

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

VALLEY CREST LANDSCAPE
DEVELOPMENT, INC.

and

Cases 13-CA-41405-1
13-CB-17555

CONSTRUCTION AND GENERAL
LABORERS DISTRICT COUNCIL OF
CHICAGO AND VICINITY, AFL-CIO AND
SEWER TUNNEL MINERS UNION LOCAL 2
A/W CONSTRUCTION AND GENERAL
LABORERS DISTRICT COUNCIL OF
CHICAGO AND VICINITY, AFL-CIO

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO

Jeanette Schrand, Esq., for the General Counsel.

Jules I. Crystal, Esq. (McGuire Woods LLP), of
Chicago, Illinois for the Respondent employer.

Robert S. Cervone, Esq.

(Dowd, Bloch & Bennett), of Chicago, Illinois
for the Respondent union.

Melinda S. Hensel, Esq., for the Charging Party.

DECISION

Statement of the Case

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Chicago, Illinois on March 24-25 and April 1, 2004. The charges were filed in Cases 13-CA-41405 and 13-CB-17555 by the International Union of Operating Engineers, Local 150, AFL-CIO (Local 150 or the Charging Party) on October 15, 2003, and were amended on November 17.¹ The cases were consolidated and the complaint was issued on November 26. The complaint alleges that ValleyCrest Landscape Development, Inc.² (ValleyCrest) has interfered with and coerced its employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act (the Act), in violation of Section 8(a)(1) of the Act, has rendered unlawful assistance and support to Construction and General Laborers District Council of Chicago and Vicinity, AFL-CIO and

¹ All dates are in 2003 unless otherwise indicated.

² The caption was amended at the hearing, with the approval of all parties, to reflect the proper name of the Respondent as ValleyCrest Landscape Development, Inc.

Tunnel Miners Union Local 2 (jointly, the Laborers), in violation of Section 8(a)(1) and (2) of the Act, and has discriminated against certain employees, in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleges that the Laborers restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act, and caused and attempted to cause ValleyCrest to violate Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act. ValleyCrest and the Laborers (together, the Respondents) deny that they have committed the unfair labor practices alleged in the complaint.

The issues may be briefly summarized as follows:

1. Did ValleyCrest violate Section 8(a)(1) and (2), and did the Laborers violate Section 8(b)(1)(A) and (b)(2), of the Act by entering into collective-bargaining agreements on September 4.

2. Did ValleyCrest violate Section 8(a)(1) and (2), and did the Laborers violate Section 8(b)(1)(A), of the Act by their actions on September 12 in connection with and during a meeting between ValleyCrest's employees and representatives of the Laborers.

3. Did ValleyCrest violate Section 8(a)(1) and (3) when, after a meeting between Local 150 and employees of ValleyCrest, ValleyCrest sent those employees home.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, ValleyCrest, Laborers, and Local 150, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the business of landscaping from its facility in Palatine, Illinois, where, during the past calendar year, it purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois. ValleyCrest admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. All parties admit and I find that the Laborers and Local 150 are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

ValleyCrest is a landscape development company, headquartered in California, with 18 branch locations in various states throughout the country. It employs general laborers who perform landscape installation work, such as shoveling dirt, rolling out sod, planting shrubs and trees, and installing pavers for walkways. ValleyCrest also employs construction equipment operators. In the past, and in the markets where ValleyCrest is a signatory to collective-bargaining agreements, a local of the Laborers has represented ValleyCrest's general laborers, while a local of the Operating Engineers has represented ValleyCrest's construction equipment operators. The parties have stipulated that ValleyCrest is engaged primarily in the building-construction industry, and that it may execute agreements pursuant to Section 8(f) of the Act.

Thomas Donnelly is the president of ValleyCrest. William Cohen is the vice president of ValleyCrest and the corporate counsel of ValleyCrest's parent company, ValleyCrest

Companies, Inc. Brian Storm is the vice president and regional manager of ValleyCrest. Douglas Swartz was an area superintendent for ValleyCrest in September 2003, and his area included the Amber Fields jobsite. Scott Reiter is ValleyCrest's general superintendent and Michael Harris is ValleyCrest's assistant branch manager in Chicago. During the period of his involvement in this case, John Mitten was an operations manager for ValleyCrest. David Grossklaus is a secretary-treasurer and business agent for the Laborers; John Bernardo is a secretary-treasurer for the Laborers; and Sergio Ayala is the field representative for the Laborers. Angel Del Rivera is the business representative and organizer for Local 150, and Joseph Ward and James Miller are officials of Local 150.

B. Local 150's Organization of ValleyCrest's Plantsmen

ValleyCrest opened its landscaping operations in the Chicago area in 2002. Also in 2002, Local 150 began organizing ValleyCrest's laborers (The term used by Local 150 for the laborers was plantsmen). ValleyCrest learned of Local 150's organizing efforts from Del Rivera, who spoke to Mitten about these organizing efforts in 2002.³ Mitten contacted Del Rivera in the late winter-early spring of 2003 and told Del Rivera that officers of ValleyCrest were coming to Chicago and wanted to meet with officials of Local 150. Del Rivera asked Mitten if the meeting concerned Local 150's organizing efforts, and Mitten replied that it did.

Mitten's statement to Del Rivera that the meeting concerned Local 150's organization of the plantsmen is corroborated by a memorandum sent to Donnelly by Cohen dated March 26, 2003 (CP Exh. 8). Donnelly had asked Cohen questions about Local 150's representation of the plantsmen, and Cohen responded to these questions in the memorandum. Cohen noted that Local 150 was "committed to maintaining and building the Plantsmen . . . classification under the Landscape Agreement" (CP Exh. 8). It is reasonable to conclude that ValleyCrest would want to investigate and discuss Local 150's intent to represent the plantsmen at the meeting scheduled shortly after this memorandum.

The meeting was held at Local 150's headquarters in Countryside, Illinois in approximately the first week of April 2003. Present for ValleyCrest were Donnelly, Mitten, Harris, and Storm. Present for Local 150 were Ward, Miller, and Del Rivera. Local 150 told the ValleyCrest representatives that they were organizing the plantsmen or laborers. The parties also discussed Local 150's representation of the machine operators. A proposed collective-bargaining agreement on behalf of the plantsmen (referred to as an addendum)⁴ was discussed and was presented to Donnelly. Donnelly asked about the meaning of the term "plantsmen" that the Local 150 representatives were using, and the term was explained to him. Donnelly replied

³ I have credited the testimony of Del Rivera in these matters, and I note that Mitten did not testify. I make no presumption regarding the failure of Mitten to appear and I accept the representation by counsel for ValleyCrest that he requested Mitten to appear. Nevertheless, Del Rivera's testimony regarding these contacts is not rebutted. Moreover, my observation of Del Rivera's demeanor on the witness stand convinces me that he is a credible witness who honestly responded to questions from counsel, and his testimony is credited.

