Edwards Painting, Inc. *and* International Union of Painters and Allied Trades, District Council 5, Affiliated with International Union of Painters and Allied Trades. Cases 19–CA–116399 and 19–CA–122730

November 30, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On September 26, 2014, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, to amend the remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

The Respondent is a family-owned painting company, which operates from the home of husband and wife Gene and Connie Edwards in Oregon City, Oregon.

On August 8 and 9, 2013, Gustavo Garcia, Roben White, Roman Ramos, and Arturo Ramos visited the Respondent's office looking for work and on both occasions spoke with Connie Edwards.[5] The Respondent does not have a formal application process or written application form. It is undisputed that Connie Edwards became aware of the applicants' affiliation with the Union during these encounters. During her conversation with White and Garcia on August 8, Connie Edwards made statements that the Respondent did not hire union painters and that it would close down before it went union. During Roman and Arturo Ramos' visit on August 9, Connie Edwards made similar statements that the Respondent did not hire union painters.[6] On both occasions, Connie Edwards took the applicants' names and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] By motion dated September 18, 2015, the General Counsel requested that certain allegations related to the two discharges involving Sean Carter in Case 19–CA–116399 be severed from this case pursuant to a non-Board settlement agreement entered between the parties on September 4, 2015. On November 24, 2015, the Board issued an Order granting the General Counsel's request. Thereafter, on November 30, 2015, the Union requested withdrawal, pursuant to the terms of the settlement agreement, of the unfair labor practice charge allegations related to Carter's discharges. Accordingly, the allegations concerning Carter's discharges have been severed and are not before us.

The Respondent filed 97 exceptions to virtually all of the judge's findings, but acknowledges that it only provided record and legal support and briefed the exceptions involving Connie Edwards (Respondent's Exceptions 2, 52–62, 70–72, 91–93, and 94–96). Accordingly, we disregard as deficient the remainder of the Respondent's bare exceptions under Sec. 102.46(b)(2) of the Board's Rules and Regulations. See, e.g., *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

In affirming the judge's findings, we do not rely on his citations to *Latino Express, Inc.*, 358 NLRB 823, 823 (2012), *Sodexo America LLC*, 358 NLRB 668, 668–669 (2012), or *Station Casinos, Inc.*, 358 NLRB 637 (2012), because the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) rendered those decisions invalid. We note that *Latino Express* was reaffirmed by the Board at 361 NLRB No. 137 (2014), and that the Board subsequently reached a different result in *Sodexo*. See *Sodexo America LLC*, 361 NLRB No. 97 (2014). Instead of *Station Casinos*, we rely on *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010) (employer violates Sec. 8(a)(1) if it communicates to employees that it will jeopardize their job security, wages, or other working conditions if they support the union).

[3] We shall modify the judge's recommended tax compensation and Social Security reporting remedy, and the corresponding provisions of the Order and notice, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also amend the remedy to provide that the Respondent shall compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, Member Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

[4] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall also modify the Order to include a provision requiring the Respondent to post the notice in English and Spanish. The judge recommended that the notice be posted in both English and Spanish in the remedy section of his decision, but he inadvertently omitted from his recommended Order language giving effect to this remedy. We shall substitute a new notice to conform to the Order as modified.

[5] We affirm the judge's finding that Connie Edwards was an agent of the Respondent. At all relevant times, Connie Edwards was the majority owner and corporate secretary, and was involved in the operation of the business, including managing the payroll. The cases that the Respondent cites to support its claim that Connie Edwards did not have authority to act for it are distinguishable. In none of those cases, as here, was the putative agent also the respondent's owner.

[6] We find it unnecessary to pass on the judge's finding that Connie Edwards' statement on September 14, 2013, to employees that the Respondent would "never go union" violated Sec. 8(a)(1), as finding this additional violation would be cumulative and would not affect the remedy.

contact information and gave them Gene Edwards' telephone number. She placed the applicants' contact information on the home refrigerator and discussed them with her husband. Connie Edwards testified that, after a few days, she disposed of the contact information because work was winding down. None of the applicants was ever contacted by the Respondent.

The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire White, Garcia, and Roman Ramos.[7] We agree. In affirming the refusal-to-hire violations, we agree with the judge that the General Counsel demonstrated that the Respondent was hiring at the time the applicants applied for work. On that point, however, we do not rely on the judge's finding that the Respondent hired "about 2 to 7 painters in August [2013]."[8] Rather, we rely on the record evidence establishing that the Respondent hired at least seven employees beginning shortly after August 8, 2013, the first date of the unlawful conduct, and through about December 21, 2013. See *FES*, 331 NLRB 9, 14 (2000) (if the General Counsel is seeking a remedy of instatement and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must prove the existence of those openings at the hearing), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).[9]

Further, in rejecting the Respondent's contention that Garcia and Roman Ramos were not as qualified as the employees it eventually hired, we do not rely on the judge's finding that three of those employees—Boris Borrayo, Ernesto Gonzalez, and Jesus Mendoza—had little painting experience because they were the lowest paid.[10] Rather, we find that the Respondent failed to meet its rebuttal burden under *FES* because it did not provide evidence regarding the qualifications of at least four of the seven employees it hired after August 8, 2013.[11] Without such evidence, the Respondent's contention that the employees it hired all possessed qualifications superior to Garcia and Roman Ramos fails.[12] *FES*, 331 NLRB at 12 (on rebuttal, it is the respondent's burden to show, at the hearing on the merits, that those whom it later hired had superior qualifications to the discriminatees).

