁰ Ronald Garner recalled Mr. Fierstein saying, "Oh, no way," as the applicants entered and "No, we're not taking any applications." I reject Glenn Harless' uncorroborated testimony that Mr. Fierstein said, "Get the hell out of here; we're not hiring." Others testified Mr. Fierstein closed the door on Mr. O'Shea, which I discount as contrary to Mr. O'Shea's testimony.

¹¹ Because of the differing testimony, I cannot find that Ms. Nielson told any applicant that Respondent had work available at that time.

The following mass applicants testified as to their work experience: ¹²

	<u>Applicant Name</u>	<u>Work Experience at Time of Application</u>
5	Paul Apao David Benadum	Six years' experience framing with drywall. Fourteen years' framing and six to eight years' hanging experience. ¹³
	Daniel Kenneth Bevier	Three years' experience "working the union." ¹⁴
10	Jacob Clark Rafael Gomez	Over one years' experience as a carpenter apprentice. ¹⁵ Employed as a representative by the Charging Party, 18 years' experience in the field, including hanging and framing.
	Elmer C. Griggs Jose Luis DeLeon	Forty-one years' framing experience. Two years experience as a carpenter's apprentice, hanging and framing.
15	Ronald Garner Glenn Douglas Harless Connie Heleman	Two years' experience hanging and framing. Two years' of drywall experience and three years of framing. Journeyman carpenter with nearly a year's experience hanging and framing.
20	Efren Hernandez Gustavo Hernandez Gerald Jennings, Sr.	Employed as an organizer by the Charging Party, 20 years' framing and hanging experience. ¹⁶ Five years' experience framing and ten years hanging. Thirty-four years' carpentry experience, including hanging and framing.
25	Gerald Jennings II. Alex Kea Oscar Martinez Saul Martinez	More than twelve years' experience framing and hanging. Ten to 15 years' framing and 15 years' hanging experience, Ten years' experience doing drywall work and framing. Ten years' experience doing drywall work and three years' doing framing.
30	Daniel O'Shea Robert Francis Pike Elder Robert Scercy Mark Sheehan	Employed as senior organizer by the Charging Party, 23 years' experience hanging and framing. Two years' experience in all aspects of drywall work. Ten years' framing and seven years' hanging experience. Employed as a representative by the Charging Party, 23 years' experience hanging and framing.
35	Dwayne Speed Leonard Orel Taylor	Three years' hanging and more than three years' framing experience. Employed as an organizer by the Charging Party, 20 years' framing and hanging experience.

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¹² June 11 applications of Noel Hernandez, Jose Luis Hernandez, Marcel Lamothe, and Jose Ruiz, none of whom testified, were received into evidence.

45 ¹³ In early September, Respondent hired Mr. Benadum who worked for two days before being laid off for being unproductive. Mr. Benadum's layoff is not at issue.

¹⁴ It is reasonable to infer that Mr. Bevier meant he had performed carpentry work at union signatory jobs for three years.

¹⁵ On September 10, Respondent hired Jacob Clark at a wage of \$14.00 an hour.

50 ¹⁶ The General Counsel seeks no remedy for Efren Hernandez or Alex Kea, and Robert Scercy was not included in the complaint as a discriminatee. No applications were put into evidence for these three individuals.

All applicants were ready and able to work on June 11. With the exception of those employed by the Charging Party, all were out of work on June 11. Respondent contacted none of the mass applicants until September. Gerald Jennings II telephoned Respondent approximately a week after making application. Ms. Nielson told him Respondent would get back to him if he were needed. Respondent never did.

E. Respondent's Hiring Practices

Respondent rarely hires from employment applications, which Respondent destroys after about 30 days. Rather, Respondent's practice for the past 24 years has been to hire primarily from referrals and walk-ins (job seekers who walk onto a jobsite or into the office seeking immediate employment). Respondent hires from the former category because it considers referrals a good source of dependable labor and from the latter category because walk-in applicants are ready to work without delay. Those hired from the latter group complete applications as a formality at the time, or after, they are hired. Respondent pays between \$15.00 to \$18.00 an hour to employees with journeyman status or skills. Respondent pays \$8.50 an hour to employees with no experience. Respondent prefers not to hire applicants whose past earnings far exceed Respondent's pay range as Jeffrey Taylor has found such workers stay with the job only until they can find a higher paying one and are thus short-term employees. Although Respondent is aware that some individuals apply together and like to work as partners or as a team, Respondent never hires them as such and does not feel bound to have them work together.¹⁷ A number of witnesses testified of the circumstances under which they were hired. Their experiences are illustrative of Respondent's hiring practices:

In spring 2002, Pablo Sanchez learned from a former employee that Respondent was hiring. When the former employee took Mr. Sanchez to Respondent's office, Jeffrey Taylor directed him to fill out an application and hired him.

In July 2002, employee Jose Mario Madrid (Mr. Madrid), who had friends working for Respondent, applied for work and Nathan Taylor hired him.

In early 2003, a temporary labor agency referred Mr. Lemke to the Tahiti job. Mr. Avondat told Mr. Lemke he would like to hire him directly. At Mr. Avondat's instruction, Mr. Lemke filled out an application, and began working for Respondent on May 28.

In April, Mr. Madrid told Mr. Sandoval that his friend, Medardo Lugo (Mr. Lugo) and his work partner, Jesus Lopez (Mr. Lopez), were looking for work. Mr. Sandoval sent Mr. Lugo and Mr. Lopez to the office where they filled out a pre-application form utilized by Respondent, asking name, contact information, and experience (information sheet). A few days later, Nathan Taylor called them and asked them to return to the office and complete applications. After they did so, he sent them to work at the Tahiti job on April 23.

¹⁷ The evidence shows several instances of "partners" being assigned to work with others, e.g., Mr. Coake working with "Frank," and Javier Gonzalez working with "Panzone."

5 In early May, a temporary labor agency referred Mr. Jordan and Mike Phelan (Mr. Phelan) to the Tahiti job where Mr. Crocker supervised them. After five or six weeks' employment, Mr. Crocker said if they wanted to keep working they should tell the labor agency the company had no more work for them and then apply to Respondent for employment. Mr. Jordan and Mr. Phelan did so and began working directly for Respondent on June 13.

10 In early to mid-May, at the Union's suggestion, Robert Janecek (Mr. Janecek) went to Respondent's office and filled out an information sheet. Someone in the office told him Respondent was not hiring at that time. Later, someone from Respondent telephoned Mr. Janecek and asked him to come in and complete an application. Mr. Janecek noted on his application that he had completed a four-year apprenticeship program, which denoted union membership. Respondent hired him, and he began working on May 14.

15 On May 14, Mr. Coake and Mr. Segovia stopped at Respondent's office to apply for work. As they filled out applications, Nathan Taylor and Mr. Partington introduced themselves, asked some questions about their experience, ascertained the two could start work the following day, negotiated a wage rate, and told them to report to a jobsite on St. Rose Parkway.

20 Around the end of May, Ramon Flores (Mr. Flores) went to Respondent's office and filled out an information sheet. When a man in the office saw Mr. Flores had metal stub framing experience, he gave him an application, which Mr. Flores completed. The man then sent Mr. Flores to one of Respondent's jobsites, and he commenced working.

25 Juan Montes contacted Mr. Crocker, whom he knew, at the Tahiti jobsite in late May and was hired.

30 On May 27, Finee Layna, Corneal Layna, Javier Gonzales, and Josua Solis, as a group, went to Respondent's office to apply for employment, filled out applications, and were hired.

35 In June or July, Carl Hererra (Mr. Hererra) heard that Mr. Crocker, whom he knew, was foreman on the Tahiti job. He and his work partner, Henry Lewis went to the jobsite and spoke to Mr. Crocker who hired them. The next morning the two completed their applications at the office and reported to the Tahiti job.

40 In September, Mr. Preston and his work partner Alfie Feliciano (Mr. Feliciano) telephoned Respondent's office and asked if they were hiring. The two were told to come in and fill out an application. They did so and were hired for the Pacific jobsite.

F. Respondent's Hiring Between June 11 and July 11

45 The parties stipulated that between June 11 and July 11, Respondent hired twelve framing and hanging employees, none of whom was a mass applicant:

50	Martin Gomez	6/12	Carlos Osorio	6/18
	Antonio Martinez	6/13	Javier Ramirez	6/18
	Kyle Stewart	6/13	Juan Torres	6/18
	Miguel Hernandez	6/17	Sergio Torres	6/19
	Frederico Mendoza	6/18	Chris Loveland	7/09
	Juan Mireles	6/18	Carlos Medina	7/17

In addition to the stipulation, I have considered Respondent's employment records to ascertain Respondent's hiring during the period June 11 to July 11. Respondent maintains an employment summary for each employee titled Employee Record Report (employee record).
 5 The employee records, numbering 202, of all "drywall & taper," "frame/hang" employees employed by Respondent during the relevant period were received into evidence. *Inter alia*, each employee record shows a "start date" and a "left date" for the employee and occasionally an explanation of termination in a "memo" section. Notwithstanding the parties' stipulation, examination of employee start dates on the employee records shows that 41 employees had
 10 start dates with Respondent in the period between June 11 and July 11: one on June 11, four on June 12, four on June 13, two on June 16, four on June 17, ten on June 18, and sixteen between June 19 and July 11. The employee with a start date of June 11 is Francisco Perez, Jr. The four employees with start dates of June 12, the day following the mass application, are Martin Gomez-Zavala, Dionicio Gutierrez-Perez, Leo Maillette, and Michael
 15 Smith. The four employees with start dates of June 13 are Mr. Jordan, Mr. Phelan, Antonio Martinez, and Kyle Stewart, all of whom were already working on Respondent's jobsites prior to June 13 as employees of Contractors and Builders, a temporary labor service.¹⁸ On June 13, Respondent directly employed the four. (It may be that Martin Gomez-Zavala should be included in the Contractors and Builders' group. Contractors and Builders' "Group Time Card" showing work performed for Respondent on June 9, in addition to the four employees already
 20 mentioned, lists the name "M. Gomez," which may refer to Martin Gomez-Zavala.)

According to Respondent, each employee hired between June 11 and July 11 (aside from temporary labor workers, presumably) was hired from a referral or as a walk-in.
 25 Respondent's employee records show Respondent paid the 41 employees hired in July wages ranging from \$8.00 to \$16.00 an hour, with an average wage of \$14.00 an hour. Respondent did not review any applications on file in hiring for jobs filled between June 11 and July 11.¹⁹

G. Respondent Animus and Alleged Independent 8(a)(1) Violations

30 Jeffrey Taylor discussed the Union's organizing drive at Respondent's weekly supervisor meetings held in the conference room of the office. According to Mr. Crocker, who testified for the General Counsel, Jeffrey Taylor told the group he did not like the Union, he thought union employees were lazy, worthless people, and he would shut his doors and start a new company
 35 if employees went union. Mr. Kohl and Mr. Partington denied that Jeffrey Taylor made such statements. I credit Mr. Crocker's testimony, which was clear and specific as to these statements. Notwithstanding Respondent's having terminated Mr. Crocker, there was no evidence he bore Respondent ill will for it. I note that Mr. Crocker's testimony was sometimes disjointed, and he was unclear about when statements or conversations he recounted occurred.
 40 I am nonetheless impressed with his obvious sincerity. Where his testimony is clear and congruent, I have credited it. I have set events forth in the order that fits best considering his overall testimony.

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¹⁸ Although Respondent stated in an August 26 letter to the Region and in its brief that Antonio Martinez was hired on June 11, his employee record lists his start date as June 13. It is clear from his application that he was part of the Contractors and Builders' contingent.

50 ¹⁹ The application of Miguel Hernandez, who started work June 17 is dated June 3, suggesting a gap between application and hire dates. However, the June 3 date appears to be an error, as the signature line is dated June 17, making application and start dates the same.

According to Mr. Crocker, as the union activity persisted, Jeffrey Taylor told supervisors at a management meeting the do's and don'ts of supervisory response to union activity that he had obtained from labor counsel. He told the supervisors if they happened to find out which employees were stirring up matters and acting as informants to the Union, they should report it, but he was not telling them to talk directly to employees. Mr. Crocker also said Jeffrey Taylor instructed supervisors that if individuals were talking and stirring up trouble on the jobs for the union, then that meant they were not doing their jobs and were unproductive; supervisors were to get rid of them by telling them the company was low on work and laying them off. It was not clear from Mr. Crocker's testimony if the latter alleged statement was a separate instruction or an explication of the former statement. Mr. Partington, Mr. Kohl, and Jeffrey Taylor all denied that Jeffrey Taylor directed supervisors to terminate employees for their union activities. As I did not find Mr. Crocker's testimony to be clear in this regard, I credit the supervisors' denials. In another July meeting, the supervisors speculated that employees Mr. Jordan, Mr. Coake, and Mr. Lemke were behind the activity.

According to Mr. Crocker, he asked all employees under his supervision if they were "union" and informed them that Jeffrey Taylor would not go union.