⁴ The addendum is formally known as the Plantsmen Addendum to the Illinois and Indiana Landscape Contractors Labor Agreement. See Emp. Exh. 1.

that he would review Local 150's proposed agreements covering the machine operators and the plantsmen and would get back in touch with the Local 150 representatives.⁵

5 In my determination of the matters discussed in the April meeting, I have credited the testimony of Del Rivera who specifically recalled that the parties discussed Local 150's organization of the plantsmen. Donnelly testified that these organizing efforts were not discussed; however, Donnelly acknowledged that he did not recall "many of the specifics that occurred at that meeting" (Tr. 422.)⁶ Donnelly also admitted that, in the meeting, he was focusing on the machine operators, not the laborers or plantsmen. On the other hand, Donnelly admitted that Del Rivera "probably" discussed the agreement or addendum dealing with the plantsmen (Tr. 418, 419, 420). Moreover, the meeting was called, at least in part, to discuss Local 150's organization of the plantsmen, and the ValleyCrest manager who told this to Del Rivera, viz., Mitten, was present at the meeting. Storm also denied that Local 150's organizing efforts were discussed; however, he did acknowledge, as did Harris, that the term "plantsmen" was used at the meeting, and that Local 150 claimed to represent plantsmen. Storm also confirmed that the Local 150 representatives explained the meaning of the term "plantsmen" to Donnelly (Of course, Cohen had already explained the meaning of the term to Donnelly before the meeting (CP Exh. 8)). Plantsmen is the term used by Local 150 for the landscaping laborers they were organizing. And there is no reason that term would have been used and explained at the meeting except in connection with Local 150's organizing efforts.

25 Del Rivera's testimony is also consistent with and corroborated by Harris' testimony that the ValleyCrest representatives attended the meeting "to find out some information about the Operating Engineers . . . basically a fishing expedition to find out what they're all about" (Tr. 435). But ValleyCrest already knew about the Operating Engineers because, as Donnelly and Cohen testified, ValleyCrest had collective-bargaining agreements with the Operating Engineers in the markets where ValleyCrest is a signatory to collective-bargaining agreements. In these markets, the Operating Engineers represent construction equipment operators. Accordingly, ValleyCrest's "fishing expedition" was not to find out about Local 150 insofar as it represented construction equipment operators, but rather to find out about Local 150 insofar as it claimed to represent plantsmen or laborers. For all the foregoing reasons, I credit the testimony of Del Rivera who specifically recalled discussing at the meeting Local 150's organization of ValleyCrest's plantsmen.

35 On May 7, Del Rivera sent a letter to Cohen enclosing the plantsmen addendum and requesting that the addendum be signed by ValleyCrest and returned to Local 150. Del Rivera also had other conversations with Donnelly during the summer of 2003. These discussions concerned Local 150's organization of the plantsmen as well as the collective-bargaining agreement that had been proposed to and submitted to Donnelly at the April meeting. In a conversation before August 2003, Del Rivera spoke with Donnelly about his local's organizing efforts, and Donnelly referred Del Rivera to Cohen. Del Rivera then spoke to Cohen, but Cohen wanted to first see the proposed agreement in booklet form, which was not yet available.

45 ⁵ All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses, or because it was incredible and unworthy of belief, or as more fully explained in the text.

50 ⁶ References to the transcript of the hearing are designated as Tr.

On August 14, Del Rivera again had a telephone conversation with Donnelly. Del Rivera complained that ValleyCrest was not responding to Local 150's requests regarding the proposed agreement. Del Rivera asked if ValleyCrest had signed an agreement with the Laborers, and Donnelly assured him that an agreement had not been signed. Del Rivera told Donnelly that Local 150 had received authorization cards from 100 percent of ValleyCrest's plantsmen, and he demanded recognition of Local 150. Del Rivera told Donnelly that he would use every legal means available to secure a contract on behalf of the plantsmen, including filing a representation petition with the National Labor Relations Board (the Board). Donnelly asked Del Rivera to delay filing a petition with the Board and that Donnelly would be in Chicago on September 9 or 10, at which time ValleyCrest and Local 150 would "iron out" their problems to Del Rivera's satisfaction (Tr. 43). After their conversation, Del Rivera faxed a letter to Donnelly on August 15 in which he demanded recognition of Local 150 as the Section 9(a) representative of the plantsmen. When asked what he did with this letter, Donnelly testified, "I ignored it"⁷ (Tr. 291).

Donnelly's dismissive attitude and failure to respond to or acknowledge Del Rivera's written demand for recognition explains, at least in part, Donnelly's failure, and the failure of other ValleyCrest officials, to remember Del Rivera's verbal statements, during meetings and telephone conversations, regarding Local 150's organization of the plantsmen. In turn, Donnelly's dismissive attitude is explained, at least in part, by ValleyCrest's working relationship with the Laborers in other markets. This working relationship is characterized by two contracts that ValleyCrest and the Laborers typically negotiate, one at union rates and a second agreement at nonunion rates. ValleyCrest feels that these contracts allow it to stay competitive for union and nonunion jobs, and it wanted to institute and preserve this relationship in the Chicago area. On the other hand, Local 150's addendum, or plantsmen contract, did not provide for two separate rates, and corporate counsel Cohen notified Donnelly of this in March 2003. Accordingly, ValleyCrest sought to deal with and preferred to deal with the Laborers instead of Local 150 as far as laborers or plantsmen were concerned. Indeed, Cohen admitted telling Del Rivera in July or August that ValleyCrest was "not really that eager to have an agreement with, or did not want an agreement at all actually" with Local 150 on behalf of the plantsmen, and "thought that we probably would want to have the [L]aborers represent those employees" (Tr. 443).

Thus, ValleyCrest's officials, and Donnelly in particular, failed to "hear" Del Rivera's statements regarding Local 150's organization of the plantsmen and possession of authorization cards from all of ValleyCrest's plantsmen, as well as Del Rivera's demand for recognition. If Donnelly did not hear these statements, the reason is, in large part, because he did not want to hear them, he did not want to deal with Local 150 as the representative of the plantsmen, and he was intent on signing a contract with the Laborers before he might be compelled to recognize Local 150. This also explains why Donnelly asked Del Rivera to withhold filing a representation petition with the Board until September 9 or 10, when Donnelly promised to be in Chicago and to work out the problems between ValleyCrest and Local 150 to Del Rivera's satisfaction. As it turned out, before Donnelly's supposed trip to Chicago, ValleyCrest had already signed a collective-bargaining agreement with the Laborers.