ORDER

The National Labor Relations Board orders that the Respondent, Edwards Painting, Inc., Oregon City, Oregon, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating employees about their union activities or affiliation or the union activities or affiliation of other employees.

(b) Telling employees that it wants to make sure no one it hires will bring up anything having to do with the Union.

(c) Instructing employees not to discuss the Union or engage in union activities, including by telling them, in reference to their union activities, not to cause trouble or problems.

(d) Instructing employees not to hand out union flyers on its jobsites.

(e) Telling employees that support for the Union is futile, including by telling them that it is not, and will never be, a union shop.

(f) Threatening employees with layoff, discharge, or job loss because of their union activities, membership, or support, including attendance of union meetings, signing petitions in support of the Union, or selecting the Union as their collective-bargaining representative.

(g) Threatening to administer drug tests to employees because they concertedly complain about terms and conditions of employment, including employee drug use on the job.

(h) Telling applicants for hire that it does not hire union painters.

(i) Promising employees benefits, including wage increases and future assignments, if they cease activities in support of the Union.

(j) Ordering off-duty employees who support the Un-

[7] We have conformed the Order to the judge's finding that the Respondent did not unlawfully refuse to consider for hire, or hire, Arturo Ramos in violation of Sec. 8(a)(3) and (1) because, as noted by the judge, the record establishes, and the General Counsel conceded, that Arturo Ramos had no genuine interest in employment when he applied for a position with the Respondent on August 9, 2013. See *Toering Electric Co.*, 351 NLRB 225, 233 (2007).

[8] ALJD 20:30–31.

[9] According to General Counsel Exhibit 34, entitled "Summary of Dates When Employees First Appear on 2013 Payroll Records Produced by Respondent in Response to Subpoena," at least the following seven employees appear to have been hired after August 8, 2013: Terrence Dowd, Terry Balla, Rolando Flores, Colton Morris, Dan Rodriguez, Diego Arrezola, and Andrew White, Jr.

We also agree with the judge's finding that the General Counsel, in addition to showing that the Respondent was hiring at the time of the unlawful conduct, demonstrated that the applicants had relevant experience for the positions for hire and that antiunion animus contributed to the Respondent's decision not to hire them. *FES*, 331 NLRB at 12.

[10] ALJD 20:32–33. There is no dispute regarding Roben White's qualifications. At the time of his application, White was a journeyman painter with over 30 years of experience.

[11] Those four employees are Balla, Morris, Arrezola, and Andrew White, Jr. GC Exhs. 34 and 33.

[12] We find it unnecessary to pass on the judge's finding that the Respondent additionally violated Sec. 8(a)(3) and (1) by refusing to consider White, Garcia, and Roman Ramos for employment because the remedy for a refusal-to-consider violation would be subsumed within the broader remedy for the refusal-to-hire violation.

ion to leave its property while allowing other off-duty employees to remain on its property.

(k) Threatening to call or calling the police because employees are distributing union literature.

(l) Discharging employees because of their union or other protected, concerted activities.

(m) Opposing employees' receipt of unemployment benefits because of their union or other protected, concerted activities.

(n) Transferring employees among jobsites to isolate them from other employees because of their union or other protected, concerted activities.

(o) Failing to assign work to employees because of their union or other protected, concerted activities.

(p) Refusing to rehire employees because of their union or other protected, concerted activities.

(q) Granting employees wage increases in order to discourage employees from engaging in union or other protected, concerted activities.

(r) Refusing to hire applicants for employment because of their union or other protected, concerted activities.

(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, offer Craig Prinslow, James Scott Oldham, and Wyatt McMinn full reinstatement to their former positions, or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, notify the Oregon Employment Department that it no longer opposes Wyatt McMinn's receipt of unemployment benefits and withdraw any appeal it has filed to the Oregon Employment Department's determination that Wyatt McMinn is not disqualified from receiving unemployment benefits.

(c) Make Craig Prinslow, James Scott Oldham, and Wyatt McMinn whole for any loss of earnings and other benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the judge's decision as amended by this decision, plus reasonable search-for-work and interim employment expenses.