In May, Mr. Adams asked Mr. Madrid while he worked at the Tahiti job if he were a union member, which Mr. Madrid denied. Ten or fifteen minutes later, Mr. Adams returned to Mr. Madrid and accused him of being an organizer for the Union. Mr. Madrid denied the charge, but Mr. Adams insisted he was right, and said, "The Union is no good, it just causes trouble...We have good jobs coming up, and if you don't participate in the Union, I take care of my people."

In May on the Tahiti job, Mr. Adams asked Mr. Janecek if he were a union man. When Mr. Janecek said he was, the two had a brief, "nonchalant" conversation about unions during which Mr. Adams said there were benefits by working nonunion, specifically that one was able to work year-round.

On May 28 or 29, shortly after Respondent hired Mr. Solis, Mr. Gonzalez, Finee Layna and Joniel Layna, Mr. Sandoval told the group to stop asking about wages or they would be fired.

On various occasions in June at company safety meetings, Mr. Crocker told employees that talking about their wages was a firing offense. During that same month, following a discussion among Mr. Coake, Mr. Segovia, Mr. Crocker, and Mr. Avondat about the wage rate Respondent had agreed to pay the two workers, Mr. Avondat told Mr. Coake, "We [talked about wages] right now but don't ever do it again, because talking about wages is a firing offense."²⁰

On an occasion in June workers complained in front of Mr. Tingey that they did not have any water in their work area. Mr. Tingey grabbed two bottles of water supplied by the Union and poured it out, saying either "Well, if you want some water, go get union water," or "This is what I think of union water." There is no evidence any supervisor observed or acquiesced in Mr. Tingey's conduct or statement.²¹

²⁰ Although Mr. Segovia did not recall Mr. Avondat making such a statement in the circumstances described by Mr. Coake, he testified that Mr. Avondat said that employees talking about wages would be fired. I credit Mr. Coake's account.

²¹ As I have found Mr. Tingey to be neither a supervisor nor an agent of Respondent, I do not attribute his conduct to Respondent.

Sometime in June on the Tahiti job, Mr. Adams asked Mr. Lemke to get him a list of all the workers who had signed union authorization cards when he attended a union meeting that evening. On the following morning, when Mr. Adams asked Mr. Lemke if he had gotten the requested list, Mr. Lemke told him there had been no meeting.

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One day in June as Mr. Lugo conversed with a union representative in the parking area of the Tahiti jobsite while on break, Mr. Sandoval, Mr. Adams, and Nick Taylor watched the two as they had on other occasions, and Nick Taylor photographed them. Respondent presented no business justification for photographing Mr. Lugo's activity.

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On three occasions near the end of June, Mr. Adams told workers they needed to go down to the union hall and see what the hall was going to do for them because Respondent was going to be laying guys off.

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Sometime in July on the Tahiti jobsite, Mr. Crocker told Mr. Jordan rumor had it that he was the one stirring up union problems. Mr. Jordan denied it, and Mr. Crocker told him to careful because if it continued, he could be laid off. On other occasions, Mr. Crocker warned employees Omar Rayez, Juan Alvarado, Sergio Torres, David Bermuda, and Juan Mendoza to be careful about what they did because Respondent was not fond of "that type of activity," and they could be laid off.

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Mr. Crocker and some of the Taylors expressed to employees their opinions that the Union should stay out of Respondent's business. They asked why, if the Union was so great, were union members working for Respondent, pointing out that Respondent worked year round even though the company paid less than union scale.

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On one occasion in June, at lunchtime, Mr. Crocker saw employees Mr. Coake and Dave Bermuda in the company of five to ten employees receiving bottles of water from Mr. O'Shea of the Union and holding union authorization cards. Mr. Crocker yanked the cards out of their hands, saying "What the hell is this stuff you got here; give me that stuff." Both Mr. Coake and Mr. O'Shea told Mr. Crocker that as a supervisor, he was not allowed to do that. Mr. Crocker apologized and returned the cards.

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Some contractors on the Pacific and Tahiti jobsites were union-signatory. In June, anticipating a strike, a dual-gate system was established at those jobs. Mr. Crocker told employees one gate was for the Ogden people, and the other gates were for the other trades. As Mr. Phelan recalled, Mr. Crocker told employees that henceforth all Respondent's employees would enter the jobsite through the designated gate, and other workers would use the other gate. According to Mr. Jordan, in late June Mr. Crocker asked him and other employees if they were union members, saying that he had heard employees were going to strike the following day, and if so union members were restricted to using a specific gate, saying, "We got this gate set up for union and this gate set up for non-union." Mr. Crocker denied having a conversation with Mr. Jordan about the gates. According to Mr. Lemke, Mr. Adams told employees that "us" union guys would be going through one gate, and all of the Ogden Valley people would be going through the other. No strike occurred at that time.

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While on the Mazda job, during break one day Mr. Coake and Mr. Segovia discussed their last job. Mr. Adams who was present asked if the job had been union. When Mr. Coake said it had, Mr. Adams said, "All you guys are union?" Mr. Coake said they were. Some days later, Mr. Adams approached Mr. Coake as he worked and asked how long and where he had been in the union. When Mr. Coake told him, Mr. Adams said he had also been in the union in California, but they couldn't get along because the union would not let him look for work. On a

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third occasion, after Mr. Coake talked with a union agent on break about problems getting water and proper lighting on the jobsite, Mr. Adams approached him as he worked and asked why the Union had been there and if they were going to organize the workers. Mr. Coake told Mr. Adams of the water and lighting problems. Mr. Adams asked again about what the union representative wanted, and Mr. Coake gave him the Union's phone number and suggested he call and ask for himself.

Respondent allowed jobsite employees an unpaid half-hour lunch break, for which employees on the Tahiti job clocked out and in. In late June, the Tahiti job's general contractor, Martin and Harris, provided a complimentary lunch to thank employees of subcontractors, including Respondent's. The lunch was expected to take longer than the usual break, and Mr. Crocker informed employees they would not be paid for that time. Some employees attending the lunch took longer than the normal unpaid lunch break. As advised, the time that exceeded the normal unpaid lunch break was also unpaid. Some employees, including Mr. Lemke, Mr. Jordan, Mr. Lugo, and Mr. Segovia circulated a petition during work time, protesting Respondent's refusal to pay for the additional half-hour spent at the Martin Harris lunch, which more than 50 employees signed.

In early July, Mr. Crocker told Mr. Lemke he had heard he was circulating a petition during "work time." Mr. Crocker reminded Mr. Lemke that Jeffrey Taylor had been really good to him by giving him a draw²² on his pay and asked if he felt opening up a can of worms like that was really worth his job. Mr. Lemke denied circulating the petition on other than his own time.

Sometime after the Martin and Harris lunch, according to Mr. Crocker, Jeffrey Taylor told the supervisors at a management meeting that certain employees were causing problems for the company, and the company did not need them any more. Mr. Crocker testified Jeffrey Taylor described the employees as "union supporters, union instigators, people stirring up individuals on the jobs, talking about better wages," naming Mr. Jordan, Mr. Lemke, Mr. Coake, and Mr. Phelan. Mr. Crocker also said Jeffrey Taylor directed the supervisors to "get rid of" the employees. Mr. Partington denied Jeffrey Taylor made such statements. I found Mr. Crocker's testimony in this regard difficult to follow. Moreover, it was sometimes challenging to distinguish between what he actually heard and what he inferred. Therefore, I do not find Jeffrey Taylor asked any supervisor to get rid of employees.

On July 3, before clocking in, Mr. Jordan and another employee presented the petition to Mr. Crocker. There is discrepant testimony as to what, if anything, Mr. Crocker said to employees at that time. In direct testimony, Mr. Crocker said he had told Mr. Lemke he could be fired for circulating the petition. Under cross-examination Mr. Crocker qualified his testimony, saying that he told employees that taking additional time for the lunch had been optional, that there was no valid basis for the petition, and that they could end up being fired for circulating the petition during work time. Mr. Jordan testified that upon receipt of the petition, Mr. Crocker said nothing and walked away. I accept Mr. Crocker's modified testimony as the accurate account. At about that same time, Mr. Segovia, in the company of Mr. Sandoval, presented the signed petition to Mr. Kohl in the construction trailer.²³

²² On July 1, Mr. Lemke received a pay advance from Respondent and a \$1.00 per hour pay increase.

²³ Mr. Segovia testified that Mr. Jordan and Mr. Lugo were not involved in presenting the petition. I take his testimony to mean only that they did not participate in the presentation to Mr. Kohl and not as a contradiction that Mr. Jordan gave the petition to Mr. Crocker.

While at the Tahiti job, Mr. Lugo openly distributed union material to coworkers and discussed union benefits with them during breaks. On one occasion, Mr. Sandoval asked Mr. Lugo how the organizing was going, and Mr. Lugo invited him to a union meeting to see for himself. On another occasion, as Mr. Lugo worked, Mr. Sandoval told him that if he continued to organize he could have problems. Mr. Sandoval said that people loyal to the company had a sure job and that many of the workers had already bought houses.²⁴ Mr. Sandoval denied asking any employee his/her union membership status or involvement in union activities. He denied threatening employees with discharge. I found Mr. Lugo to be a convincing witness, and I accept his testimony over Mr. Sandoval's.

Mr. Flores was employed at the Pacific job when the October 2 strike began. He left the jobsite and waited across the street with three other workers. According to Mr. Flores, one of Jeffrey Taylor's sons whose name Mr. Flores could not recall asked the four if they wanted to go to another job. Mr. Flores told him they could not do that because the strike was against the company. The man offered to transport them to another job surreptitiously. Mr. Flores again refused and said he had previously asked Mr. Crocker for more money, and although Mr. Crocker had said he would get it in his next check, he never had. The man said, "If you want, I can offer you more money." Mr. Flores again refused. According to Nathan Taylor, he approached a group of employees milling about outside the Pacific jobsite after the strike began and asked them if they were going to work. One of the workers asked if there were other job sites they could go to. Nathan Taylor said other jobs were manned, but if something came up, Respondent would see if it could get them to other jobs. The workers asked if they would get paid, and Nathan Taylor said they would if they crossed the picket line and worked. Nathan Taylor denied offering any worker a raise to cross the picket line. While I accept Nathan Taylor's testimony of what transpired between him and striking workers, it does not prove that a different Taylor did not offer to increase wages if employees crossed the picket line.

During the course of the picketing, Mr. Montes had a telephone conversation with an individual he initially identified as Nathan Taylor and later as "Joshua" Taylor,²⁵ who asked if he would like to return to work. Mr. Montes declined, saying he could not cross the picket line. Under cross-examination, Mr. Montes testified that he had two conversations, one with Nathan and one with Joshua [Jeremiah], both of whom told him Respondent could give him some more money if he returned to work. Mr. Montes' affidavit account does not state Nathan Taylor offered him more money. I discount Mr. Montes' testimony regarding Nathan Taylor.

According to Mr. Jordan, several days after the strike ended, he approached Nick Taylor and Mr. Tingey who were returning to the Pacific job at lunchtime and asked if he could get his job back. Mr. Tingey said, "F__ you, you black mother, we don't want you here. Go get a union job." Nick Taylor said, "You come over here, mother, we going to kick your A. We don't want you here."²⁶ Gerald Jennings standing nearby encouraged Mr. Jordan to walk away without

²⁴ In his affidavit to the Board, Mr. Lugo recounted Mr. Sandoval's statement: "If you all want to continue to work here you'd better stop organizing...workers with experience in the company have cars and houses, and the company always keeps them busy with work." Although worded differently, the thrust of Mr. Lugo's testimony remains the same, and the difference between oral and affidavit accounts does not diminish his credibility.

²⁵ Although Mr. Montes did not accurately recall the name of the person with whom he had the telephone conversation, his overall testimony justifies a conclusion that it was Jeremiah Taylor.

²⁶ Mr. Jordan's testimony was essentially corroborated by Glenn Harless.

response. Mr. Jordan reported the incident to Mr. Crocker who arrived at the jobsite as Nick Taylor and Mr. Tingey walked away. Mr. Crocker said he would take care of it, and Mr. Jordan observed him go with Nick Taylor and Mr. Tingey into a work trailer on the jobsite where they stayed for about half an hour. When the latter two came out, they left the jobsite in a truck, pulling off briefly to throw rocks at where Mr. Jordan and others were standing.²⁷

According to Gerald Jennings' account of the incident, Nick Taylor was the only speaker. When Mr. Jordan called, "Hey Nick, is there any way you can get my job back," Nick yelled, "No, you f__ black mother f__, we don't want your kind here. Go get a Union job." Nick's companion made obscene gestures. Nick Taylor denied calling Mr. Jordan "black m__f__." I found Mr. Jordan and Mr. Jennings to be forthright and sincere witnesses, and I accept their accounts of what occurred.