⁷ The credibility of this statement is doubtful, especially considering the importance to ValleyCrest of Local 150's formal demand for recognition. Nevertheless, Donnelly's claim that he ignored the formal demand demonstrates his dismissive attitude toward Local 150's representation of ValleyCrest's plantsmen or laborers.

C. Collective-Bargaining Agreements Between ValleyCrest and the Laborers

On September 4, ValleyCrest and the Laborers signed two collective-bargaining agreements—(1) a Landscape Agreement, providing for union wages on certain jobs, and (2) a Specialty Landscape Agreement, providing for nonunion wages on all other jobs. On the same day, the parties executed a letter agreement that suspended the application of the collective-bargaining agreements for one year so that ValleyCrest could evaluate the desirability of operating in the Chicago area. The letter agreement further exempted certain existing jobs of ValleyCrest from coverage under the collective-bargaining agreements.⁸ When these agreements were executed, the Laborers did not claim, nor did it present to ValleyCrest any evidence, that it represented any of ValleyCrest's laborers, much less a majority of those workers. The Laborers have stipulated herein that it did not represent a majority of ValleyCrest's workers when the agreements were signed. Indeed, there is no evidence that any official or representative of the Laborers had talked to or contacted any employee of ValleyCrest before the agreements were signed.

One of the provisions of the Landscape Agreement, which is incorporated from an attached "Independent Construction Industry Collective Bargaining Agreement," is as follows:

1. Recognition. The Employer, in response to the Union's request for recognition as the majority 9(a) representative of the Laborer employees, and the Union's offer to show evidence of its majority support, hereby recognizes the Union under Section 9(a) of the Act as the sole and exclusive collective bargaining representative for the employees now and hereinafter employed in the Laborer bargaining unit with respect to wages, hours and other terms and conditions of employment without the need for a Board certified election.

The Specialty Agreement contains a similar provision:

The Employer, in response to the Union's request for recognition as the majority representative of its employees, and the Union's offer to show evidence of its majority support, hereby recognizes the Union as the exclusive collective bargaining representative of the employees of the Employer over whom the Union has jurisdiction without the need for a Board certified election.

Both contracts also contain union-security provisions. The Landscape Agreement, serially incorporating the agreement between the Laborers and the Builders Association of Chicago, requires union membership after 7 days employment (GC Exhs. 6 and 8). The Specialty Agreement requires union membership 7 days after employment for specialty landscape workers, and 30 days after employment for lawn maintenance workers (GC Exh. 50).

⁸ Cohen testified that only the economic terms of the collective-bargaining agreements were within this exemption; however, the letter agreement contains no such limiting provision. One party's post-execution, parole modification of the terms of a written agreement is ineffective to alter the terms of a written agreement. See, e.g., *NDK Corp.*, 278 NLRB 1035 (1986).

D. RC Proceeding Before The Board And Article XX Proceeding Before the AFL-CIO

5 On September 11, Local 150 filed an RC Petition with the Board seeking certification as the exclusive representative of ValleyCrest's plantsmen. By letter dated September 12, and in an attempt to defeat the petition filed by Local 150, ValleyCrest, through counsel, represented to the Board that the collective-bargaining agreements between ValleyCrest and the Laborers "contain 9(a) recognition language. The 9(a) language contained in an 8(f) construction contract acts as a contract bar. *Reichenbach Ceiling Partition*, 337 NLRB No. 17, 180 LRRM 1002 (2001)" (GC Exh. 14). (In *Reichenbach*, the Board affirmed the Acting Regional Director's determination that the 9(a) recognition language in that case, in an agreement involving a construction industry employer, created a bargaining relationship pursuant to Section 9(a)). On 10 or about September 22, ValleyCrest, through counsel, filed a motion to stay the hearing on Local 150's petition, and stated that, "no question concerning representation exists as a contract bar is in effect" (GC Exh. 10).

15 On September 18, the Laborers instituted an Article XX proceeding by filing a complaint before the AFL-CIO. The Laborers' complaint alleged that Local 150 had failed to respect the established collective-bargaining relationship between the Laborers and ValleyCrest. The Laborers based the complaint on its allegation that ValleyCrest "has recognized the Laborers under Section 9(a) of the National Labor Relations Act" (GC Exh. 17). 20

E. The Events of September 12

25 On a date between September 4 and 12, Donnelly and Cohen told Harris that the Laborers and ValleyCrest had executed agreements, and they directed Harris to assemble the workers for the benefit of the Laborers so that the Laborers could obtain signed cards from the workers. As Harris testified, the corporate office told him, "we needed to get guys signed up" (Tr. 310). Harris was aware that ValleyCrest intended to hold a safety meeting in September, so he directed his supervisors to conduct the safety meeting and to assemble the workers on 30 the morning of September 12.

35 On September 12, ValleyCrest's supervisors and foremen instructed the workers to assemble at the Amber Field's worksite for a meeting with the Laborers. Laborer's officials Grossklaus and Ayala were present and conducted the meeting. The purpose of the meeting was to enable the Laborers to solicit and obtain signed authorization cards from the workers. Many of the workers were brought from other work locations. The number of workers who attended the meeting is unclear, but it was most likely between 25 and 37 workers. At least three ValleyCrest foremen were present, together with area superintendent Swartz.

40 A ValleyCrest foreman called the meeting to order at the workers' normal starting time of 6:30 a.m. The workers are Hispanic and Ayala spoke to them in Spanish. He also translated whatever Grossklaus wanted to tell the workers because Grossklaus did not understand or speak Spanish. Ayala told the workers that he and Grossklaus were members of the union, although he did not identify the union. Ayala said that he and Grossklaus were there to obtain 45 signed cards from the workers, that the workers had to sign the papers, that the union had already talked to ValleyCrest officials about this, and that the company had authorized the union to talk to the workers. In response to a question from a worker who had already signed a card for Local 150, Ayala told him that Local 150 was not involved with this employer. He told the workers that his union had already signed a collective-bargaining agreement with ValleyCrest. 50 Ayala did briefly discuss wages, and told one worker that in order for the workers to be eligible to receive a wage of \$28 an hour, they would have to sign the cards.

The express language as well as the clear import of Ayala's statements to the workers was that they were required to sign the cards. Ayala denies he told the workers they were required to sign the cards, but Ayala was not a credible witness regarding his testimony on what occurred during this meeting. Moreover, ValleyCrest and the Laborers claim that they had executed valid 8(f) agreements, which contained a 7-day union-security clause, and September 12 was 8 days after these agreements were signed. Accordingly, the Laborers contend that they could lawfully require the employees to sign authorization cards. This contention and belief increases the likelihood that Ayala did instruct the employees on September 12 that they were required to sign the authorization cards.