(d) Make Craig Prinslow whole for any loss of earnings and other benefits suffered as a result of its refusal to rehire him in October 2013, in the manner set forth in the remedy section of the judge's decision as amended by this decision, plus reasonable search-for-work and interim employment expenses.

(e) Make James Scott Oldham and Wyatt McMinn whole for any loss of earnings and other benefits suffered as a result of its failure to assign them work in September, October, and November 2013, less any net interim earnings, plus interest.

(f) Compensate Craig Prinslow, James Scott Oldham, and Wyatt McMinn for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Within 14 days from the date of this Order, remove from its files all references to the discharge of Craig Prinslow about July 30, 2013; the refusal-to-rehire Prinslow in October 2013; the failure to assign work to James Scott Oldham in September through November 2013; the failure to assign work to Wyatt McMinn in September through November 2013; the discharge of James Scott Oldham about November 13, 2013; the discharge of Wyatt McMinn about November 13, 2013; and the opposition to Wyatt McMinn's claim for unemployment benefits since about January 2014, and, within 3 days thereafter, notify each of them in writing that this has been done and that those actions will not be used against them in any way.

(h) Within 14 days from the date of this Order, offer Gustavo Garcia, Roben White, and Roman Ramos 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 they would have enjoyed had Gustavo Garcia and Roben White been hired on August 8, 2013, and had Roman Ramos been hired on August 9, 2013.

(i) Make Gustavo Garcia, Roben White, and Roman Ramos whole for any loss of earnings and other benefits suffered as a result of the refusal to hire them, in the manner set forth in the remedy section of the judge's decision as amended by this decision, plus reasonable search-for-work and interim employment expenses.

(j) Compensate Gustavo Garcia, Roben White, and Roman Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(k) Within 14 days from the date of this Order, remove from its files any reference to the refusal to hire Gustavo Garcia, Roben White, and Roman Ramos, and, within 3

days thereafter, notify each of them in writing that this has been done and that this action will not be used against them in any way.

(l) 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.

(m) Within 14 days after service by the Region, post at its Oregon City, Oregon facility, copies of the attached notice in English and Spanish marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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, in both English and Spanish, to all current employees and former employees employed by the Respondent at any time since June 7, 2013.

(n) Within 14 days after service by the Region, hold a meeting or meetings, during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read in English and Spanish to the employees assembled for this purpose, by Gene Edwards or another responsible official of the Respondent in the presence of a Board agent, or at the Respondent's option, by a Board agent in the official's presence.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2016

_____
Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Lauren McFerran, Member

(SEAL) 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 ask you about your union activities or membership or the union activities or membership of other employees.

WE WILL NOT tell you that we want to make sure no one we hire brings up anything that has to do with International Union of Painters and Allied Trades, District Council 5, affiliated with International Union of Painters and Allied Trades (the "Union").

WE WILL NOT tell you not to discuss the Union or engage in union activities, including by telling you, in reference to your union activities, not to cause trouble or problems.

WE WILL NOT tell you not to hand out union flyers on our jobsites.

WE WILL NOT tell you that your support for the Union is futile, including by telling you that we will not, and will never be, a union shop.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with layoff, discharge, or job loss because of your union activities, membership, or support, including attendance of union meetings, signing petitions in support of the Union, or selecting the Union as your collective-bargaining representative.

WE WILL NOT threaten to drug test you because you concertedly complain about your terms and conditions of employment, including employee drug use on the job.

WE WILL NOT tell applicants for hire that we do not hire union painters.

WE WILL NOT promise you benefits, including wage increases and future assignments, to discourage you from supporting the Union.

WE WILL NOT order off-duty employees to leave our property because they support the Union while allowing off-duty employees who do not support the Union to remain on our property.

WE WILL NOT threaten to call or call the police because you are distributing union flyers.

WE WILL NOT fire you because of your union membership or support or because you act together with other employees for your benefit and protection.

WE WILL NOT oppose your receipt of unemployment benefits because of your union membership or support.

WE WILL NOT transfer employees among jobsites in order to isolate them from other employees, because of their union or other protected, concerted activities.

WE WILL NOT fail to assign work to employees because of their union or other protected, concerted activities.

WE WILL NOT refuse to rehire you because of your union membership or support.

WE WILL NOT give you wage increases in order to discourage you from supporting a union.

WE WILL NOT refuse to hire you because of your union membership or support.

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

WE WILL, within 14 days of the date of the Board's Order, offer Craig Prinslow, James Oldham, and Wyatt McMinn full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the date of the Board's Order, notify the Oregon Employment Department that we no longer oppose Wyatt McMinn's receipt of unemployment benefits and withdraw any appeal we have filed to the Oregon Employment Department's determination that Wyatt McMinn is not disqualified from receiving unemployment benefits.

WE WILL make Craig Prinslow, James Oldham, and Wyatt McMinn whole for the wages and other benefits they lost because we fired them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL make Craig Prinslow whole for the wages and other benefits he lost because we refused to rehire him in October 2013, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL make James Scott Oldham and Wyatt McMinn whole for the wages and other benefits they lost because we failed to assign them work in September, October, and November 2013.