H. Terminations of Leland Coake, Robert Preston, Alfie Feliciano, Michael Jordan, Josue Solis, Javier Gonzalez, Finee Layna, and Joniel Layna Morales, Merdardo Lugo, Joel Lemke, Robert Janecek

Although Respondent has a written disciplinary procedure it follows for safety infractions, it has no formalized or even customary procedure for meting discipline for other misconduct or problems. Jeffrey Taylor must approve virtually every termination, including layoff or discharge.

Leland Coake. On May 14, Mr. Coake and his work partner Alvaro Segovia (Mr. Segovia) began working for Respondent as framers at a jobsite at St. Rose Business Park. Shortly after, they were relocated to the Mazda job where they remained until transferred to the Tahiti job after Memorial Day.

As evidenced by Mr. Adams' interrogation of Mr. Coake described above, Respondent was aware of the union affiliation of Mr. Coake and Mr. Segovia. Moreover, after transfer to the Mazda job, Mr. Coake and Mr. Segovia wore union-inscribed hats and tee shirts to work, and Mr. Coake distributed authorization cards, which he kept openly in the side pocket of his lunch container.

On June 17, Mr. Coake was partnered with "Frank," a new employee. The two completed an assigned framing task at about 8:30 to 8:45 a.m., then reported to the construction trailer and asked for Mr. Crocker. Mr. Kohl told them Mr. Crocker would not be available for 40 minutes and directed them to return to their area, which they did. At 9:00 a.m., they took their normal 15-minute break and returned once more to the construction trailer where they were again told to report to their work area. Frank became upset at the wait, gathered his tools, and left. After waiting in his work area until about 9:40, Mr. Coake walked into rooms where employees were taping to find work. Mr. Rivera asked him, "What the hell are you guys doing down here." Mr. Coake told him he was looking for work, explained what had happened that morning, and said that Frank had quit. Mr. Rivera told Mr. Coake to go to the second floor and start hanging lids (ceiling panels), a two-person job.

Mr. Coake asked if Mr. Rivera expected him to do the work without a partner. Mr. Rivera said, "Well then, you just go home then." To this point, the evidence is uncontroverted. What happened after Mr. Coake left the jobsite is in dispute.

²⁷ As no other witness recounted rock throwing, which would presumably be a notable incident, I find that if Nick Taylor and Mr. Tingey threw rocks, it was not at the strikers.

5 According to Mr. Coake, he did not know if he had been fired. After leaving the job, Mr. Coake left a message on Mr. Avondat's voice mail. He then called the office and informed the receptionist what had happened, saying he wanted to talk to Mr. Avondat or Mr. Partington to learn if he should return to work. The receptionist told him the office would find out what was going on and tell him when he was to return to work. On the following day, Mr. Coake telephoned the office asking to speak to Mr. Avondat or Mr. Partington, and again the receptionist said the office would let him know. According to Mr. Coake, after additional telephone calls the next day, the receptionist told him he had been laid off, and he could pick up his check. Mr. Coake did so; no one ever told him why he had been fired.

10 Shannon Taylor gave a different version. She testified that on a date she could not recall, a man identifying himself as Mr. Coake telephoned and asked when he could pick up his paycheck. Shannon Taylor asked if there were a problem, and Mr. Coake said he had been fired on the preceding Friday. Shannon Taylor asked him to wait while she spoke to Mr. Avondat and Mr. Kohl, who were in the conference room. Shannon Taylor told them Leland Coake was on the telephone saying he had been fired the previous week. Mr. Avondat said Mr. Coake was not fired, that Respondent needed him. Shannon Taylor returned to the telephone and said, "Leland, you're not fired." Mr. Coake explained to her that on the previous Friday when he could not find any work to do, he had gone home for the day and had been unable to contact Mr. Avondat who was out of town. Shannon Taylor agreed the foreman had been unavailable. She put Mr. Coake on hold again and reported the further exchange to Mr. Avondat. Mr. Avondat said, "No he's not fired; we need him on the job."

25 Shannon Taylor returned to the telephone and again told Mr. Coake he was not fired, saying, "I apologize for any misunderstanding, but you have your job if you would like it."

Mr. Coake said, "No, I'll just come and get my paycheck."

30 Jeffrey Taylor furnished yet another version of Mr. Coake's termination. According to him, the Tahiti job was winding down and work was slow; Respondent laid off Mr. Coake for lack of work. Mr. Coake's employee record bears the notation, "06-17-03 Laid Off."

35 Robert Preston and Alfie Feliciano. On September 15, Respondent hired Mr. Preston and his long-time work partner, Alfie Feliciano (Mr. Feliciano) to work on the Pacific job under the supervision of Mr. Crocker. Both participated in picketing Respondent during the October strike. On October 29, they returned to work. Although Counsel for the General Counsel asserts that Respondent isolated Mr. Preston and Mr. Feliciano from other workers after their return from the strike, evidence regarding work assignments is too sketchy to warrant such a finding.

40 On November 4, Mr. Crocker asked Mr. Preston to pick up his work pace because someone had called the office to complain he was standing around. Mr. Preston suspected Mr. Tingey of lodging the complaint. Later that afternoon, Mr. Crocker told Mr. Preston he would be issued a warning because of the complaint. In response to Mr. Preston's protest, Mr. Crocker said he thought Mr. Preston could work a little faster. Shortly before quitting time, Mr. Preston who was irritated that someone had reported he was not working, said repeatedly in a high-pitched voice to Mr. Feliciano, "Daddy, Daddy, Rob's standing around."

50 Mr. Tingey who was sitting on his forklift in the vicinity, said, "What? Are you talking to me?"

Mr. Preston said, "If the cap fits then wear it. So if you're the one that's calling the office, yes, I'm talking to you."

Although accounts differ somewhat as to what was said, all witnesses agree that a verbal confrontation ensued between Mr. Tingey and Mr. Preston. According to Mr. Preston, Mr. Tingey insulted Mr. Preston's work ethic and at some point called him a "lazy union f__."28 Mr. Preston responded in kind and disparaged the quality of Mr. Tingey's safety inspections. Mr. Tingey ordered Mr. Preston to "shut the f__ up," to which Mr. Preston replied, "No, you shut the f__ up." While this interchange continued unvaried, Jeremiah Taylor approached Mr. Tingey and Mr. Preston and told both men to shut up and separate. According to Mr. Tingey and Jeremiah Taylor, Mr. Tingey, as instructed, walked away. When Jeremiah Taylor told Mr. Preston to shut up and to leave, Mr. Preston said, "F__ you, who the hell are you. Shut the f__ up. You're nothing but a punk kid." Jeremiah told Mr. Preston to leave the job and not to plan on coming back. Mr. Preston admitted he told Jeremiah Taylor to shut up, and Mr. Feliciano indirectly bolstered Mr. Tingey and Jeremiah Taylor's accounts. Mr. Feliciano testified he told Jeremiah Taylor he needed to get his buddy back and stop telling people to shut the f__ up, which suggests Mr. Tingey had left as instructed. Based on that and on my observations of witness manner and demeanor, I accept Jeremiah Taylor's account of the interchange.

When Jeremiah Taylor told Mr. Preston to leave the job, Mr. Feliciano said, "Me too?"

Jeremiah Taylor said, "Yeah both of you. Get you guys' sh__ and get the f__ off my job, don't bother coming back." Mr. Preston and Mr. Feliciano complied. After they left the job, Mr. Preston and Mr. Feliciano went to the office to pick up their checks. At the office, Jeffrey Taylor told Mr. Feliciano he had not been fired and suggested he report back to the jobsite. Mr. Feliciano said Mr. Preston was his partner. Jeffrey Taylor told him his partner had been fired, but he was not fired, he still had a job. Mr. Feliciano said he was going with his partner.

Mr. Preston's separation notice stated he had been fired for "verbal insubordination to [a] foreman" and that performance and productivity had been taken into consideration. According to Jeffrey Taylor, the *sine qua non* basis for Respondent's termination of Mr. Preston was his "verbal insubordination." In response to the charges, Mr. Preston commented in writing on the separation notice: "I disagree w/ the work ethics and lack of productivity...11-4-03 was the first of any verbal confrontations." Respondent gave Mr. Tingey a "verbal" warning, counseling control of personal feelings on the job, which was noted on his Consecutive Employee Warning Report as his "First Disciplinary Report."

Michael Jordan and Medardo Lugo. On July 3, Mr. Jordan and Mr. Lugo separately presented copies of the Martin Harris lunch petition to management. That afternoon, Respondent laid them off. Mr. Crocker told Mr. Jordan he was being laid off because the work was caught up. Mr. Sandoval told Mr. Lugo he was keeping employees with more seniority because they were loyal to the company. He told the laid-off workers that if the company had more work they would call them.

²⁸ According to Mr. Preston, this was not the first time Mr. Tingey had so vilified Mr. Preston. A few times during the week Mr. Preston returned from the strike, Mr. Tingey had said to Mr. Preston, "You lazy union guys; you guys are all the same," and Mr. Preston had responded that he did more work than Mr. Tingey.

Respondent’s individual employee records show the beginning and termination date of each employee next to lines reading “START DATE” and “LEFT DATE.” The memo sections of some records contain specific information about the basis for termination such as “laid off,” “fired,” “quit,” “no call no show,” or “strike,” along with dates. Other records merely note a date next to the “LEFT DATE” line without further explanation. Employee records for July 3 show the following: 20 employees had left dates of July 3; of those, only two records give an explanation; Abraham Sotelo’s record notes “laid off,” and Hector Nevarro’s record notes “stopped work;” Mr. Lugo’s record has the date 07/03/03 entered to the right of the “LEFT DATE” entry line without further explanation; Mr. Jordan’s record bears a separate notation of “LEFT DATE 07/03/03” in the memo section.

According to employee records, the 20 employees with left dates of July 3 had hire dates ranging from October 2002 through June 19. Of the 58 employees with left dates in July, 39 were specifically designated as “laid off” during July in the following numbers:

15	07/03 – 1	07/17 -- 1
	07/09 -- 1	07/19 – 2
	07/10 – 3	07/24 -- 6
	07/11 – 2	07/25 – 1
20	07/14 – 3	07/28 – 4
	07/16 – 1	07/29 – 2
	07/18 – 6	07/30 -- 6

Finee Layna, Josue Solis, Javier Gonzalez, and Joniel Layna Morales. Respondent hired Finee Layna, Mr. Fierro, Mr. Gonzalez, and Joniel Layna Morales on May 27 and assigned them to the Tahiti job, where they worked as a team. The first day or so on the job, Mr. Sandoval asked Finee Layna why he had not told him the group did not know how to nail or hammer on the ceiling. Finee Layna said they knew how but did not have “hammering” experience because their prior work had been at metal-structured projects. According to Finee Layna, Mr. Sandoval said that was okay, but his boss had called and said the four were organizing the Union and if they continued, they would be fired. Joniel recalled that Mr. Sandoval said not to make “a lot of noise” with the Union and that if the four asked about wages, they would be fired.²⁹ I find Mr. Sandoval did not threaten the four with termination for their union activities, but he did warn them against enthusiastic union support.

On Friday, June 6, the four employees wore union logo-inscribed tee shirts to work. The following Monday, June 9, Mr. Sandoval gave each of them a paper, saying they needed to sign their dismissals. The employees signed the papers, which turned out to be safety certifications. Then or shortly thereafter, Respondent sent the four employees to the Centennial job where they were to report to Mr. Adams.

At the Centennial job, Mr. Adams assigned Mr. Fierro, Finee Layna and Corneal Layna to “hang” a ceiling. He assigned Mr. Gonzalez to work with an employee called “Panzon.” Shortly after the lunch break, Mr. Adams appeared where the group was working and angrily told them they were doing the work improperly, saying, “What are you doing? That doesn’t go like that.” Mr. Adams asked an unidentified person how much experience the four had, saying they did not know what they were doing. Finee Layna said he had eight years’ experience. Mr. Adams said, “The f—with that. I don’t need you guys here, get the f—out of here.” He told

²⁹ The record supports a finding that this threat occurred at a different time when Mr. Sandoval cautioned the employees about discussing wages.

Panzon to tell them they were fired. In Spanish, Panzon said, "Don't pay attention to him, Dave is like that." Panzon said two were fired, but if two of them wanted to stay and work they could. No one wanted to stay since all had come to work in one car. The four picked up their tools and left. According to Finee Layna, about a week later, on the next pay day, he and Mr. Gonzalez
 5 went to the office to pick up their paychecks.

Shannon Taylor testified that on a Monday in June, she received a note from Ms. Nielson that four employees (apparently the Finee Layna group) had quit. On the following Wednesday, four employees came to the office. With one of them as spokesman, they
 10 requested their paychecks. Shannon Taylor asked why they wanted their paychecks, and the spokesman said they had been fired. She asked why, if they had been fired, they had they come in on Monday saying they quit. The spokesman said, "I don't know what get the "f" off my job means to you, but to me that indicates that I'm fired." Shannon Taylor told the spokesman she had contacted the foreman who reported that when he checked, he found the four gone.
 15 She told them their paychecks would be ready on Friday, and the group left.