Ayala's lack of credibility is highlighted by his testimony regarding the presence of supervisors during the meeting. Ayala testified as follows:

Q. At some point during the meeting did anyone who you believed to be a supervisor arrive?

A. Not at the time.

Q. While you were present at the project, did anyone who [you] believed to be a supervisor arrive?

A. When we, talking about the same group?

Q. Yes, while you were there at Amber Fields.

A. No

Q. Did you recall seeing anybody driving a ValleyCrest pick up truck and wearing a ValleyCrest uniform?

MS. SCHRAND: Objection, leading.

THE WITNESS: Yes.

ADMIN. LAW JUDGE GONTRAM: Overruled.

Q. BY MR. CERVONE: Do you know who that person was?

A. I don't remember his first name but he introduced himself. He was a supervisor.

(Tr. 272-273). Thus, Ayala testified that no supervisors were present while he was at that project, yet immediately after that sworn testimony, and in response to a leading question from his counsel, he testified that a supervisor was present. Ayala went on to testify that he introduced himself to this supervisor, but that the supervisor did not say anything to the employees. It is not credible that Ayala did not remember the presence of a supervisor who arrived in a pickup truck, who wore a company uniform, who introduced himself to Ayala and the workers, and to whom Ayala introduced himself. By dissembling, Ayala was apparently trying to insulate the meeting from the coercive effect of the presence of company supervisors, but he quickly acknowledged the opposite when prompted by his counsel.

In weighing the credibility of Ayala's testimony concerning the September 12 meeting versus the testimony of ValleyCrest's employees who were present at that meeting, I have also considered that the latter are current employees of ValleyCrest. Where such testimony is adverse to the employer, it is considered to be against the employee's self-interest, and therefore more worthy of belief. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem 83 F.3d 419 (5th Cir. 1996). Moreover, the Laborers had signed two agreements with ValleyCrest on September 4, and these agreements contained 7-day union-security clauses. This increases the plausibility of the employees' testimony that Ayala told them they had to sign the authorization cards. Finally, the employees' demeanor on the witness stand was consistent with and demonstrated candidness and honesty.

The supervisor, other than foremen, who was present during the meeting was Swartz. After Ayala spoke, Swartz asked if the workers had yet signed the authorization cards. He was told that they had not, and he became upset. He then told the workers that they should sign cards, but whether they did or did not, they should do so quickly and return to work. The cards
 5 were written in English, and there is no evidence that any of the workers could read English. Nevertheless, the meaning of the cards was not explained to the workers. Moreover, Ayala told the workers that they should not date the cards because the union would do that later.

10 One worker, Miguel Lopez, who had signed a card for Local 150 on April 3, told Swartz that he did not want to sign the union card. Swartz said in a loud voice, "Why don't you want to sign?" (Tr. 118). Swartz told Lopez that he had to sign. Grossklaus then took Lopez by the arm, led him a short distance from the group, put the card in front of his face, and directed him to sign it. Lopez signed the card, but he did not read it, and it was not explained to him.

15 The meeting lasted about one-half hour. Most of the workers signed the cards. Ayala testified that about 30-32 workers signed cards, and about 7 did not.⁹ Accounting for the time of the meeting, the signing of the cards, and the return by the workers to their various work locations, all of the workers started at least one-half hour after their normal starting time, some as late as 2 hours after. However, all workers were paid from 6:30 a.m.
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25 Later that same day, September 12, Del Rivera and another Local 150 official met with approximately 20-30 employees at ValleyCrest's Discovery jobsite. The purpose of the meeting was to inform the employees of Local 150's progress in organizing workers in the landscaping industry. They met at noon, which was the start of the workers' lunch break. The lunch break was one-half hour, but the meeting lasted for approximately 45 minutes.¹⁰ The foreman on the job called Reiter and told him about the meeting between Local 150 and the workers. Reiter contacted Steve Koschak, who was the general superintendent at this time, and Koschak instructed Reiter to send the employees home at 1:30 p.m. The normal workday for the employees ended at 2:30 p.m., and the employees were paid on September 12 only until 1:30.
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III. Analysis

A. The September 4 agreements

35 Section 8(a)(1) of the Act prohibits an employer from interfering with employees in the exercise of rights guaranteed in Section 7 of the Act. Section 8(a)(2) of the Act prohibits an employer from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it. Section 9(a) provides that
 40 representatives selected by a majority of the employees shall be the exclusive representatives of such employees.

45 ⁹ Other Laborer's officials held meetings at other job sites on September 12. Bernardo testified that, in total, about 60 ValleyCrest employees signed authorization cards.

¹⁰ Del Rivera testified that the meeting ended at 12:45. Neither ValleyCrest nor the Laborers offered any admissible evidence concerning the duration of the meeting. Reiter testified about what the foreman on the job had told him, but this evidence was not offered for its truth. Moreover, and without regard to the purpose for which Reiter's testimony was offered, Del
 50 Rivera was a credible witness. Accordingly, Del Rivera's testimony regarding the length and termination of the meeting is credited.

Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act. Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(3), which, in turn, prohibits an employer from discriminating in a term or condition of employment in order to encourage or discourage membership in any union.

An employer that recognizes a minority union as the exclusive representative of its employees pursuant to Section 9(a) of the Act commits an unfair labor practice and violates Section 8(a)(1) and (2), and the union violates Section 8(b)(1)(A). *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). "There could be no clearer abridgment of § 7 of the Act." *Id.* at 737. A union that accepts recognition in violation of Section 8(b)(1)(A) also violates Section 8(b)(2) if the agreement contains a union-security clause. *Stockton Door Co.*, 218 NLRB 1053, 1055 (1975), *enfd.* 547 F.2d 489 (9th Cir. 1976), *cert. denied* 434 U.S. 834 (1977). Moreover, an employer's grant of exclusive recognition to a minority union constitutes unlawful support in violation of Section 8(a)(2) because "the union so favored is given a 'marked advantage over any other in securing the adherence of employees.'" *Int'l Ladies' Garment Workers' Union v. NLRB*, *supra* at 738, citing *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938). Such prohibited conduct is not excused by a showing of good faith or by the minority union's subsequent acquisition of majority support. *Id.* at 736, 739.

An exception to this fundamental principle is Section 8(f), which exempts agreements with an employer engaged primarily in the building and construction industry. However, there are important distinctions between Section 8(f) contract/relationships and Section 9(a) contract/relationships. In particular, a union signatory to an agreement under Section 8(f) does not necessarily represent a majority of the employees. Indeed, that question is irrelevant to an 8(f) contract or relationship. Accordingly, an 8(f) contract does not bar the processing of a representation petition filed under Section 9 because "[a]t no time does [the 8(f) union] enjoy a presumption of majority status, rebuttable or otherwise, and its status as the employees' representative is subject to challenge at any time." *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). On the other hand, a 9(a) contract/relationship generally bars such petitions for up to 3 years. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996). This different treatment derives from the overriding principle of the Act, expressed in Section 7, to assure employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity. The question presented herein is whether the September 4 agreements between ValleyCrest and the Laborers were (1) Section 8(f) agreements (and, therefore, lawful because the Laborers' minority status would be irrelevant), or (2) Section 9(a) agreements (and, therefore, unlawful because the Laborers admittedly did not represent a majority of the employees).