WE WILL compensate Craig Prinslow, James Oldham, and Wyatt McMinn for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days of the date of the Board's Order, remove from our files all references to the discharge of Craig Prinslow, James Oldham, and Wyatt McMinn, the opposition to Wyatt McMinn's unemployment claim, the refusal to rehire Craig Prinslow, and the failure to assign work to James Scott Oldham and Wyatt McMinn, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL, within 14 days of the date of the Board's Order, offer to Gustavo Garcia, Roben White, and Roman Ramos 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 they would have enjoyed had Gustavo Garcia and Roben White been hired on August 8, 2013, and had Roman Ramos been hired on August 9, 2013.

WE WILL make Gustavo Garcia, Roben White, and Roman Ramos whole for the wages and other benefits they lost because we refused to hire them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Gustavo Garcia, Roben White, and Roman Ramos for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each discriminatee.

WE WILL, within 14 days of the date of the Board's

Order, remove from our files all references to the failure to hire Gustavo Garcia, Roben White, and Roman Ramos and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the failure to hire them will not be used against them in any way.

EDWARDS PAINTING, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-116399 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Rachel Harvey, Esq., for the General Counsel.
Gene Edwards, President, In Pro Se, for the Respondent.
James Scott Oldham, Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Portland, Oregon, over a 5-day period between May 6 and May 20, 2014, upon the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, as amended[1] (complaint), issued on April 17, 2014, by the Regional Director for Region 19.

The complaint alleges that Edwards Painting, Inc., Respondent, violated the Act by engaging in the following unfair labor practices:

The complaint alleges Respondent violated Section 8(a)(1) of the Act by:

- interrogating its employees about their union activities on numerous occasions;
- threatening employees with lay off if they signed a petition in support of the Union or if they voted for representation by the Union;
- threatening employees with discharge if they attended a union meeting;
- threatening it employees with discharge because of their union membership;
- threatening its employees with discharge if they signed a petition in support of the Union;
- threatening to call and calling the police because its employees were distributing union flyers to employees at its facility;
- threatening employees with lay off if they signed a petition in support of the Union or if they voted for representation by the union;
- ordering its off-duty employees who supported the Union to leave its property while allowing other off-duty employees to remain;
- promising employees a wage increase if they would cease their union activities;
- telling its employees there could be no trouble;
- telling employees that Respondent would never go union;
- telling applicants for hire that it does not hire union painters;
- telling its employees that it did not want people it hires to stir up union stuff;
- telling its employees on numerous occasions that it is not a union shop and never will be a union shop;
- telling employees if they ceased talk about the Union, ceased organizing and there was no more trouble, it would have work for them through the winter;
- telling employees that the Union is mafia;
- telling employees that the Union was trying to steal its work;
- telling its employees they would be subject to random drug testing because the employees concertedly complained about an employee using drugs on the worksite;
- telling employees that working conditions would improve if they removed their union T-shirts;
- telling its employees they were not to cause problems, start any trouble or hand out union flyers on the jobsite and;
- engaging in surveillance of its employees' union or concerted activities.

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by:

- terminating employees Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn for engaging in union or other concerted, protected activity;
- transferring its employees Oldham and McMinn to isolate them from other employees and by failing to assign work to Oldham, Prinslow, and McMinn for engaging in union or other concerted protected activity;

[1] On May 9, 2014, counsel for the General Counsel moved to amend the complaint to add par. 5(d) alleging that in about August 2013 Respondent created an employee application form that asked prospective applicants for their union affiliation. The motion to amend was granted and Respondent was deemed to deny the new allegation. In its brief counsel for the General Counsel moved to amend the complaint to withdraw complaint pars. 5(a)(vi), 7(a)(iii), 8(b), 9(b), 14, and 16 since alleged discriminatee Carter did not appear and testify in support of these allegations at the hearing as required under a subpoena issued to him at the request of the General Counsel. The motion is granted.

– granting its employees wage increases and by opposing McMinn's receipt of unemployment benefits for engaging in union or other concerted protected activity, and:
– refusing to consider for hire or hire applicants Arturo Ramos, Gustavo Garcia, Roben White, and Roman Ramos because they supported the Union or to discourage employees from engaging in union or other concerted protected activity.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

On June 24 and 25, 2014, Respondent filed its post-hearing briefs. On June 27, 2014, counsel for the General Counsel filed a Motion to Strike Extra-Judicial Evidence from Respondent's Briefs. Given the pro se nature of Respondent's representation, counsel for the General Counsel does not object to the apparent late filing of the briefs and I will consider Respondent's arguments contained therein. However, counsel for the General Counsel objects to the addition of extraneous evidence referred to in Respondent's briefs that was not offered at the hearing. General Counsel contends that striking Respondent's citations to extra-record evidence is necessary because consideration of such evidence would deprive the General Counsel and the Charging Party of due process, including the opportunity to object to introduction of the evidence, cross-examine witnesses about it, call witnesses to rebut it, and respond to it substantively in a brief.