I found Shannon Taylor to be a forthright and sincere witness, and I credit her account. I also credit Finee Layna's account of what occurred on the job. While Finee Layna may, in an excess of pride, have reported to the office that the four had quit, Mr. Adams did not deny Finee Layna's account, and I conclude the four employees reasonably believed they had been fired when Mr. Adams told them to get "out of here." Accordingly, I find Mr. Adams discharged the
 20 four employees on June 9.

Robert Janecek. Respondent employed Mr. Janecek from May 14 to May 28. Through Mr. Adams' questioning, described above, Respondent knew Mr. Janecek was a union member. When Mr. Janecek was assigned to the Tahiti job, he was told of Respondent's policy that workers on that jobsite sign out and in at lunch break as well as before and after work. Mr. Janecek was "perturbed" at having to take his time to sign out and in at lunch. On his second day on the Tahiti job, Mr. Janecek did not sign out at lunch break. When he finished his
 30 lunch period, he went to the trailer to sign in, and the timekeeper told him to go home because he had not signed out at lunch. As he left the trailer, Mr. Janecek saw Mr. Avondat and told him what had occurred. Mr. Avondat sent Mr. Janecek and his work partner back to their work area, saying he would look into it.

Being unsure whether he was still employed, when Mr. Janecek got to his area, he did not do any work. Jeremiah Taylor, whom Mr. Janecek knew to be a foreman, told him to get his tools and start working, and the issue would be taken care of. Mr. Janecek refused until he "knew for sure that [he] was still employed." A heated discussion ensued during which, according to Mr. Janecek, Jeremiah Taylor called Mr. Janecek a "son of a bitch" among other
 40 pejoratives, told him he did not want his "kind" on the job, and fired him. Mr. Janecek picked up his tools and left the job. Mr. Janecek's testimony at the hearing differs somewhat from his recollections recorded contemporaneously. In a journal he kept in May, he wrote as follows:

I made a comment [to Jeremiah] to the effect I wasn't going to work for nothing and if I was going to be sent home then I would wait to put on my tools until I
 45 knew for sure. This Jeremiah kid said I had better put on my tools if I expected to stay on the job...One thing led to another, some tempers, some anger and some 19-year-old kid thinking he was going to push me around and scare me. He then fired me and told me get off the job which I pretty much gladly obliged him and started to do. One of Jeremiah's cronies...happened by...In discussing [our
 50 dispute] with him, Jeremiah used some derogatory language in reference to me (ie. Asshole.) At this point I had had enough of this non-union, scab crap and

[told Jeremiah] that he had the right to fire me, he had the right to send me off the job, but he didn't have any right whatsoever to call me obscene names and if he continued the name calling, where I was concerned, he would regret it.

5 I consider Mr. Janecek's contemporaneous account more reliable than his testimony at the hearing; therefore, I find Jeremiah did not call Mr. Janecek any names until after he had fired him and did not say he did not want "his kind" on the job. The next morning, Mr. Avondat telephoned Mr. Janecek. Mr. Avondat told Mr. Janecek to go to the office, and Respondent would send him to a job. Mr. Janecek recounted what had occurred the day before.
10 Mr. Avondat said he was not aware of that and would get back to him. Later that afternoon, a secretary told Mr. Janecek he had been fired. Two to three months later, Respondent reemployed Mr. Janecek for two to three days before he voluntarily took other employment.

15 Joel Lemke. On Tuesday, July 1, Mr. Lemke obtained a pay advance from Jeffrey Taylor and received a pay raise of \$1.00 an hour. At about the same time, Mr. Lemke told Mr. Crocker he would be absent on the day following because of a court hearing. There is some question as to the date Mr. Lemke notified Mr. Crocker of his prospective absence and when he was absent. Mr. Lemke was vacillatory as to whether he worked on July 2. He testified as follows:

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Q. What day were you off because of a court appearance?

A. I do believe it was on a Wednesday before the 4th of July [July 2] and then the 4th, was like, I think on a Friday. Then I was off that Wednesday afternoon and I had Court Thursday and then it was the 4th of July weekend and I came back to work that
25 Monday after.

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When Mr. Lemke reported to work the following Monday, he learned from fellow workers that Respondent had laid off employees on July 3. After Mr. Lemke learned about the layoffs, Mr. Crocker told him to pick up his check at the office, and Mr. Lemke asked no questions
30 because he assumed he had been laid off as well. When he went to the office, the secretary told him Respondent considered he had quit. Mr. Lemke denied quitting, and the secretary suggested he return to the jobsite and talk to Mr. Crocker. Mr. Lemke returned to the construction trailer and told Mr. Kohl and Mr. Sandoval that he had not quit and asked to speak to Mr. Crocker or Mr. Avondat. Mr. Avondat was informed Mr. Lemke wanted to talk to him; he
35 came to the trailer to talk to somebody else and told Mr. Lemke he was too busy to see him right then, that it would be a little while before he could talk to him. After waiting about half an hour, Mr. Lemke gathered up his tools and left, assuming he had been fired.

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According to Jeffrey Taylor, Mr. Lemke came to him for a pay advance, saying he had to go to court and needed the money to pay some fines. He did not reappear at work until the following Thursday when he picked up his tools. He picked up his paycheck the following day, which was the normal Friday payday. Respondent discharged Mr. Lemke for not showing up to work. Mr. Lemke's time card for the period June 30 to July 6 shows he punched out at the end of shift on July 1 and did not punch in thereafter. His employee record shows his pay raise and
45 his "left date" were both on July 1.

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V. Discussion

A. Supervisory or Agency Status

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Respondent denied the supervisory and/or agency status of Mr. Isitt, Mr. Rivera, Mr. Sandoval, Mr. Tingey, and Ms. Nielson.

Section 2(11) of the Act defines a "supervisor" as 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
 5 grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner."
 10 *Arlington Electric, Inc.*, 332 NLRB 74 (2000), quoting *Union Square Theatre Management*, 326 NLRB 70, 71 (1998).

With regard to agency, Section 2(13) of the Act provides:

15 In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

20 The Board has noted, "When applied to labor relations... agency principles must be broadly construed in light of the legislative policies embedded in the Act."³⁰ The Board adopts the concept of apparent authority and applies the common law principles of agency when determining whether apparent authority is created: (1) there must be some manifestation by the principal to create a reasonable basis for believing the principal has granted authority, and
 25 (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Pratt Towers, Inc.*, 338 NLRB No. 8, slip op. at 12 (2002).

30 As to Mr. Sandoval, the evidence shows he had, and exercised, authority to select employees for layoff on the Tahiti job at all times relevant to this matter. Admitted supervisors told him how many workers needed to be laid off but left individual selections up to him. The evidence does not establish how frequently Mr. Sandoval may have chosen layoff candidates, but it is not necessary that an employee "regularly and routinely" exercise enumerated powers; the existence of the power is determinative. *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99, at slip op. 2 (2003). Since Mr. Sandoval possessed discretionary and independent authority to
 35 choose which employees would be laid off, he was a supervisor within the meaning of the Act.

40 The supervisory issues herein with regard to Mr. Isitt, Mr. Rivera, and Mr. Tingey center on their authority to assign and direct employees. That each of them exercised such authority is undisputed. Whether the exercise was with independent judgment and not in a merely routine or clerical manner is the crucial question in determining the supervisory status of each. As the United States Supreme Court noted, "The statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status...It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies."³¹ The Board is careful not to give too broad an interpretation to the statutory term "independent judgment"
 45 because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999).

50 ³⁰ *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1933), remanded 56 F.3d 205 (D.C. Cir. 1995).

³¹ *NLRB v. Kentucky River Community Care*, 121 S. Ct. 1861, 1867-1868 (2001).

Mr. Isitt and Mr. Rivera worked as leadmen under Mr. Adams and Nick Taylor, respectively. There is no evidence either had authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees. Both were responsible for seeing that Mr. Adams' and Nick Taylor's instructions were carried out and assigned work to employees in furtherance of that responsibility. However, that alone does not establish supervisory authority. As the Board has consistently stated, "[Work] assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11)." *McGraw-Hill Broadcasting Co., Inc.*, 329 NLRB 454, 459 (1999). There is no evidence either Mr. Isitt or Mr. Rivera independently devised work plans or determined where or on what task employees were to work. Accordingly, I cannot find the General Counsel met his burden of proving either Mr. Isitt or Mr. Rivera were supervisors of Respondent within the meaning of the Act at any time relevant hereto. However, Respondent sometimes directed new employees to report to Mr. Isitt or Mr. Rivera at assigned jobsites. Further, Mr. Isitt and Mr. Rivera communicated supervisory decisions to employees, and Mr. Rivera directed Mr. Coate to go home when he could find no more work to do. As Respondent has made Mr. Isitt and Mr. Rivera "conduit[s] of information to employees on their day-to-day duties," Respondent has placed them in positions where employees could reasonably believe they spoke for management. *Mid-South Drywall Co., Inc.*, 339 NLRB No. 70, at slip op. 1 (2003). Accordingly, I find the General Counsel met his burden of proving Respondent vested Mr. Isitt and Mr. Rivera with apparent authority to act as its agents within the meaning of the Act at relevant times.

Mr. Tingey worked as a forklift driver on the Tahiti and later the Pacific jobs where he occasionally directed employees to move material, generally in connection with facilitating his forklift duties. Although Respondent appointed Mr. Tingey as "safety guy" after the strike ended on October 27, it does not appear his authority extended beyond checking employees' tools and informing employees which tools did not meet safety standards. Such limited authority provides no basis for finding supervisory status, and the fact that Mr. Tingey may have informed employees of safety issues in a despotic manner also provides no basis. There is no evidence Mr. Tingey acted as a conduit for relaying and enforcing Respondent's decisions, directions, policies or views. Although employees knew Mr. Tingey had a personal relationship with one or more of Jeffrey Taylor's sons, there is no evidence of any statements or acts from which they could realistically have inferred he was privy to Respondent's policies and plans. See *Zimmerman Plumbing and Heating Co.*, 325 NLRB 106 (1997) (senior foremen independently acted as the employer's spokesmen on jobsites and were responsible for relaying and enforcing employer decisions, directions, policies and views). Therefore, it was not reasonable for employees to believe Mr. Tingey reflected company policy or acted for management when he engaged in conduct that would be unlawful if attributable to Respondent. Accordingly, I do not find the General Counsel met its burden of proving Mr. Tingey was a supervisor or an agent of Respondent within the meaning of the Act at any time relevant hereto.

As to Ms. Nielson, there is no evidence she exercised any authority encompassed by the supervisory indicia named in the Act. Although she signed safety certifications over the title "Personnel Manager," there is no evidence she actually held such a position. Even assuming she possessed such a title, the Board cautions that an individual's title alone cannot establish whether that individual is a supervisor. *Pan-Osten Co.*, 336 NLRB 305 (2001). Further, Respondent did nothing beyond employing Ms. Nielson in its office to manifest to any third party that she was its agent in making statements about work availability or any other managerial matter. There is also no evidence Respondent ever held Ms. Nielson out as a conduit for transmitting information from management to applicants or employees. In these circumstances, I find the General Counsel has not met his burden of proving Ms. Nielson was Respondent's agent at any relevant time or for any communication herein.

B. Independent Violations of Section 8(a)(1)

1. Legal Principles

5

Section 8(a)(1) of the Act provides that “It shall be an unfair labor practice for an employer...to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act].” In considering communications from an employer to employees, the Board applies the “objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization, or promise benefit for not doing so, interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB No. 90 (2004); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001).

The Board has adopted a totality-of-the-circumstances test in determining whether questioning of an employee constitutes unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* Sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board also considers the following criteria called “the Bourne factors”³²:

- (1) Background, i.e. history of employer hostility and discrimination.
- (2) Nature of information sought, e.g. on which to base employment action.
- (3) Identity of the questioner, i.e. place in company hierarchy.
- (4) Place and method of interrogation, e.g. casual or formal, in boss’s office.
- (5) Truthfulness of the reply.

Ultimately, the Board’s task is to “determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the [questioned] employee so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Center*, 330 NLRB 935, 940 (2000). The interrogation occurring herein is evaluated under those standards.

It is unlawful under Section 8(a)(1) of the Act for an employer to create an impression that it is watching or monitoring its employees’ protected union activity, or in other words, to create an impression of surveillance. The underlying premise is that employees should be free to participate in union activity without fearing that members of management are peering over their shoulders, noting who is involved in union activities and to what extent or how. “[T]he test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance.’ *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999).” *St. Thomas Gas*, 336 NLRB 711, 719-720 (2001). It is not necessary that employees attempt to keep their activities secret to create a violation, and it is not necessary that the employer’s words indicate the information has been obtained illegally. *Grouse Mountain Lodge*, at 1322-1323 (2001).

50

³² First set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

A supervisory statement that an employer will never be union is essentially a threat that employees' organizing efforts are futile and is coercive in violation of Section 8(a)(1) of the Act. Any statement or implication that an employer will close a business rather than recognize a union also interferes with the free exercise of employee rights under the Act.