The party asserting the existence of a 9(a) relationship in the construction industry, viz., the General Counsel herein, has the burden of proving it. *John Deklewa & Sons*, *supra* at 1385 fn. 41. A written agreement will establish a 9(a) relationship "if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support." *Staunton Fuel & Material*, 335 NLRB 717 (2001). The September 4 agreements between the Laborers and ValleyCrest meet each of these conditions. The agreements unequivocally acknowledge that the Laborers requested recognition as the majority representative, that ValleyCrest recognized the Laborers as the majority representative, and

that this recognition is based on the Laborers' offer to show evidence of its majority.¹¹ Indeed, ValleyCrest acknowledges that the agreements "clearly meet" the standard set forth by the Board in *Staunton Fuel & Material* (ValleyCrest's Posthearing Br. p. 19).

5 The recognition language in the agreements closely, if not exactly, tracks the conditions adopted by the Board in *Staunton Fuel & Material*. Thus, the agreements not only show the establishment of a 9(a) relationship, but also show that this was the parties' intent. The parties' intent to create a 9(a) relationship is further demonstrated by ValleyCrest's representation to the Board, in response to the RC petition filed by Local 150, that the agreements barred the petition.
10 An 8(f) agreement would not bar another union's representation petition; only a 9(a) agreement would act as a bar. The parties' intent to create a 9(a) relationship is further demonstrated by the Laborers' allegation in its Article XX complaint before the AFL-CIO that ValleyCrest had recognized the Laborers under Section 9(a).

15 The Respondents contend that, in spite of the unequivocal 9(a) language in their September 4 agreements and in spite of their contrary positions before the Board and the AFL-CIO, they actually intended to enter into an 8(f) relationship. The parol evidence rule prohibits evidence of outside agreements or understandings to vary the unambiguous terms of a written agreement. *NDK Corp.*, 278 NLRB 1035 (1986). The Respondents do not assert that their
20 September 4 agreements contain ambiguous terms. Accordingly, even if I were to accept the contention that the parties had some understanding outside the written agreements, such an understanding could not be used to change the terms of the agreements made by the parties.

25 Moreover, to enforce such an alleged oral understanding, which contradicts the clear language of the written agreements, would be manifestly unfair to other unions, such as Local 150 who had the support of a majority of the unit members, because ValleyCrest cited the clear 9(a) language in the agreements to defeat Local 150's representation petition before the Board. Thus, in 2003, ValleyCrest maintained before the Board that the agreements are Section 9(a) agreements in order to defeat Local 150's petition to represent the plantsmen. In the present
30 proceeding, ValleyCrest maintains that the agreements are Section 8(f) agreements in order to defeat the unfair labor practice charges brought against it. The parol evidence rule operates to prevent such chicanery. To enforce the alleged oral agreement between ValleyCrest and the Laborers would allow the parties to change the meaning and legal effect of their agreements in a chameleon-like fashion, and would allow the Respondents to evade their responsibilities
35 under the Act. The Respondents do not claim that there was a mutual mistake when they made the agreements. Rather, they claim to have had unwritten understandings or agreements which contradict the clear language of the agreements. As noted, such alleged understandings are not permitted to alter the unambiguous terms of a written agreement. The unambiguous terms of the parties' September 4 agreements establish that they entered into a 9(a) relationship.

40 ValleyCrest contends that its filings with the Board in opposition to Local 150's representation petition were made after September 12, the date on which it allegedly obtained signed cards from a majority of the employees. ValleyCrest points to the testimony of Bernardo that the Laborers secured about 60 cards and that Bernardo believed this represented a
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50 ¹¹ The Specialty Agreement does not specifically refer to Section 9(a). However, this omission does not alter the result. As the Board stated in *Nova Plumbing, Inc.*, 336 NLRB 633, 635 (2001), enf. denied *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (DC Cir. 2003), citing *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000), a decision whose approach was adopted by the Board, "the absence of any specific reference to Section 9(a) is not fatal if the rest of the agreement conclusively notifies the parties that a 9(a) relationship is intended."

majority of the employees. Similarly, the Laborers contend that the representations it made in its Article XX complaint occurred after September 12, at which point it allegedly represented a majority of the employees. Accordingly, the Respondents argue that their respective representations before the Board and the AFL-CIO concerning their 9(a) relationship were accurate at the time the representations were made.

The Respondents' argument is unavailing because at no time did the Laborers represent an uncoerced majority of ValleyCrest's workers. This is seen from the actions of the Laborers' agents on September 12, and more important, from the fact that many or all of the workers who signed cards for the Laborers on September 12 had already signed cards for Local 150. Under the Board's dual card doctrine, when an employee signs cards for two unions, neither card may be counted toward a majority unless it is established that the card signer intended only one to be effective. *Le Marquis Hotel, LLC*, 340 NLRB No. 64 (2003). In addition, at least some, and possibly all, of ValleyCrest's laborers could not speak or read English, yet the cards were not explained to the workers at the meeting. When a card signer cannot read what is printed on the face of an authorization card, no presumption is raised that the signer intended authorization for union representation. *Maximum Precision Metal Products*, 236 NLRB 1417 (1978). Unless it is established that the signer understood the meaning and purpose of the card, it "cannot be counted toward establishing the Union's majority support." *Food Cart Market*, 286 NLRB 1016, 1017 (1987). The record herein fails to establish that the workers understood what they were signing on September 12.

Moreover, the Respondents' claim of majority representation on September 12 was not established by competent evidence because the purported size of the bargaining unit was not properly established (See Tr. 211). In addition, the claim of majority representation was not corroborated by independent or documentary evidence, such as the actual signed cards or personnel records showing the size of the bargaining unit. Without such evidence, which is readily available to the Respondents, and in light of the above-cited infirmities of the cards, the Respondents' claim of majority representation has not been proven.