In making my findings of fact, I have relied only on the evidence contained in the transcript, including the testimonial and documentary evidence. While I have considered the arguments of the parties, I have not considered any evidence from the briefs of either counsel for General Counsel or Respondent. Accordingly, it is unnecessary to strike portions of Respondent's briefs.

Upon the entire record, except as noted above, including the briefs from counsel for the General Counsel and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is a painting company located in Oregon City, Oregon. While it failed to deny it is an Oregon Corporation and admitted it derived gross revenues in excess of $500,000 during the last 12 months, it denied that it is engaged in interstate commerce by denying it has purchased and received goods valued in excess of $50,000 directly from points located outside the State of Oregon or from other enterprises located in the State of Oregon which received the goods directly from points outside the State of Oregon.

Respondent's tax return from the State of Washington[2] reflects that, during the calendar year 2013 it had sales of $100,000 within the State of Washington.

At the hearing Tracy Martin, the credit manager for Miller Paint Company, Inc. (Miller) testified that Miller is an Oregon Corporation with an office in Portland, Oregon. During the last calendar year Respondent purchased paint and other supplies from Miller valued in excess of $50,000 and Miller in turn purchased goods valued in excess of $50,000 from points located directly outside the State of Oregon.

John Wied, the CFO of Walsh Construction Company, Oregon (Walsh) testified that Walsh is an Oregon corporation with an office in Portland, Oregon. In the course of the past 12 months Respondent provided services to Walsh valued in excess of $50,000. During that same period of time Walsh purchased goods valued in excess of $50,000 from points located directly outside the State of Oregon.

Based upon the above, I find that Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Siemons Mailing Service*, 122 NLRB 81, 85 (1959).

II. LABOR ORGANIZATION

Respondent denied that International Union of Painters and Allied Trades, District Council 5, Affiliated with International Union of Painters and Allied Trades (Union) is a labor organization within the meaning of Section 2(5) of the Act.

At the hearing Robin White, president, Local 10, International Union of Painters and Allied Trades, District Council 5, Affiliated with International Union of Painters and Allied Trades, testified that Local 10 represents employees of painting employers in the Portland, Oregon area in collective bargaining, grievance/arbitration proceedings, and other matters related to terms and conditions of employment. Local 10 is affiliated with the International Union of Painters and Allied Trades, District Council 5, Affiliated with International Union of Painters and Allied Trades, White testified that employee members of Local 10 participate in meetings to consider proposed collective-bargaining agreements, and election of union officers. Based upon the above, I find that Local 10, International Union of Painters and Allied Trades, District Council 5, Affiliated with International Union of Painters and Allied Trades, is a labor organization within the meaning of Section 2(5) of the Act. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851–852 (1962).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent is a painting contractor with an office and place of business at the home of Gene and Connie Edwards in Oregon City, Oregon. Respondent engages mainly in painting the interior and exterior of multi-family residential buildings. During the relevant period herein, Respondent had about 20 employees. About 50 percent of those employees were inexperienced painters who were working in their first painting job. In the 1980's Respondent was signatory to the Union's master collective-bargaining agreement. At some point Respondent sought to cancel the collective-bargaining agreement and as a result Gene Edwards said the Union tried to destroy Respondent. Edwards explained, "[T]hey go after you and take every—every means at their disposal to put you out of business." In his affidavit to the Board on January 14, 2014, Gene Edwards admitted "I will shut down the company before I go union."

[2] GC Exh. 19.

1. Supervisory status

Respondent denied that Charley Gene Edwards, Connie Edwards, Grant Eugene Edwards, or Bob Edwards are supervisors within the meaning of Section 2(11) of the Act or agents within the meaning of Section 2(13) of the Act.

Charley Gene Edwards (Gene Edwards) is the president of Respondent. Prior to December 2013 he was a part owner and president of Edwards Painting Inc. After December 2013 Mrs. Edwards and their son Grant Edwards transferred all of their stock in Edwards Painting, Inc., to Gene Edwards. Gene Edwards is the chief officer of Respondent and has authority to hire, fire, assign employees' work, and discipline Respondent's employees.

The record reflects that Connie Edwards (Mrs. Edwards), Charley Gene Edwards, wife, prior to December 2013 was an officer and shareholder of Respondent. In December 2013 she transferred her ownership interest to her husband and resigned as secretary of Edwards Painting, Inc. Mrs. Edwards prepared all of the paperwork necessary for the paychecks of Respondent's employees and pays Respondent's bills.

Grant Edwards was a part owner and officer of Respondent prior to December 2013 when he resigned his position as vice president and transferred his stock to his father, Gene. Grant is one of Respondent's superintendants and has authority to hire, fire, and assign work to employees.