5

An employer's prohibition of employee wage discussion, without sufficient business justification, violates Section 8(a)(1) of the Act. *Alaska Ship and Drydock*, 340 NLRB No. 95 (2003).

10

A supervisor's equating loyalty to an employer with opposition to a union violates Section 8(a)(1) of the Act. *Westwood Health Care Center*, at 942.

15

Mere supervisory observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance." *Town & Country Supermarkets*, 340 NLRB No. 172, slip op. 7 (2004); *Fred'k Wallace & Son*, 331 NLRB 914 (2000). However, the Board has long held that that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act as it has a tendency to intimidate. *Saia Motor Freight Line* 333 NLRB #87 (2001); *F.W. Woolworth Co.*, 310 NLRB 1197 (1993).

20

2. J.D. Crocker

The credible evidence establishes that during the spring and summer Mr. Crocker, an admitted supervisor, engaged in the following conduct:

25

At various times, asked employees under his supervision if they were "union." Mr. Crocker's questioning was done casually, and there was little or no secrecy about union affiliation on jobsites where undisguised union members performed work alongside nonunion employees. Moreover, union supporters at the jobsites openly displayed their adherence, wearing union logos and talking with union representatives. However, Mr. Crocker's purpose in questioning employees was, at least in part, to gather information for upper management to use in combating the union drive. In those circumstances and in light of Respondent's pervasive unfair labor practices, Mr. Crocker's questions constitute unlawful interrogation in violation of Section 8(a)(1) of the Act.

30

35

Informed employees that Jeffrey Taylor would not go union. This statement constitutes a threat that employees' organizational efforts are futile. Further, the implication behind so dogmatic an assertion is that Respondent will take unspecified steps, possibly including closing, to avoid unionization. Such a statement violates Section 8(a)(1) of the Act.

40

Informed employees that talking about wages was a firing offense. No business justification having been offered for Respondent's policy, the announced prohibition violates Section 8(a)(1) of the Act.

45

Told Mr. Jordan he was suspected of stirring up union problems, thereby creating an impression of surveillance of employees' union activities in violation of Section 8(a)(1).

50

Told employees to be careful about engaging in union activities because they could be laid off. By these statements, Mr. Crocker not only created an impression of surveillance of employees' union activities but also threatened reprisals for such activity in violation of Section 8(a)(1).

5 Along with some of the Taylors, told employees the Union should stay out of Respondent's business. While supervisors may express their noncoercive opinions of the union, the statement that the Union should stay out of Respondent's business articulates a view that unions have no place in employer/employee relations and could reasonably be expected to restrain employees from supporting the Union, particularly when the opinions are offered in an atmosphere of extensive unfair labor practices.

10 Confiscated union authorization cards from employees. Mr. Crocker's ensuing apology does not vitiate the coerciveness of the conduct when other unfair labor practices remained unremedied.

15 When employees circulated a petition concerning the unpaid Martin Harris lunch period, they engaged in concerted, protected activity. In talking with Mr. Lemke about his participation in the petition, Mr. Crocker reminded him that Jeffrey Taylor had been good to him by giving him a pay advance, thereby equating refraining from protected activity with loyalty and gratitude for past favors. Mr. Crocker's implication that circulating the petition was opening a can of worms and could be worth Mr. Lemke's job was also a threat of reprisal for engaging in protected activity. Mr. Crocker's statements were coercive in violation of Section 8(a)(1). However, Mr. Crocker's caution that employees could be fired for circulating the petition during work time does not violate the Act.

25 As to allegations that Mr. Crocker and Mr. Adams' statements regarding the functioning of two-gate systems established at its jobsites were unlawful, I find no violation of the Act. I do not take the testimony of Mr. Jordan and Mr. Lemke as evidence that Respondent misrepresented the function of the two gates so as to distinguish coercively between its union-supporting and union-opposing employees. Mr. Crocker, whom I found to be frank about what he had told employees, denied such a conversation, and Mr. Phelan testified supervisors gave lawful explanations of how the gates were to be used (i.e. one gate for Respondent's employees, the other gate for the employees of other contractors.) The concepts underlying reserved gate provisions are complex, and explanations of them are susceptible to misunderstanding and unwarranted inferences. In light of Mr. Crocker and Mr. Phelan's testimony and without more evidence than the somewhat vague recollections of Mr. Jordan and Mr. Lemke, I decline to find Respondent misrepresented the purpose and application of the reserved gates.

3. Scott Avondat

40 The credible evidence establishes that during the spring and summer Mr. Avondat, an admitted supervisor, told employees that talking about wages was a firing offense. As explained above, such a threat violates Section 8(a)(1) of the Act.

4. David Adams

45 The credible evidence establishes that during the spring and summer Mr. Adams, an admitted supervisor, engaged in the following conduct:

50 Asked Mr. Madrid while he worked at the Tahiti job if he were a union member. Asked Mr. Coake why the Union had visited the Mazda job and if the Union were going to organize the workers. Asked Mr. Janecek if he were a union man. In the existing atmosphere of widespread unlawful coercion, Mr. Adams' interrogation of Mr. Madrid, Mr. Coake, and Mr. Janecek is unlawful under Section 8(a)(1) of the Act.

Accused Mr. Madrid of being an organizer for the Union. By doing so, Mr. Adams created the impression of surveillance of Mr. Madrid's union activities and thereby violated Section 8(a)(1) of the Act.

5

Impliedly promised Mr. Madrid benefits if he did not engage in union activity by telling him, "We have good jobs coming up, and if you don't participate in the Union, I take care of my people." Such an implied promise, linking abandonment of union support to job security, violates Section 8(a)(1) of the Act.

10

Asked Mr. Lemke to obtain a list of workers who had signed union authorization cards. Such a request interfered with, restrained, and coerced Mr. Lemke in his exercise of Section 7 rights and violated Section 8(a)(1) of the Act.

15

Told employees to see what the union hall was going to do for them because Respondent was going to be laying off workers. Mr. Adams' conjoining the union hall with the announcement of pending layoffs impliedly threatened employees who were union supporters that they would likely be selected for layoff and violated Section 8(a)(1).

20

5. Jeremiah Taylor and Paul Tingey

The credible evidence establishes that in October Jeremiah Taylor, an admitted supervisor, engaged in the following conduct:

25

During the strike, told Mr. Montes in a telephone conversation that Respondent could give him more money if he returned to work. Jeremiah Taylor's promise of benefit for strike abandonment interfered with, restrained and coerced Mr. Montes in his exercise of Section 7 rights and violated Section 8(a)(1).

30

6. Nick Taylor

The credible evidence establishes that during October, Nick Taylor, an admitted supervisor, engaged in the following conduct:

35

Either he or his companion, Mr. Tingey, cursed and threatened Mr. Jordan when he asked if he could get his job back following the strike, telling him to get a union job. It is unnecessary to determine whether Nick Taylor or Mr. Tingey made the statements, as Nick Taylor's silence would constitute acquiescence to Mr. Tingey's conduct. By Mr. Tingey and Nick Taylor's threats and name calling, which were clearly motivated by Mr. Jordan's protected strike activity, Respondent violated Section 8(a)(1) of the Act.

40

In June photographed Mr. Lugo as he conversed with a union representative in the parking area of the Tahiti jobsite during break. Having presented no justification, by photographing Mr. Lugo as he engaged in protected activity, Respondent violated Section 8(a)(1) of the Act.³³

45

³³ As for evidence Respondent's supervisors watched or looked at employees as they talked with union agents, I find no violation. Although the employees' activity was protected, it was conducted openly at or very near Respondent's work area. Therefore Respondent's merely observing the activity does not constitute unlawful surveillance

50

7. Francisco "Paco" Sandoval

5 The credible evidence establishes that sometime during the spring and summer, Mr. Sandoval, engaged in the following conduct:

On May 28 or 29, in violation of Section 8(a)(1), told Mr. Solis, Mr. Gonzalez, Finee Layna and Joniel Layna to stop asking about wages or they would be fired,

10 Asked Mr. Lugo how the union organizing was going. While such a benign and apparently casual question would not be unlawful per se, in the circumstances of widespread unfair labor practices on Respondent's jobsites, the question is coercive. Not only does Mr. Sandoval's question to Mr. Lugo constitute interrogation, it also creates an impression of surveillance of his union activities, both unlawful under Section 8(a)(1).

15 Told Mr. Lugo that if he continued to organize he could have problems but that loyal employees had sure jobs. By these comments, Mr. Sandoval threatened Mr. Lugo with reprisals for engaging in union activities and promised benefits for ceasing such activity, both violations of Section 8(a)(1).

20 At the time of the July 3 layoffs told Mr. Lugo Respondent was keeping employees with more seniority because they were loyal to the company. Although the complaint does not specifically allege this statement as a violation of 8(a)(1), I may find a violation and recommend a remedy for it as the issue has been fully litigated and is closely connected to the subject matter of the complaint. See *Gallup, Inc.*, 334 NLRB 366 (2001); *Letter Carriers Local 3825*, 333 NLRB 343, fn. 3 (2001).

8. Unidentified Son of Jeffrey Taylor

30 When, on October 2, an unidentified son of Jeffrey Taylor told striking employees he could offer them more money, he made an unlawful offer of benefit to induce employees to cease supporting the Union in its strike. Since all Jeffrey Taylor's sons hold supervisory positions, Respondent is accountable for the statements of any of them, whether specifically identified or not. The unidentified son's conduct interfered with, restrained and coerced the employees in their exercise of Section 7 rights and violated Section 8(a)(1) of the Act.

C. Refusal to Hire or Consider for Hire Mass Applicants

40 The General Counsel alleges Respondent refused to hire or consider for hire the mass applicants. In such cases, the General Counsel bears the burden under *FES*³⁴ of showing Respondent was hiring at the time the mass applicants applied for employment, the mass applicants had experience and training relevant to the requirements of the positions for hire, and antiunion animus contributed to Respondent's decision not to hire or consider them.³⁵

34 331 NLRB 9 (2000), aff'd 301 F.3d 83 (3rd Cir. 2002).

50 ³⁵ I note the General Counsel's initial burden of proof for a discriminatory refusal-to-consider allegation does not require him to establish the applicants' relevant experience or training.

5 It is clear Respondent hired employees during the 30-day period the mass applications
were on file, and Respondent does not dispute that the mass applicants had experience and
training relevant to the positions Respondent filled. Accordingly, the General Counsel has met
its burden as to the first two elements of FES. As to the third element, “the allegations of
unlawful discrimination...must be supported by affirmative proof establishing by a
preponderance of the evidence that the Respondent’s conduct was unlawfully motivated.” *Ken*
Maddox Heating & Air Conditioning, Inc., 340 NLRB No. 7, slip op. 3 (2003). The credible
evidence herein is that the mass applicants, openly union-affiliated, sought employment with
Respondent, and Respondent, patently opposed to employee unionization, neither hired nor
10 considered them for employment. It is true no direct evidence shows anti-union motivation in
Respondent’s failure to hire or consider the mass applicants. Although Mr. Fierstein voiced
chagrin at seeing the mass applicants entering Respondent’s office, I cannot infer antiunion
motivation from that. Not only did Mr. Fierstein have no supervisory or managerial position with
Respondent, it is unlikely Respondent would receive a group of 23 or more unexpected
15 applicants with enthusiasm in any event. See *JS Mechanical, Inc.*, 341 NLRB No. 46 (2004).
However, Respondent’s demonstrable union animus must be accorded significant weight when
assessing whether Respondent would have taken the same action (or inaction) toward a large
group of applicants appearing at its office wearing, say, bowling instead of union tee shirts.
Given Respondent’s record of animus and unlawful conduct, the General Counsel has met his
20 initial burden of proving the unlawfulness of Respondent’s failure to hire or consider for hire the
mass applicants. Since the General Counsel has met his initial burden for the refusal-to-hire
and/or refusal-to-consider allegations, the burden shifts to Respondent to show it would not
have hired or considered the applicants even in the absence of their union activity or affiliation.
FES at 12; *Wright Line*, 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert.
25 Denied 455 U.S. 989 (1982). Respondent must litigate the issue of whether the alleged
discriminatees would have been hired but for the discrimination against them at the hearing on
the merits. “Matters which can be litigated at the unfair labor practice stage...cannot be
deferred to compliance.” *FES*, supra at 12 and 17; *Watkins Engineers & Constructors, Inc.*, 333
NLRB 818, 819-820 (2001).

30 The uncontroverted evidence establishes Respondent rarely hired from employment
applications on file, preferring to employ referrals or walk-in applicants who were immediately
available to work. Respondent also preferred to hire employees at lower wages than the
ranges established by area union contracts. Respondent’s employment preferences are neutral
35 and legitimate. *Ken Maddox Heating & Air Conditioning, Inc.*, supra, at slip op. 3 and cases
cited at fn. 4 (preference in employing individuals referred by existing employees is a legitimate
policy); *Kelly Construction of Indiana*, 333 NLRB 1272 (2001) (preference for hiring applicants
accustomed to earning wages within the company’s range is legitimate and nondiscriminatory.)