In any event, the Respondents' respective representations before the Board and the AFL-CIO are only utilized herein as additional evidence of the Respondents' intent in signing the September 4 agreements. The representations are not charged as, nor are they deemed to be, independent unfair labor practices. Accordingly, if the Respondents' representations before the Board and the AFL-CIO were eliminated from consideration, or, indeed, if those representations could be found to be accurate at the time they were made, the inalterable conclusion from the clear language of the September 4 agreements remains, viz., that the Respondents entered into a Section 9(a) relationship when they signed those agreements. By entering into a 9(a) relationship, the Respondents violated the Act because the Laborers admittedly did not represent a majority of the unit employees, and this unfair labor practice would not be eliminated or made lawful should the Laborers subsequently obtain an uncoerced majority. *Int'l Ladies' Garment Workers' Union v. NLRB*, supra at 736.

ValleyCrest argues that if the Respondents are found to have entered into a 9(a) relationship, ValleyCrest still did not violate the Act because (1) the September 4 agreements were entered into before Local 150 had achieved majority status, and (2) the 9(a) relationship of ValleyCrest and the Laborers did not violate the Act because the September 4 agreements closely tracked and complied with the requirements for establishing a 9(a) relationship as set forth by the Board in *Staunton Fuel & Material*, supra. Neither of these arguments is valid. First, the September 4 agreements were made after Del Rivera told Donnelly that Local 150 had signed-up all of the laborers or plantsmen. Moreover, the statutory violation does not depend on the employer's knowledge. *Int'l Ladies' Garment Workers' Union v. NLRB*, supra. Second,

the Laborers have acknowledged in this proceeding that it did not represent a majority of the unit employees when the September 4 agreements were signed. Such majority representation is the sine qua non of a valid 9(a) relationship. Merely because the parties intended to enter into a 9(a) relationship and followed the Board's requirements for proving that it entered into such a relationship does not mean that the relationship was necessarily a lawful one. If ValleyCrest's contention were accepted, the statutory requirement that the employees' exclusive representative must be selected by a majority of the employees could be eliminated at the whim or design of the employer and its favored union. This contention is rejected.

The Laborers argue that the Respondents' intent at the formation of the September 4 agreements is revealed by the 7-day union-security clauses in those agreements. The Laborers argue that since Section 8(f) permits a 7-day union-security clause, whereas Section 9(a) only permits a 30-day union-security clause, the agreements show the parties' intent to enter into an 8(f) relationship. This argument does not prove enough. The agreements specifically and clearly recite the parties' intent to enter into a 9(a) relationship. The agreements also track the Board's requirements for establishing a 9(a) relationship. To take one of the parties' contractual rights contained in another section of the agreements and infer that because such a right is conferred in Section 8(f) of the Act, the parties intended that latter section of the Act to govern their relationship rather than Section 9(a) of the Act (which is the section set forth in the recognition provision of the agreements) would allow an inference to control and take precedence over the clearly expressed provisions of the agreements. I will not engage in such a contrived parsing of the agreements to give the parties the benefits of both a 9(a) and an 8(f) relationship, but without any of the responsibilities. It may be that the parties sought to obtain the benefits of a Section 9(a) as well as an 8(f) relationship, but by doing so, they unlawfully conferred and received, respectively, Section 9(a) recognition in violation of the Act. And the fact that the parties, in addition, may have sought Section 8(f) benefits does not change the character of their unlawful 9(a) relationship.

The Laborers cite *Hovey Electric*, 328 NLRB 273 (1999) as support for its contention that the September 4 agreements with ValleyCrest are governed by Section 8(f), not Section 9(a). In *Hovey*, the recognition clause of the parties' collective-bargaining agreement stated that "[s]ubsequent to proof having been submitted to the Employer by the Union that the majority of his employees are members of the Union, the Employer recognizes the Union as the sole bargaining representative of his employees." The administrative law judge found that the agreement was signed pursuant to Section 8(f), and that the cited provision, although not conferring 9(a) recognition, gave the union an opportunity to subsequently make a demand for 9(a) recognition. The union later obtained majority support from the workers, and it then lawfully demanded and received recognition. The Board affirmed the judge's dismissal of the complaint. *Hovey Electric* is inapposite to the present case because the contractual provision from which the judge concluded that 9(a) recognition was not unlawfully conferred is not contained in the September 4 agreements between the Respondents. The recognition contained in the Respondents' agreements is not conditioned on the Laborers subsequently obtaining and presenting proof of a majority, but rather, is immediately granted in the agreements.

For all of the reasons set forth above, the September 4 agreements were not signed pursuant to Section 8(f). Rather, the agreements were signed pursuant to Section 9(a) and before the Laborers had obtained a majority, or any, support from the workers. Accordingly, the Respondents' collective-bargaining agreements were unlawful 9(a) agreements when they were signed, and there is no issue regarding the conversion of an 8(f) agreement into a 9(a) agreement.

By entering into the September 4 collective-bargaining agreements in which ValleyCrest recognized the Laborers as the exclusive representative of its landscape employees when the Laborers did not represent a majority of those employees, ValleyCrest violated Section 8(a)(1) and (2) of the Act. By accepting recognition as the exclusive representative of the employees
 5 when it did not represent a majority of those employees, the Laborers violated Section 8(b)(1)(A). In addition, because the September 4 agreements contained unlawful union-security clauses, the Laborers also violated Section 8(b)(2).

B. The Meeting with the Laborers on September 12

10 The protections for employees' exercise of Section 7 rights, which are set forth in Section 8(a)(1) and 8(b)(1)(A) of the Act, do not depend on the employer's or the union's motivation, or on the subjective reaction of the employees or members, or on whether the interference or coercion succeeded or failed. Rather, the Board's test, under Section 8(a)(1), is
 15 "whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act." *Whirlpool Corp.*, 337 NLRB No. 117 (2002), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). The test under Section 8(b)(1)(A) is whether the charged conduct had a reasonable tendency to restrain or coerce an employee in the exercise of rights under the Act. *Letter Carriers Branch 47 (Postal Service)*, 330 NLRB 667 (2000).
 20 Similarly, a violation of Section 8(a)(2) does not depend on antiunion animus or a specific motive to interfere with employees' Section 7 rights, or the employees' subjective reaction to the interfering conduct. *Int'l Ladies' Garment Workers' Union v. NLRB*, supra at 739; *Duane Reade, Inc.*, 338 NLRB No. 140 (2003). In making a determination of unlawful interference or restraint, all of the circumstances are considered, including the context in which the alleged unlawful
 25 statement or action occurred. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The following circumstances are relevant in determining the lawfulness of ValleyCrest's and the Laborers' actions in connection with and during the meeting with the Laborers on September 12. ValleyCrest called the meeting for the purpose of having its employees sign
 30 authorization cards for the Laborers. Attendance was mandatory, the meeting was held during worktime, and the employees were paid for their time at the meeting. ValleyCrest foremen were present throughout the meeting, and Swartz, the area superintendent, was present when cards were distributed and signatures were solicited (ValleyCrest admits that Swartz is a supervisor and agent pursuant to Section 2(11) and (13) of the Act). Ayala told the employees that Local
 35 150 was no longer involved with the employees of ValleyCrest, and that ValleyCrest had already signed an agreement with the Laborers. Ayala assured the employees that the Laborers had already talked to ValleyCrest about this matter and ValleyCrest approved the workers signing the cards. Ayala told the employees that they had to sign the union authorization cards. Swartz told the employees that they should sign the cards. One employee, Lopez, spoke up and said
 40 he did not want to sign the card. Swartz told him that he had to sign the card. In the presence of Swartz, Grossklaus then took Lopez by the arm, led him away from the others, and directed him to sign the card. Lopez did sign the card, which he could not read and was not explained to him. The other employees were also Hispanic, and they could not read the cards; however, the cards were not explained to the employees.
 45