Bob Edwards is Gene and Connie Edwards' nephew. Bob Edwards works for Respondent as an estimator and superintendant. Bob Edwards runs jobs, assigns work to employees, and has effectively recommended that employees be hired.

Based upon the above, I find that Gene Edwards, Grant Edwards, and Bob Edwards are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), *citing NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Based upon her ownership interest, her status as an officer of Respondent, her intake of applications and her payroll function, I find that Connie Edwards is an agent of Respondent within the meaning of Section 2(13) of the Act. *Beacon Electrical Co.*, 350 NLRB 238, 242 fn. 11 (2007); *Diehl Equipment Co.*, 297 NLRB 504, 504 fn. 2 (1989); *Toering Electric Co.*, 351 NLRB 225, 236 (2007); *Wal-Mart Stores*, 350 NLRB 879, 884 (2007); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988).

2. The James Oldham and Wyatt McMinn terminations

James Scott Oldham (Oldham) has been a painter for 27 years. He is a member of the Union and is classified by the Union as a journeyman painter. In July 2010 Oldham began working for the Union as a field representative responsible for organizing nonunion painting contractors. In this capacity, Oldham works as a "salt," applying for work with nonunion painting contractors to organize their employees.

Oldham and fellow Local 10 member Mike Bokamper applied for work with Respondent at Respondent's Four Square jobsite in Portland, Oregon. Oldham spoke with Grant Edwards who was Respondent's superintendant on this jobsite. Both Oldham and Bokamper were hired by Grant Edwards on about June 2, 2013.[3] Three or 4 days later Oldham went to Respondent's home office and filled out an application he was given by Gene Edwards.

On about June 7, at the Four Square job, Oldham told Grant Edwards that Wyatt McMinn (McMinn), who was Local 10's vice president and a 17-year journeyman painter, was available for work. Grant Edwards asked Oldham if McMinn was union and Oldham told Grant Edwards he was not. A few days later Respondent hired McMinn and assigned him to work at the Art House project. On June 8, Oldham was also assigned to work at the Art House project where both worked for about 2 months.

On about June 13, at the Art House job McMinn spoke with Grant Edwards. Edwards asked McMinn where he had worked and if he had worked for union shops. McMinn said he had not worked for union shops. At the hearing, Grant Edwards did not describe the conversation he had with McMinn when they first met. He generally denied interrogating any employees about union activities, but did not deny asking McMinn if he had worked for union shops before. Grant Edwards admitted that he asked painter Shane Rohde (Rohde) when he was hired in the summer of 2013, if he was a member of the Union.

Toward the end of June 2013, Oldham, Bokamper, and McMinn began speaking with Respondent's employees about the Union and asked employees to sign a petition for union representation. Employees discussed their jobs and complained about not getting overtime, about Respondent's disorganization, about lack of respect from management, and about health benefits.

In early July 2013, Oldham set up a meeting for Respondent's employees to attend at a church near the Four Square project. Oldham asked six or seven employees to attend the meeting. At about this time Grant Edwards had a conversation with Oldham and McMinn outside the Art House project.

Edwards asked them, "are you guys union." Oldham replied, "What's a union." Edwards said, "I want to know are you guys union." When Oldham asked him why he was asking this, Edwards replied, "because I just want you to be honest with me there's a meeting going on Saturday, and it's about signing a petition. And I want to know if you guys are union." Edwards asked if they knew about the meeting. Edwards repeatedly asked Oldham and McMinn if they were union.[4] Edwards told Oldham and McMinn that a union representative was causing problems for Respondent. When Oldham and McMinn admitted that they had talked to a union representative, Edwards said that Respondent was not, and would never be, a union shop, and that the only reason Respondent had jobs like the Art House project, was because it was nonunion. When Oldham and McMinn asked what would happen if they signed the Union's petition, Edwards said that if they signed the petition, they could not work for Respondent and that the Union would not allow them to work for Respondent if they were union. Oldham asked how they could be working for him if they were union and Edwards repeated that if they were union, they could not work for him. I credit both Oldham and McMinn as their

[3] All dates herein refer to 2013 unless otherwise specified.

[4] Tr. 63, lines 4–18.

testimony was given in a straightforward and consistent manner that had the ring of truth to it.

While he denied interrogating his employees, Grant Edwards admitted that he asked Oldham and McMinn about the union meeting. Edwards admitted that he may have told Oldham and McMinn Respondent probably would not be able to stay in business if it went union and that the Union would not allow its members to work for Respondent. Edwards further admitted saying that Respondent did not "plan on going union" and in his Board affidavit admitted that he may have told employees that Gene Edwards would never go union.