40 Respondent generally adhered to its hiring preferences. One exception occurred in mid-
May, when Mr. Janecek filled out an information sheet, and Respondent later asked him to
complete an application and hired him, which is inconsistent with Respondent’s asserted
practice of hiring essentially on the spot. However, hire records, along with those applications in
evidence, show employees nearly always started work on the day of or the day after application,
45 which supports Respondent’s position that it usually conducted on-the-spot hiring and did not
hire from filed applications. A number of employees also testified of the circumstances under
which they were hired. From their testimonies, a pattern emerges of individuals requesting
work, being permitted to fill out an application, and being hired on the spot, or being hired and
then filling out an application. Those hires who were not referred by supervisors or employees
50 were almost exclusively walk-ins, that is, applicants who came to the jobsite or the office
seeking immediate work.

In sum, the evidence supports Respondent's assertions that it did not review past applications in hiring when sufficient referrals or walk-ins existed to meet its hiring needs. The evidence also supports a finding that Respondent put employees to work at the time or within a day of application. Applying those practices to the mass applicants, it is clear that the mass applicants, being walk-ins, would normally have been considered for all hanging and framing jobs available on the day they applied, June 11, and on the following day, June 12.

Respondent contends it was not hiring and had no concrete plans to hire on June 11, when the mass applications were tendered. The evidence does not support this contention. Rather, employee records show that one employee, Francisco Perez, Jr., had a start date of June 11, and four employees had start dates of June 12, the day following the mass application: Martin Gomez-Zavala³⁶, Dionicio Gutierrez-Perez, Leo Maillette, and Michael Smith. Given Jeffrey Taylor's credited testimony that Respondent's practice was to hire walk-in applicants who could start work immediately, it is reasonable to infer that Francisco Perez, Jr. with a start date of June 11 may have been hired on that day, and the four employees who began work on June 12 were likely hired on June 11 or June 12. There are no applications in evidence for the five employees who started work on June 11 and June 12 except for Martin Gomez-Zavala whose application shows he applied for work on June 11. His application and such other employee applications as are in evidence support the inference that Respondent put employees to work on the day of or the day after they made application. It is also reasonable to infer from the five June 11 and June 12 start dates that Respondent had job openings on June 11 and was hiring to fill them. While there is no specific evidence that Francisco Perez, Jr. was hired on June 11 rather than the day before, I resolve the question against Respondent within whose control evidence to the contrary must repose.

Notwithstanding the availability of work on June 11 and June 12, Respondent did not consider for hire and, as an inevitable consequence, did not hire any of the mass applicants. To meet its *FES* burden, Respondent must present evidence explaining why it did not hire or consider the mass applicants for the five jobs it filled on June 11 and June 12. Respondent has not done so. Although Respondent has a neutral policy of preferring not to hire applicants whose past earnings far exceeded Respondent's pay range, the policy was not uniformly followed, and there is no evidence Respondent applied it to the mass applicants. There is also no evidence Respondent followed its other neutral policy of hiring referrals to fill the June 11 and June 12 openings. Although not repeated in its brief, Respondent's answer presented an affirmative defense that applicants who are agents of the Union are ineligible for employment. This defense, however, is without merit. *Town & Country Electric*, 516 U.S. 85 (1995); *Aztech Electric Company*, 335 NLRB 260, 263 (2001); *Sunland Construction Co.*, 309 NLRB 1224 (1992).

All evidence dictates a conclusion that, but for union animus, the mass applicants would have been considered for the June 11 and June 12 openings. The mass applicants fit within Respondent's practices in hiring: they had the requisite experience, they were walk-in applicants at the time Respondent must have been hiring to fill the June 11 and 12 openings, they were immediately available to work, and there is no evidence any mass applicant would not have accepted a job within Respondent's wage range or would not have continued employment for a reasonable period. Respondent has not explained why it did not hire or consider for hire any of the mass applicants to fill the five openings for which Respondent hired Francisco Perez, Jr., Martin Gomez-Zavala, Dionicio Gutierrez-Perez, Leo Maillette, and Michael Smith. Respondent

³⁶ As discussed below, the position filled by this employee may not have been an opening available to applicants.

only contends that it was not hiring at the time of the mass application, which assertion I have found to be inaccurate. I must, therefore, conclude that Respondent has not met its burden under *FES* and that it violated Section 8(a)(3) and (1) by refusing to hire five of the mass applicants and by refusing to consider all of the mass applicants for the five June 11 and 12 job openings.

As for job openings occurring after June 12, the evidence is not so clear. Employee records show four employee starts on June 13: Michael Jordan, Michael Phelan, Antonio Martinez and Kyle Stewart. June 13 being close to the June 11 mass application date, it is possible, under Respondent's practices, that the mass applicants should have been considered for openings occurring on this date as well as those occurring on June 11 and 12. However, the four employees starting on June 13 were already employed on Respondent's jobsites by Contractors and Builders. To decrease labor costs, Respondent requested they terminate employment with Contractors and Builders and accept employment with Respondent. The four complied; Respondent accepted applications from them and recorded them as employees as of June 13. The hiring of employees already working for Respondent, albeit on Contractors and Builders' payroll, does not evidence job openings for which walk-in applicants would have been selected. I do not, therefore, consider that the jobs filled by Mr. Jordan, Mr. Phelan, Antonio Martinez, or Kyle Stewart would have been available to the mass applicants. As stated earlier, it may be that Martin Gomez-Zavala, hired on June 12, should be included in the Contractors and Builders' group. If so, the opening he filled would also have been unavailable to the mass applicants. Resolution of that question is left to the compliance stage of these proceedings.

After June 13, Respondent did not hire new workers again until June 16 or nearly a week following the mass applications and filled 32 frame/hang positions between June 16 and July 9. Only eight employment applications are in evidence for the 32 hires. Each shows application was made the day of or the day before the applicant's start date. That evidence, although incomplete, is consistent with Respondent's neutral policy to employ walk-ins as job openings occurred and immediately put them to work, rarely reviewing applications on file for hiring purposes. There is no evidence Respondent followed this neutral policy in the post-June 16 hires in order to favor nonunion applicants over union supporters. I cannot, therefore, find Respondent was unlawfully motivated in following its established policy. Since Respondent's policy precluded review of applications on file, regardless of applicants' union affiliation, Respondent's failure to review the mass applications on file or to contact any of the mass applicants in consideration for job openings occurring on and after June 16 was not unlawful. Rather, it was the fortuitous result of "neutral hiring policies, uniformly applied [citation omitted]." *Ken Maddox Heating and Air Conditioning, Inc.*, supra, at slip op. 3 (2003); *Sunland Construction Co.*, 309 NLRB 1224, fn. 33 (1992). Accordingly, I conclude Respondent has shown it would not have reviewed any of the mass applications in filling job openings on and after June 16 even if the applicants had not been affiliated with the Union, and its failure to do so did not violate the Act.

Gerald Jennings II's employment quest with Respondent differs from those of other mass applicants and requires separate discussion. Approximately one week after the mass application, Gerald Jennings II telephoned Respondent and again inquired about job opportunities. One week from the mass application of June 11 would put his inquiry date at June 18. Even though the date is approximate, Gerald Jennings II must have made the call to Respondent during the week of June 16, when Respondent was hiring as follows: two workers on June 16, four on June 17, nine on June 18, six on June 19, two on June 20, three on June 21, and three on June 23. When he telephoned, he spoke to Ms. Nielson who did not deny Respondent was hiring but said Respondent would get back to him if he were needed. In these circumstances, and since, as described above, the General Counsel has met his initial

burden for the refusal-to-hire and/or refusal-to-consider allegations, the burden shifts to Respondent to show it would not have hired or considered Gerald Jennings II even in the absence of his union affiliation. *FES*, supra. Respondent has not met its burden. When Gerald Jennings II followed up on his June 11 application by inquiring about employment, Respondent was hiring. Gerald Jennings II had the requisite experience and was prepared to work on Respondent's terms. While Respondent did not review filed applications when hiring, Respondent had no policy of refusing to hire or consider for hire applicants who made telephone inquiries. On the contrary, in September Mr. Preston and Mr. Feliciano made initial contact with Respondent by telephone, were instructed to apply, and were thereafter hired. Respondent has not shown why it failed to hire or consider for hire Gerald Jennings II when hiring during June 16 through June 23. Accordingly, Respondent violated Section 8(a)(3) and (1) by refusing to hire or to consider for hire Gerald Jennings II for the job openings it filled during that period.

D. Failure to Hire Adrian Young

The complaint alleges Respondent discriminatorily refused to hire Adrian Young. In early June Mr. Partington tentatively hired Mr. Young subject to approval by Jeffrey Taylor. The following day, as requested by Mr. Partington, Mr. Young returned to Respondent's office to find out if he had been officially hired. While there, an unidentified young man told Mr. Young Respondent would not hire him because the company had learned he was "union." The General Counsel argues this unidentified man is likely Jeremiah Taylor given the age and physical description provided by Mr. Young, but Mr. Young's description is too general to permit me to draw any such inference. I have also considered whether I can infer the agency status of the unknown person because he had previously been in the company of Mr. Partington and was, at the time of his comments to Mr. Young, the only one present in Respondent's office. Those facts do not form a sufficient basis for inferring agency. Consequently, while the anonymous young man's statements unquestionably evidence unlawful motivation, they cannot be ascribed to Respondent.

As stated above, in refusal to hire cases, the General Counsel bears the burden under *FES* of showing Respondent was hiring at the time of employment application, that the applicant had experience and training relevant to the requirements of the positions for hire, and that antiunion animus contributed to Respondent's decision not to consider or to hire the applicant. With regard to Respondent's failure to hire Mr. Young, the General Counsel has met the first two factors of his burden: Respondent must have been hiring at the time Mr. Young applied, and he must have met the experience and training requirements or Mr. Partington would not, even tentatively, have proffered employment. However, the General Counsel has not met his burden of showing that antiunion animus motivated Respondent's decision not to hire Mr. Young or, indeed, that Respondent decided not to hire Mr. Young. When, as requested by Mr. Partington, Mr. Young returned to Respondent's office to find out if his employment had been approved, the unknown young man's statements apparently deterred further inquiry. Consequently, no supervisor and/or agent of Respondent ever told Mr. Young the company would not hire him. His assumption that such was the case does not bind Respondent. Accordingly, I conclude the General Counsel has not met his *FES* burden as to Respondent's failure to hire Mr. Young, and I shall dismiss this allegation of the complaint.

E. Terminations of Robert Preston, Michael Jordan, Josue Solis, Javier Gonzalez, Finee Layna, and Joniel Layna Morales, Merdardo Lugo, Joel Lemke, and Robert Janecek

5 The question of whether Respondent violated the Act in terminating the above
employees rests on its motivation. The Board established an analytical framework for deciding
cases turning on employer motivation in *Wright Line*, supra. To prove an employee was
discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a
preponderance of the evidence, that an employee's protected conduct was a motivating factor in
10 the employer's decision. If the General Counsel is able to make such a showing, the burden of
persuasion shifts "to the employer to demonstrate that the same action would have taken place
even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts
only if the General Counsel establishes that protected conduct was a "substantial or motivating
factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333, 1333 (2000).
15 Put another way, "the General Counsel must establish that the employees' protected conduct
was, *in fact*, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB 608,
fn. 3 (2001).

20 The elements of discriminatory motivation are union activity, employer knowledge, and
employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, these elements are
clearly met: Mr. Preston, Mr. Jordan, Josue Solis, Javier Gonzalez, Finee Layna, Joniel Layna
Morales, Mr. Lugo, Mr. Lemke, and Mr. Janecek were openly involved in supporting the Union,
and Respondent was aware of their involvement. As to the third element, employer animus,
Respondent expressed strong animosity toward the Union's organizational drive and toward
25 employees' union activities generally and committed extensive violations of Section 8(a)(1) of
the Act. Accordingly, I find the General Counsel has met his initial burden by "making a
showing sufficient to support the inference" that the terminated employees' protected activities
were motivating factors in Respondent's decisions to discharge them. *Tom Rice Buick, Pontiac
& GMC Truck*, 334 NLRB 785, 786, fn. 6 (2001). However, this finding "does not mean that
30 [any] discharge [herein] was in fact '*unlawfully motivated*.'" *Id.* As the Board has noted, "The
existence of protected activity, employer knowledge of the same, and animus...may not,
standing alone, provide the causal nexus sufficient to conclude that the protected activity was a
motivating factor for the adverse employment action." *Shearer's Foods, Inc.*, 340 NLRB No.
132, at slip op. 2, fn. 4 (2003); see also *American Gardens Management Company*, 338 NLRB
35 No. 76 at slip op. 2 (2002).

40 The General Counsel having carried his initial burden, the burden shifts to Respondent
to demonstrate that it would have discharged Mr. Preston, Mr. Jordan, Josue Solis, Javier
Gonzalez, Finee Layna, and Joniel Layna Morales, Merdardo Lugo, Mr. Lemke, and Mr.
Janecek even in the absence of their protected activities. Whether Respondent has met its
burden varies as to individual circumstances as discussed hereafter.