The September 12 meeting involves similar, if not more compelling, circumstances and factors than are present in other cases in which the Board has found violations of Section 8(a)(1) and (2) and Section 8(b)(1)(A). See *Duane Reade, Inc.*, supra; *Vernitron Electrical Components, Inc.*, 221 NLRB 464 (1975), enf. 548 F.2d 24 (1st Cir. 1977). For example, in
 50 *Duane Reade* the employer directed its employees to meet with the Respondent union during paid worktime for the purpose of signing authorization cards. Store managers were present during most of the meetings. In one meeting, the store manager told the employees that the

Respondent union was the only union with whom the employer was affiliated. In two stores, the Respondent union submitted a demand for recognition before it signed up any employees. Finally, the employer denied another union equal access to the employees in its stores. The Board held that these acts of assistance “in combination, reasonably tended to coerce employees in the exercise of their free choice in selecting a bargaining representative.” *Duane Reade*, supra, slip op. at 2. Accordingly, the Board found that the employer violated Section 8(a)(1) and (2) and that the union violated Section 8(b)(1)(A) and (2). All of these acts of assistance, in varying degrees of severity, are also present herein. Similarly, the operative circumstances in *Vernitron* are analogous to those in the present case, and are certainly no more compelling with regard to interference and coercion.

The Respondents argue that if they forced the workers to sign the authorization cards, their actions were lawful because the agreements they had signed on September 4 were valid under Section 8(f) of the Act, and therefore, the union-security clauses in the agreements were lawful. They further argue that since the union-security clauses were lawful, they could properly require the employees to become members of the union. This argument depends, in the first instance, on whether the agreements were signed pursuant to Section 8(f). However, as found herein, the agreements were not signed pursuant to Section 8(f) and are not governed by that section. Rather, the agreements were signed pursuant to Section 9(a), and a union-security clause in a 9(a) agreement—that is, a lawful 9(a) agreement, not an unlawful one such as the present agreement—must allow employees 30 days to join the union. Accordingly, the Respondents’ argument that they could lawfully require the employees to become members of the union on September 12 is rejected.

The present complaint also charges that ValleyCrest, through Swartz, condoned “threats by agents of Respondent Laborers in his [Swartz]’ presence, [and therefore] threatened unspecified reprisals against its employees if they did not sign Respondent Laborers authorization cards” (Complaint para. IX(b)). During the September 12 meeting, after Lopez said that he did not want to sign the authorization card, Grossklaus grabbed Lopez by the arm, led him away from his coworkers, put the card in Lopez’ face, and told him to sign it. This action was done in the presence of Swartz who did not prevent it or disapprove of it. Although Grossklaus’ action could be characterized as an assault, see *Eagle-Pitcher Industries*, 331 NLRB 169, 179 (2000), such a characterization is not required. Nor is it required that the action meet the legal definition of assault. It is sufficient that the action restrains or coerces employees in the exercise of their rights under Section 7 of the Act. *Multi Color Industries*, 317 NLRB 890, 897 (1995); *Refuse Compactor Service*, 311 NLRB 12, 19 (1993). By condoning Grossklaus’ action, itself a violation of Section 8(b)(1)(A), Swartz interfered with the employees’ Section 7 rights, in violation of Section 8(a)(1). *City Market, Inc.*, 340 NLRB No. 151 (2003); *Newton Bros. Lumber Co.*, 103 NLRB 564, 567 (1953).

By ValleyCrest’s actions in connection with and during the meeting on September 12, it interfered with its employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1), and rendered unlawful assistance and support to the Laborers, in violation of Section 8(a)(2). By the Laborers’ actions in connection with and during the meeting on September 12, it restrained and coerced employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(b)(1)(A).

C. The Meeting with Local 150 on September 12

The complaint alleges that ValleyCrest violated Section 8(a)(3) and (1) of the Act by sending its employees home at 1:30 on September 12 after their meeting with Local 150.

5 ValleyCrest paid the employees until 1:30, but their normal quitting time was 2:30.¹²

The analytical test established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) applies to cases alleging violations of the Act under Section 8(a)(3) and 8(a)(1) that depend on employer motivation. First, the General Counsel must make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's action. Motivation may be established circumstantially by proof of union or protected activity, employer knowledge, and employer animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. If the employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The undisputed evidence shows that, on September 12, ValleyCrest's employees at the Discovery job site were engaged in union activity and that ValleyCrest was aware of such activity. Cohen admitted that ValleyCrest was not interested in having an agreement with Local 150, and preferred the Laborers. Accordingly, the undisputed evidence establishes protected activity, knowledge, and animus.

Moreover, motive and union animus may be, and often are, proven through indirect evidence. Evidence of disparate treatment may support an inference of animus. *Embassy Vacation Resorts*, 340 NLRB No. 94 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Many, if not all, of ValleyCrest's employees who attended the September 12 morning meeting with the Laborers were late in starting work that day. Some did not start work until 8 a.m., one and one-half hours late. None of these employees were sent home because of such lateness, and no employee's wages were reduced. However, the employees who attended the lunch meeting with Local 150 on September 12 were approximately 15 minutes, and at most one-half hour, late in returning to work after lunch. Yet, these employees were sent home and were not paid for the balance of the day after they were sent home. Thus, ValleyCrest treated its employees differently depending on whether the employees met with the Laborers or met with Local 150.

ValleyCrest's motivation in sending its employees home after their meeting with Local 150 was not based on animus against all unions, but rather animus against Local 150. Nevertheless, the statute does not exempt such particularized antiunion motivation. The statute, Section 8(a)(3), prohibits discrimination "to encourage or discourage membership in **any** labor organization" (Emphasis added). ValleyCrest's expressed preference for the Laborers, and expressed bias against Local 150, was the motivation for its favorable treatment of the employees who attended the Laborers' meeting and its disparately unfavorable treatment of the

¹² ValleyCrest does not attempt to justify or explain dismissing its employees after they met with Local 150 on the time of day the meeting occurred, for example, that there was little time remaining, and it was deemed more efficient to dismiss the employees rather than sending them back to work. Of course, the propriety or cogency of such a claim would depend, in the first instance, on a finding that the meeting lasted until 1:30, a finding that has not been made in this case. Nevertheless, because the issue has not been raised, it is not addressed herein.

employees who attended the Local 150 meeting. Such discriminatory treatment against employees because of their involvement with Local 150 violates Section 8(a)(3) and (1).