I found Grant Edwards to be one of the most incredible witnesses I have observed in over 29 years as a judge. His testimony was given in a painfully halting manner with minutes passing between question and answer, giving the observer the impression that he had no recollection of events whatsoever. He repeatedly looked to his father, who was sitting at counsel table, as if to have him provide the proper response. His testimony lacked any specificity and was characterized by his inability to recall events of even a few days past. His testimony was often contradicted by prior statements given in his Board affidavit. I do not credit his testimony.

Grant Edwards admitted learning of Oldham and McMinn's union meeting from painter Alberto Valencia. Gene Edwards also admitted that he learned about Oldham and McMinn's union activities within their first few months of employment and that he heard about their planned union meeting. Gene Edwards admitted he knew "all Oldham and McMinn were there for was to cause problems."[5]

On about August 2, 2013, at 4 p.m. Oldham and McMinn went to Respondent's home office to pick up their paychecks, as was the standard procedure for Respondent's employees. When picking up their checks, employees would remain on Respondent's property for 10 to 45 minutes. Oldham's vehicle was parked in Respondent's driveway with two or three other employees' cars. A number of union members were located at the curb near the driveway to Respondent's home office with a three by eight foot union banner that displayed the Local 10 logo. The union members were not blocking the driveway. Oldham and McMinn went to speak with the protesters and put on union T-shirts.[6] Oldham and McMinn then went back up the driveway to speak with Respondent's employees. At this point Gene Edwards appeared near the house. After a few minutes, Grant Edwards drove up, got out of his truck, looked at Oldham and McMinn's union shirts, and said so it looks like you guys are done. Oldham said that they were not done and that they were there to organize. Grant Edwards said that they could not work for Respondent if they were union because the Union would not let them. Grant Edwards told Oldham and McMinn they couldn't work here if you're union. Grant Edwards went into the house and Gene Edwards brought out paychecks that had been amended to add $2 per hour.[7] Gene Edwards said I gave you boys a raise. You are doing good work and I don't want any trouble. Gene Edwards said that Respondent was not a union company and would never be union. Both Grant and Gene Edwards told Oldham and McMinn that they got their checks and to leave. Oldham and McMinn walked down the driveway to stand with the union supporters holding the banner. Grant Edwards then walked down to Oldham and McMinn, said that he was not pleased that the Union showed up at his father's home, and asked that in the future they respect that it was Gene Edwards' home and not come there anymore. Oldham and McMinn talked to Grant Edwards about the benefits of unionization, and Grant Edwards said, "You know, I know my dad, and one thing for certain is he's not union and he's never going to be union. So you're wasting your time. You're wasting your breath."[8] While at the hearing Grant Edwards denied that he told employees Respondent would never go union, in his Board affidavit he admitted he may have made such statements.[9] As noted above, I do not credit Grant Edwards but give credence to the testimony of Oldham and McMinn.

In early August 2013 Oldham and McMinn were assigned to Respondent's Hollyfield job in Lake Oswego, Oregon where they regularly wore their union T-shirts. Walsh Construction was the general contractor and Bob Edwards was Respondent's superintendant at this jobsite. On about August 5, 2013, Bob Edwards approached Oldham and McMinn on the job and asked what was going on. Edwards told Oldham and McMinn that Walsh was asking about the union T-shirts. Edwards then said he had heard that there will be picketing today. Oldham replied there would be no picketing. Bob Edwards said that picketing was ineffective and asked them if they were moles for the Union. When Oldham said they were not moles, Edwards said he respected their work and they were doing good but that they couldn't have trouble. If they wanted to keep working there could be no trouble. Oldham said he and McMinn were there to organize Respondent as a union shop and Edwards replied he knew Gene (Edwards) and he would never go union. He then told Oldham and McMinn that all the guys who signed the union petition would get laid off this winter.

Bob Edwards admitted that he asked Oldham if he was in the Union and told him he knew that union members would be kicked out if they went to work for a nonunion employer. He also admitted asking Oldham, after he admitted that he was in the Union, why he was there. While Edwards initially denied telling Oldham that there could be no trouble, he later admitted to saying that there should be no "shenanigans." He also admitted he told Oldham that he would never be part of the Union. Edwards denied telling Oldham or McMinn that employees who signed the petition would be laid off. I credit Oldham and McMinn's version of this incident. They both testified and an honest and straightforward manner. Their testimony was detailed and devoid of inconsistency. I do not credit Bob Edwards as his testimony like that of all the other Edwards' was obviously biased based upon their close familial relationship.

On August 9, 2013, Oldham and McMinn went to Respondent's home office to get their paychecks. When they received their checks, Gene Edwards told them to keep up the good

[5] Tr. 394–396.
[6] GC Exh. 2.
[7] GC Exhs. 3 and 4.
[8] Tr. 72, 272.
[9] Ibid. 852–856.

work. Upon seeing their checks, Oldham and McMinn noticed that they had received another $1-per hour raise.[10] Gene Edwards said he did not want any trouble on his jobs. He told Oldham to keep it up and you'll get another dollar. While Gene Edwards denied generally that he had told Oldham or McMinn that he did not want any problems on the job, he admitted in his Board affidavit that he may have said I don't want any problems. Respondent also granted wage increases to about nine of its employees on August 2[11] and throughout August, as the Union's organizing campaign peaked.[12] Gene Edwards admitted that he gave Oldham and McMinn wage increases because they were doing a good job.