45 Robert Preston and Alfie Feliciano. On November 4, someone complained to the office
that Mr. Preston was dawdling on the job, which resulted in a verbal warning. Mr. Preston
suspected Mr. Tingey had accused him. Toward the end of his shift, Mr. Preston engaged in
loud sarcastic commentary as he worked, which, though seemingly undirected, was likely to
elicit a response from Mr. Tingey who was nearby. When Mr. Preston's derisive remarks
achieved the desired result, he and Mr. Tingey faced off verbally. The resulting interchange
was mutually obscene and offensive, and if that were all that occurred, Mr. Preston would be no
50 more culpable than Mr. Tingey. However, when supervisor Jeremiah Taylor attempted to end

the fray, the verbal combatants responded differently. When Jeremiah Taylor directed the two to disperse, Mr. Tingey complied while Mr. Preston remained where he was and directly flouted Jeremiah Taylor's order, telling him he should shut up and saying he was nothing but a punk kid.

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It is true Mr. Preston was irritated by what he perceived as an unfair and spurious attack on his industriousness. It may also be true that a history of Mr. Tingey casting reflections on his union affiliation and work ethic may have increased his indignation. Understanding and even sympathizing with Mr. Preston does not justify a conclusion that "there were no limits to the expression of his anger." The Board has recognized that "[T]here are...limits to employee insubordination, even when provoked." [Citation omitted]." *Trus Joist MacMillan*, 341 NLRB No. 45, at slip op. 3 and fn. 9 (2004). There is no contention here that Respondent's unfair labor practices prompted Mr. Preston's outburst or that his confronting Mr. Tingey was concerted protected activity.³⁷ In any event, Mr. Preston was not fired for confronting Mr. Tingey; he was fired because he refused to follow Jeremiah Taylor's orders. That refusal and Mr. Preston's personal attack on Jeremiah Taylor constituted open insubordination, which Mr. Preston did not dispute.³⁸

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The fact that Respondent had a valid basis for discharging Mr. Preston does not, of course, answer the question of whether Respondent was actually motivated in doing so by its antiunion animus. Counsel for the General Counsel argues that Mr. Tingey and Jeremiah Taylor "instigated an act of 'insubordination' to justify Preston's dismissal." There is no evidence Jeremiah Taylor had anything to do with initiating the confrontation between Mr. Preston and Mr. Tingey. Responsibility for its instigation belongs solely to Mr. Preston, whose comments sparked the squabble. There is no evidence Jeremiah Taylor promoted the dispute or did other than discourage its prolongation. He equally ordered Mr. Tingey and Mr. Preston to shut up and walk away. Mr. Tingey complied; Mr. Preston did not. It may be Respondent was not loathe to discharge Mr. Preston, a union supporter, but the fact that Respondent may have welcomed his termination does not make it unlawful. *Klate Holt Company*, 161 NLRB 1606, 1612 (1966); *Avondale Industries, Inc.*, 329 NLRB 1064 (1999). The General Counsel introduced no evidence of disparate treatment, and there is no evidence Respondent tolerated insubordination. Accordingly, I find Respondent has met its burden of showing it would have discharged Mr. Preston regardless of his protected activities, and I shall dismiss this allegation of the complaint.

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Michael Jordan and Merdardo Lugo. Respondent laid off open union adherents, Mr. Jordan and Mr. Lugo, on July 3, the same day they presented the Martin Harris lunch petition to management. Mr. Crocker told employees the layoffs were because work was caught up, and there is no evidence to show otherwise. In spite of unexplained inconsistencies in Respondent's employment records, the evidence supports Respondent's contention that decreased labor needs prompted the July 3 layoffs. Although the records specifically designate only one employee as "laid off" on July 3, they show 20 employees left Respondent's employ on

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³⁷ See *Atlantic Steel Co.*, 245 NLRB 814 (1979) (requires balancing of factors when the issue is whether an employee loses the Act's protection while engaging in concerted activity).

³⁸ In his separation notice comments, the only defense Mr. Preston raised to the charge of insubordination was that "11-4-03 was the first of any verbal confrontations."

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that date. The only plausible explanation is that Respondent laid them off, and Mr. Lemke's testimony that when he returned to the jobsite after July 4, he learned of layoffs supports that explanation. The layoff of so substantial a group of employees is congruent with legitimate business purposes, and I find the July 3 layoff was not unlawfully motivated.

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The conclusion that Respondent instituted a *bona fide* layoff of employees on July 3 does not resolve the issue of whether Respondent unlawfully included Mr. Jordan and Mr. Lugo in the layoff. As stated earlier, the General Counsel has met his initial burden under *Wright Line* as to the terminations of Mr. Jordan and Mr. Lugo, and the burden has shifted to Respondent to demonstrate that it would have laid off the two employees even if they had not engaged in protected activity.

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In determining whether Respondent has met its burden, Respondent's layoff policies are relevant. At the time of the layoffs, Respondent exercised complete discretion over layoff selections. Although Mr. Sandoval mentioned seniority as a basis for layoff choices, it is clear from the wide range of laid-off employees' hire dates that seniority was not a factor. While Respondent is not obligated to follow seniority or any other nondiscriminatory criteria in layoffs and is free to retain employees whose skills and work ethics best fit its needs, once the burden of proof under *Wright Line* has shifted to Respondent, it must explain why retained employees' skills and work ethics were superior to those of Mr. Jordan and Mr. Lugo. Respondent has provided no explanation.

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Not only has Respondent failed to explain why it selected Mr. Jordan and Mr. Lugo for layoff, supervisor statements evidence unlawful motive. Prior to the layoffs, Mr. Adams had told Mr. Madrid Respondent would take care of those who did not participate in the Union. In a similar vein, at the time of layoff, Mr. Sandoval told Mr. Lugo Respondent was keeping employees who were loyal to the company. It is reasonable to infer that Respondent measured loyalty by employee abstinence from union or other protected activity such as participation in the Martin Harris lunch petition. Respondent has, therefore, not only failed to rebut the inference established by the General Counsel that animus toward protected activity was a motivating factor in Respondent's decision to lay off Mr. Jordan and Mr. Lugo but has also failed to confute the direct evidence of unlawful motivation provided by Mr. Sandoval's coercive explanation for layoff selection. Accordingly, I find Respondent laid off Mr. Jordan and Mr. Lugo in violation of Sections 8(a)(1) and (3) of the Act.

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Josue Solis, Javier Gonzalez, Finee Layna, and Joniel Layna Morales. Respondent contends it did not discharge these four employees, but rather they voluntarily terminated their employment. Uncontroverted evidence, however, establishes that Mr. Adams told the employees he did not need them and that they were to get off the jobsite. He directed someone called "Panzon" to tell them they were fired. Although Panzon qualified Mr. Adams' instructions by saying two of the workers could stay if they wanted, there is no reason the employees should have believed they could accept his assertion rather than Mr. Adams' order. I find Mr. Adams fired the four employees.

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Respondent contends that even if Respondent fired the employees, it did so because their work was unsatisfactory. This latter position is more supportable than the former. By Finee Layna's account, from their first days on the job, Respondent was dissatisfied with the performance of at least one of the group, as demonstrated by Mr. Sandoval's complaint that Finee Layna had misrepresented the experience of his brother. Further, Finee Layna admitted he and his brother did not have "hammering" experience, which apparently Respondent wanted. After the group transferred to the Centennial jobsite, which Mr. Adams supervised, Mr. Adams angrily expressed his displeasure with their work and abruptly fired them. It is true that

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Mr. Adams' conduct seems intemperate, but Panzon's assertion to the employees that "[Mr. Adams] is like that" suggests Mr. Adams had a reputation for impetuosity. I cannot, therefore, infer from Mr. Adams' precipitance in ordering the four off the jobsite that he was motivated by antiunion considerations. Neither his hastiness in discharging the four workers nor the fact that another foreman might not have taken the same action makes the discharges discriminatory. The Board does not determine whether a nondiscriminatory reason for discharging an employee is wise or well supported. *West Limited Corp.*, 330 NLRB 527, fn. 5 (2000). The question is whether Mr. Adams ordered the four employees from the jobsite because he was dissatisfied with their work performance (a lawful reason) or whether he terminated them because of their support of the Union (an unlawful reason).

There is evidence Respondent directed animosity toward the four employees because of their protected activities. Early in their employment, Mr. Sandoval told the four employees not to make "a lot of noise" about the Union, and on another occasion he told them to stop asking about wages or they would be fired. However, there is no evidence Respondent regarded the four as prominent union supporters or targeted them for reprisal in any way, and there is no evidence they continued to discuss the forbidden topic of wages. On the group's last day at work, Mr. Sandoval gave each of them a paper, saying they needed to sign their dismissals, which papers, however, turned out to be safety certifications. Then or shortly thereafter, Respondent sent the four employees to the Centennial job where Mr. Adams fired them. Counsel for the General Counsel argues that Mr. Sandoval's byplay with the safety certifications was a clumsy attempt to create a plausible basis for their later discharge. The evidence does not support such an inference. A more plausible explanation is that Mr. Salvador engaged in puerile and possibly malicious behavior toward the four employees. But there is no evidence their protected activities prompted either his conduct or their transfer to the Centennial job. Therefore, neither violated the Act.

Nothing occurred on the Centennial job to suggest the four employees' union or protected activity were issues. The entire exchange between Mr. Adams and the four employees at the jobsite centered on work quality and experience. There is no evidence Mr. Adams incorrectly evaluated their work, and there is no evidence Mr. Adams would not have reacted in the same way toward unsatisfactory work of employees who opposed the Union. Accordingly, I find Respondent has met its burden of showing it would have discharged Josue Solis, Javier Gonzalez, Finee Layna, and Joniel Layna Morales notwithstanding their union or other protected activities, and I shall dismiss these allegations of the complaint.

Robert Janecek. Mr. Janecek disliked the Tahiti job policy of signing out and in for lunch and deliberately flouted it on his second day on that jobsite. The timekeeper sent Mr. Janecek home, but Mr. Avondat countermanded the order and told Mr. Janacek and his work partner to return to work while he looked into the situation. Although Mr. Janacek returned to his work area, he refused to work. Jeremiah Taylor, whom Mr. Janacek knew to be a supervisor, also told Mr. Janacek to continue working while the problem was resolved. When Mr. Janacek again refused to work until he "knew for sure that [he] was still employed," Jeremiah Taylor fired him.

While Counsel for the General Counsel argues that Mr. Janecek "acted reasonably" in seeking assurance he was still employed, that is not the issue. The question is whether Respondent's conduct was unlawfully motivated. I find it was not. No one contends it was unreasonable for supervisors to direct Mr. Janecek to return to work while Respondent considered his refusal to follow timekeeping rules. An employee's overt disdain of reasonable orders is a justifiable basis for discipline, and the Board "cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, fn. 6 (2000). There is no evidence Respondent permitted any other

employee to dictate terms under which he or she would work, and there is no evidence Respondent permitted any other employee to disregard direct supervisory orders. The circumstances of Mr. Janecek's termination can be summed up in one sentence: Mr. Janecek engaged in the unprotected activity of refusing to follow reasonable supervisory instructions, and Respondent fired him for it. In the absence of any evidence of disparate treatment, I find Respondent has met its burden of showing it would have discharged Mr. Janecek notwithstanding his union activities. See *Tom Rice Buick, Pontiac & GMC Truck*, at 787. Accordingly, I shall dismiss this allegation of the complaint.

Joel Lemke. There is a dispute in the facts regarding Mr. Lemke's termination. Mr. Lemke testified that Respondent claimed, falsely, that he had quit, and Jeffrey Taylor asserts Respondent fired Mr. Lemke for being absent without leave. Mr. Lemke's version is congruent only if he worked on July 2, when he assertedly got permission to be absent the following day. Mr. Lemke was, however, hazy about whether he worked on July 2, and company records show he did not. It appears from the records that Mr. Lemke worked on July 1 and did not appear for work on either of the following two days. The work records, which I have no reason to disbelieve, are inconsistent with Mr. Lemke's testimony of permissibly missing only one day of work, and they are consistent with Jeffrey Taylor's account of Mr. Lemke having been AWOL. Moreover, although Mr. Lemke wanted to talk to one of the foreman in order to rectify what Mr. Lemke considered Respondent's error, he declined to wait longer than half an hour to do so. Given Mr. Lemke's vague testimony as to when he last worked for Respondent, and his failure to wait longer than half an hour to clear up the matter, I accept Jeffrey Taylor's testimony. There being no evidence of disparate treatment, I find Respondent has met its burden of showing that it would have discharged Mr. Lemke for taking an unapproved absence notwithstanding his union activities.

F. Terminations of Leland Coake and Alfie Feliciano

Respondent contends that Mr. Coake and Mr. Feliciano voluntarily terminated their employment.