5 ValleyCrest's argument that there is no evidence of discrimination is based on its view of the facts, discredited herein, that employees who attended the Laborers' meeting were not late in returning to work, whereas the employees' meeting with Local 150 continued until 1:30 p.m. The credible evidence does not support these factual contentions. The evidence shows that ValleyCrest does not send its employees home when they attend a union meeting that extends into work hours. Indeed, this occurred in the morning of September 12. However, in the
10 afternoon of September 12, when the employees met with a different union, they were penalized. Accordingly, ValleyCrest has not proven that it would have taken the same action in the absence of the protected activity by its Discovery site employees. *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998).

15 For all of the foregoing reasons, I conclude that the Respondent discriminated against its Discovery site employees and violated Section 8(a)(3) and (1) of the Act when it sent those employees home on September 12 and refused to pay those employees for the remainder of the day.

20 Conclusions of Law

1. ValleyCrest is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25 2. The Laborers and Local 150 are labor organizations within the meaning of Section 2(5) of the Act.

30 3. ValleyCrest has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by entering into the September 4 collective-bargaining agreements with the Laborers in which ValleyCrest recognized the Laborers as the exclusive representative of its landscape employees when the Laborers did not represent a majority of those employees.

35 4. The Laborers has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act by accepting recognition as the exclusive representative of the employees of ValleyCrest when it did not represent a majority of those employees.

40 5. The Laborers has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(2) and Section 2(6) and (7) of the Act by entering into the September 4 collective-bargaining agreements which contained unlawful union-security clauses.

45 6. ValleyCrest has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (2) and Section 2(6) and (7) of the Act by its actions in connection with and during the meeting on September 12.

50 7. The Laborers has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act by its actions in connection with and during the meeting on September 12.

8. ValleyCrest has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by its actions in sending

its Discovery site employees home on September 12 and refusing to pay those employees for the remainder of the day.

Remedy

5

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

10

Having found that the Respondent, ValleyCrest, unlawfully sent its Discovery site employees home on September 12 and refused to pay them for the remainder of the day, I shall order that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

15

Having found that the Respondent, the Laborers, unlawfully enforced the September 4 agreements with ValleyCrest, which included union-security clauses, I shall order the Laborers to reimburse ValleyCrest's employees any dues that were paid by them as a result of the union-security clauses of the September 4 agreements.

20

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

25

ORDER

A. The Respondent, ValleyCrest Landscape Development, Inc., Palatine, Illinois, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Taking any actions to enforce the September 4 agreements with the Construction and General Laborers District Council of Chicago and Vicinity, AFL-CIO and Tunnel Miners Union Local 2 (jointly, the Laborers).

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(b) Recognizing or bargaining with the Laborers as the representative of ValleyCrest's laborers or plantsmen until the Laborers are certified by the Board.

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(c) Threatening or condoning threats against employees if they do not sign authorization cards for the Laborers.

(d) Rendering unlawful assistance to the Laborers.

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(e) 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.

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¹³ 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.

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

5 (a) Make ValleyCrest's employees who were sent home and not paid for the remainder of the day on September 12 whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

10 (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action in sending employees home early on September 12, and within 3 days thereafter notify the employees in writing that this has been done and that the action will not be used against them in any way.

15 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (d) Within 14 days after service by the Region, post at its facility in Palatine, Illinois copies of the attached notice marked "Appendix 1."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2003.

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

35 B. The Respondent, the Laborers, its officers, agents, successors, and representatives, shall

40 1. Cease and desist from

(a) Taking any actions to enforce the September 4 agreements with ValleyCrest, including the union-security provisions of those agreements.

45 (b) Demanding or accepting recognition from ValleyCrest as the representative of ValleyCrest's laborers or plantmen until the Laborers are certified by the Board.

50 ¹⁴ 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."

(c) Threatening ValleyCrest's employees if they do not sign authorization cards for the Laborers.

(d) Demanding or accepting unlawful assistance from ValleyCrest.

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(e) In any like or related manner 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.

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(a) Reimburse ValleyCrest's employees for any dues that were paid by or collected from them as a result of the union-security clauses of the September 4 agreements.

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(b) Within 14 days after service by the Region, post at its union office or hiring hall, as approved by the Regional Director for Region 13, copies of the attached notice marked "Appendix 2."¹⁵ Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2003.

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

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

Dated, Washington, D.C., September 20, 2004.

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Joseph Gontram
Administrative Law Judge

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¹⁵ 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."

50

APPENDIX 1

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 take any action to enforce the September 4, 2003 agreements with the Construction and General Laborers District Council of Chicago and Vicinity, AFL-CIO and Tunnel Miners Union Local 2 (jointly, the Laborers).

WE WILL NOT recognize or bargain with the Laborers as the representative of ValleyCrest's laborers or plantsmen until and unless the Board certifies the Laborers.

WE WILL NOT threaten or condone threats against employees for not signing authorization cards for the Laborers.

WE WILL NOT render unlawful assistance to the Laborers.

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

WE WILL make employees who were sent home and not paid for the remainder of the day on September 12, 2003 whole for any loss of earnings and other benefits, plus interest, suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful action in sending employees home early on September 12, 2003, and within 3 days

thereafter notify the employees in writing that this has been done and that the action will not be used against them in any way.

ValleyCrest Landscape Development, Inc.

(Employer)

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.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

(312) 353-7570, Hours: 8:30 a.m. to 5:00 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, (312) 353-7170.

APPENDIX 2

NOTICE TO MEMBERS

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

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

WE WILL NOT take any action to enforce the September 4 agreements with ValleyCrest Landscape Development, Inc., (ValleyCrest) including the union-security provisions of those agreements.

WE WILL NOT demand or accept recognition from ValleyCrest as the representative of ValleyCrest's laborers or plantsmen until and unless the Board certifies the Laborers.

WE WILL NOT demand or accept unlawful assistance from ValleyCrest.

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

WE WILL NOT threatening employees of ValleyCrest if they do not sign authorization cards for the Laborers.

WE WILL reimburse ValleyCrest's employees for any dues that were paid by or collected from them as a result of the union-security clauses of the September 4 agreements.

Construction and General Laborers District Council
of Chicago and Vicinity, AFL-CIO and Tunnel
Miners Union Local 2

(Labor Organization)

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.nlrb.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

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