Leland Coake. As noted earlier, the three accounts (Mr. Coake's, Shannon Taylor's and Jeffrey Taylor's) regarding Mr. Coake's termination are inconsistent. In spite of the inconsistency between Jeffrey Taylor and Shannon Taylor's accounts, I found Shannon Taylor to be a persuasive witness with good recall and a truthful manner. I accept her account of what occurred.

In resolving credibility in favor of Shannon Taylor's testimony, I note that Mr. Coake's account of his last day at work is not fully plausible. From Mr. Coake's account, I am perplexed that he should have assumed he was fired. According to Mr. Coake, he and his partner ran out of work, and his partner unaccountably left the jobsite in disgust and presumably quit. When Mr. Coake pointed out to Mr. Rivera that he could not do the available work without a partner, Mr. Rivera told him to "go home then." There is nothing in that account to explain why Mr. Coake should have thought he was fired. It was reasonable for Mr. Rivera to tell Mr. Coake he might as well go home since there was no work he could perform singly. Viewed objectively, there is nothing in Mr. Rivera's action to suggest he was firing Mr. Coake. In trying to resolve the conundrum, I have considered that Jeffrey Taylor's assertion that Mr. Coake had been laid off for lack of work is inconsistent with Shannon Taylor's testimony and apparently inaccurate, which diminishes the credibility of Respondent's position. Nevertheless, the General Counsel bears the burden of proving Mr. Coake was terminated. Since I cannot reconcile the inherent incongruity of Mr. Coake's testimony and since I have found Shannon Taylor to be a credible witness, I conclude the General Counsel has not shown that Respondent terminated

Mr. Coake. Rather, the credible evidence establishes that although Mr. Coake may have wondered whether or not he was still employed after Mr. Rivera told him to go home, Respondent did not, in fact, terminate him. I accept Shannon Taylor's testimony that when Mr. Coake telephoned the office to see when he could pick up his paycheck, she assured him that, notwithstanding any misunderstanding, he had his job if he wanted it. Mr. Coake did not want it. Accordingly, I find Mr. Coake voluntarily terminated his employment, and I shall dismiss this allegation of the complaint.³⁹

Alfie Feliciano. Although Jeremiah Taylor discharged Mr. Feliciano at the same time he discharged Mr. Preston, Jeffrey Taylor did not approve Mr. Feliciano's discharge. When Mr. Feliciano reported to the office for his paycheck following the confrontation between Jeremiah Taylor and Mr. Preston, Jeffrey Taylor told him that although his partner, Mr. Preston, had been fired, he had not been and suggested he report back to the jobsite. Mr. Feliciano declined to do so, saying he was going with his partner. The General Counsel takes the position, essentially, that as Respondent hired Mr. Preston and Mr. Feliciano at the same time and permitted them to work together, they were an employment package and termination of one was constructive discharge of the other. The evidence does not support such a theory, and I find Mr. Feliciano voluntarily terminated his employment with Respondent when he elected to go with his partner. Accordingly, I shall dismiss this allegation of the complaint.

Conclusions of Law

1. Jeffrey Taylor, an individual, d/b/a Ogden Valley Drywall is and has been at all times material an employer engaged within the meaning of Section 2(2), (6), and (7) of the Act.
2. Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by
 - (a) Interrogating employees about their union membership, support, or activities.
 - (b) Threatening that employees' organizational efforts were futile.
 - (c) Threatening that employees' organizational efforts might result in Respondent's closing its business.
 - (d) Threatening employees with discharge for talking about employee wage rates.
 - (e) Creating the impression of surveillance of employees' union activities.
 - (f) Surveilling employees' union activities by photographing them talking to union representatives.
 - (g) Threatening employees with layoff for engaging in union activities and/or supporting the Union.
 - (h) Implying the Union has no place in employer/employee relations by telling employees the Union should stay out of Respondent's business.
 - (i) Confiscating union authorization cards from employees.
 - (j) Equating engaging in the protected activity of circulating a petition with disloyalty to Respondent.
 - (k) Threatening unspecified reprisals by telling an employee that engaging in protected activity was opening a can of worms.

³⁹ Counsel for the General Counsel argues that the falsity of Respondent's lack-of-work defense shows pretext in the termination of Mr. Coake. It is unnecessary to address that argument, however, because the General Counsel has not shown Respondent terminated Mr. Coake.

- (l) Impliedly promising benefits to employees if they refrained from union activity.
 - (m) Telling employees that Respondent was retaining loyal employees during layoffs.
 - (n) Promising wage increases to an employee if he abandoned a protected strike.
 - (o) Insulting and cursing an employee because he engaged in a protected strike.
 - 5 (p) Asking an employee to obtain information on the union activities of others.
4. Respondent violated Section 8(a)(3) and (1) of the Act on or about June 11 by failing and refusing to hire or consider for hire job applicants on the basis of their union affiliation or other protected activities.
 - 10 5. Respondent violated Section 8(a)(3) and (1) of the Act on or about June 18 by failing and refusing to hire or consider for hire Gerald Jennings II on the basis of his union affiliation or other protected activities.
 - 15 6. Respondent violated Section 8(a)(3) and (1) of the Act on July 3 by laying off Michael Jordan and Medardo Lugo because of their union or other protected activities.
 - 20 7. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

25 Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

30 Respondent having unlawfully refused to hire five of the June 11 mass applicants, it must offer them immediate and full instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions. Respondent must also make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The identity of the five job applicants whom Respondent refused to hire or the specifics of the relief granted to remedy the refusal should identification prove impracticable will be determined at the compliance stage of the proceeding.

40 Respondent having unlawfully refused to hire applicant Gerald Jennings II, it must offer him immediate and full instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position. Respondent must also make him whole for any loss of earnings and other benefits in the manner set forth above.

45 Respondent having unlawfully refused to consider for hire the June 11 mass applicants, it must consider them for hire for future job openings for a period of 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Charging Party, Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, and the Regional Director for Region 28 of future openings in positions for which the discriminatees applied or substantially equivalent positions for a period of 6 months from the date of this Order. If it is shown at a compliance stage of this proceeding that the Respondent, but for the failure to consider the discriminatees on June 11, would have selected any of them for

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any job openings arising after the beginning of the hearing on March 22, 2004, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, Respondent shall hire them for any such position and make them whole for any loss of earnings and benefits in the manner set forth above.⁴⁰

5 Respondent having discriminatorily laid off Michael Jordan and Medardo Lugo, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits in the manner set forth above.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴¹

ORDER

15 Respondent, Jeffrey Taylor, an individual, d/b/a Ogden Valley Drywall, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- 20 (a) Failing and refusing to hire or consider for hire job applicants on the basis of their union affiliation or other protected activities.
- (b) Laying off or otherwise terminating employees because of their union or other protected activities.
- 25 (c) Interrogating employees about their union membership, support, or activities.
- (d) Threatening that employees' organizational efforts are futile.
- (e) Threatening that employees' organizational efforts may result in Respondent's closing its business.
- (f) Threatening employees with discharge for talking about employee wage rates.
- 30 (g) Creating the impression of surveillance of employees' union activities.
- (h) Surveilling employees' union activities by photographing them talking to union representatives.
- (i) Threatening employees with layoff for engaging in union activities and/or supporting the Union.
- 35 (j) Implying the Union has no place in employer/employee relations by telling employees the Union should stay out of Respondent's business.
- (k) Confiscating union authorization cards from employees.
- (l) Equating engaging in the protected activity of circulating a petition with disloyalty to Respondent.
- 40 (m) Telling employees that Respondent was retaining loyal employees during layoffs.

45 ⁴⁰ When, as here with regard to five applicants and Gerald Jennings II, both refusal-to-hire and refusal-to-consider violations are found regarding the same applicants, "the refusal-to-consider violation is subsumed by the broader refusal-to hire remedy." *Jobsite Staffing and Jobsite Personnel, Inc.*, 340 NLRB No. 43, slip op. 2 (2003).

50 ⁴¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (n) Threatening unspecified reprisals by telling an employee that engaging in protected activity was opening a can of worms.
- (o) Impliedly promising benefits to employees if they refrained from union activity.
- (p) Promising wage increases to an employee if he abandoned a protected strike.
- (q) Insulting and cursing an employee because he engaged in a protected strike.
- (r) Asking an employee to obtain information on the union activities or support of other employees.
- (s) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

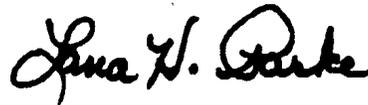
2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of this Order, insofar as it has not already done so, offer five of the job applicants who made application for employment with Jeffrey Taylor, an individual, d/b/a Ogden Valley Drywall instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges, or, if such is impracticable, otherwise institute such remedial relief as determined appropriate at the compliance stage of the proceeding.
- (b) Within 14 days from the date of this Order, insofar as it has not already done so, offer Gerald Jennings II instatement to the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.
- (c) Consider the mass applicants for hire for future job openings for a period of 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Charging Party, Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, and the Regional Director for Region 28 of future openings in positions for which the mass applicants applied or substantially equivalent positions for a period of 6 months from the date of this Order.
- (d) Within 14 days from the date of this Order, insofar as it has not already done so, offer Michael Jordan and Medardo Lugo 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.
- (e) Make the five job applicants described in paragraph 2(a) above, Gerald Jennings II, Michael Jordan, and Medardo Lugo whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.
- (f) If it is shown at a compliance stage of this proceeding that Respondent, but for the failure to consider the mass applicants on June 11, would have selected any of them for any job openings arising after the beginning of the hearing on March 22, 2004, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, Respondent shall hire them for any such position and make them whole for any loss of earnings and benefits in the manner set forth above.
- (g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the five job applicants described in paragraph 2(a) above and Gerald Jennings II and within three days thereafter notify them in writing that this has been done and that the refusal to hire them or to consider them for hire will not be used against them in any way.

- 5 (h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for hire the mass applicants and within three days thereafter notify them in writing that this has been done and that the refusal to consider them for hire will not be used against them in any way.
- (i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Michael Jordan and Medardo Lugo and within three days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.
- 10 (j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.
- 15 (k) Within 14 days after service by the Region, post at its office in Las Vegas, Nevada, copies of the attached notice marked "Appendix."⁴² Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the operations involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 2003.
- 20 (l) 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 Respondent has taken to comply.

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

35 Dated, at San Francisco, CA: July 13, 2004



40 Lana H. Parke
Administrative Law Judge

45

50 ⁴² If this Order is enforced by a Judgment of the 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."

APPENDIX
NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly, **WE WILL NOT** fail and refuse to hire or consider for hire job applicants because of their affiliation with Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union) or any other labor organization or because they engaged in other protected activities.

WE WILL NOT lay off our employees because of their union or other protected activities.

WE WILL NOT interrogate employees about their union membership, support, or activities.

WE WILL NOT threaten that employees' organizational efforts are futile.

WE WILL NOT threaten that employees' organizational efforts may cause us to close our business.

WE WILL NOT threaten employees with discharge for talking about their wages or the wages of other employees.

WE WILL NOT create the impression we are watching employees' union activities.

WE WILL NOT photograph employees when they are engaging in union activities.

WE WILL NOT threaten employees with layoff for engaging in union activities.

WE WILL NOT tell employees the Union should stay out of our business.

WE WILL NOT confiscate union authorization cards from employees.

WE WILL NOT say or suggest employees are disloyal to us when they engage in the protected activity of circulating a petition or other protected activity.

WE WILL NOT tell employees that we will not lay off those who show loyalty to the company by not engaging in protected activity.

WE WILL NOT threaten unspecified reprisal by telling employees that engaging in protected activity is opening a can of worms.

WE WILL NOT impliedly promise benefits to employees if they refrain from union activity or support.

WE WILL NOT promise wage increases to employees if they abandon a protected strike.

WE WILL NOT insult or curse employees because they engage in a protected strike.

WE WILL NOT ask any employee to obtain information on the union activities or support of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer five of the job applicants who made application for employment with us on June 11 and Gerald Jennings II reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL consider the job applicants who made application for employment with us on June 11 for future job openings for a period of 6 months in accord with nondiscriminatory criteria.

WE WILL offer Michael Jordan and Medardo Lugo 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.

WE WILL Make the five job applicants described above, Gerald Jennings II, Michael Jordan, and Medardo Lugo whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them.

WE WILL remove from our files any reference to our unlawful refusal to hire the five job applicants described above and Gerald Jennings II and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them or to consider them for hire will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful refusal to consider for hire the job applicants who made application for employment with us on June 11 and within three days thereafter notify them in writing that this has been done and that the refusal to consider them for hire will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful layoff of Michael Jordan and Medardo Lugo and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

Jeffrey Taylor, an individual, d/b/a Ogden Valley
Drywall

Dated _____ By _____
(Representative) (Title)

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.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

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

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, (602) 640-2146.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

**JEFFREY TAYLOR, AN INDIVIDUAL
d/b/a OGDEN VALLEY DRYWALL**

and

**Cases 28-CA-18803
28-CA-18925
28-CA-19195**

**SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA**

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