In mid-August at the Hollyfield job, Grant Edwards told Oldham that he was doing a good job. When Oldham asked if Edwards liked his and McMinn's work, Edwards replied that he did. Oldham asked if they gave up wearing the five shirts and organizing if they could continue to work. Edwards said if they give up the union stuff you'll have work through the winter. Grant Edwards stated that he recalled the conversation described by Oldham but denied saying that he would have work for Oldham and McMinn if they ceased organizing, claiming not to recall whether there was any mention of the Union. For the reasons stated above I credit Oldham and McMinn over Grant Edwards.

In about mid-August Oldham and McMinn were painting walls at the Art House job. After about half the job was done, they noticed there was a color change in the white paint they were using. After Oldham called Grant Edwards and described the problem, Edwards told Oldham that what occurred was a paint manufactures' issue. Edwards said to box the paint together, i.e., mix and rotate all of the buckets of paint so that they became one batch of paint. Oldham and McMinn did as instructed, and continued to paint the walls. According to Oldham and McMinn, they could not see a difference in paint color once they had boxed the paint. It was not until in late August or early September that other painters noticed the shade difference while touching it up. When advised of the color difference, Grant Edwards told Oldham and McMinn that this happened sometimes, that it was not their fault, and that they should not worry about it. Grant Edwards failed to deny making such a statement to Oldham and McMinn. Oldham and McMinn were never disciplined in any way for this incident.

Respondent contends that Oldham and McMinn sabotaged the Art House painting by deliberately applying the wrong color of paint. No evidence was adduced to support this allegation.

By August 30, 10 of Respondent's employees had signed a petition[13] for the Union to represent them. On August 30, Oldham was driving with McMinn to Respondent's office to pick up their paychecks. While driving, Oldham received a text message from painter Jeffrey Tucciarone, who had signed the Union's petition on August 28, saying, "hey just let you know I'm not joining the union [sic]."[14]

Oldham and Tucciarone then exchanged text messages in which Jeffrey Tucciarone told Oldham that Grant Edwards knew who had signed the petition and had repeatedly asked him about who had signed it.

When Oldham got to Respondent's home office on August 30, Gene Edwards told Oldham not to start any trouble. He told Oldham that he was being given another raise. Oldham asked Gene and Grant Edwards if they wanted to see the union petition[15] employees had signed. Gene Edwards replied that he knew who was on the petition but said let me see it. When Oldham had given Gene Edwards the petition, Edwards reviewed it and said who he was going to lay off. After Oldham handed him the petition, Gene Edwards went through it making statements about individual petition signers, and said, "Well, this guy wasn't a very good painter. This guy we're going to layoff anyway. This guy and this guy, I already knew about them. I figured as much," and, "[T]his guy's no good, or this guy won't be here too long."[16]

During the discussion painter Steve McNatt, walked past and Gene Edwards asked him if he had signed up with the Union. McNatt replied he had not.

On September 14, 2013, Oldham and McMinn were again at Respondent's office to get their paychecks. Gene Edwards told both Oldham and McMinn that he had no jobs for them since he only had big jobs and they were causing too much trouble. He said that when he found a small job, he would put them on it. While at Respondent's office, Oldham and McMinn were passing out union flyers to employees on the driveway near the house concerning organizing Respondent. Gene Edwards admitted he may have told Oldham and McMinn they should be careful about what they were printing. Gene Edwards told Oldham and McMinn that they could not pass out the flyers. Connie Edwards came out of the house and said that Respondent would never go union. Meanwhile, Gene Edward's grandson confronted Oldham and McMinn about passing out flyers and an argument ensued. Gene Edwards threatened to call the police if Oldham and McMinn did not leave the premises. Oldham said they were not leaving and would continue to distribute flyers. Gene Edwards then called the police. No other employees were told they had to leave the Edwards' property.

On September 24, 2013, Oldham and McMinn were working on Respondent's Four Square jobsite, wearing T-shirts that said, "Walsh Construction Co. Hired a contractor That breaks FEDERAL LAW."[17] During the day a Walsh supervisor named Lane spoke with Oldham and McMinn and asked what was on the shirt. Oldham told him what the shirts stated. Lane took a photo of the shirt and asked if Grant Edwards knew about the shirts. Lane told Oldham that he and that another of Respondent's employees had called Grant Edwards about the T-shirts. Later that day Grant Edwards told Oldham and McMinn that they were being moved to another jobsite called Springwater. The Springwater job involved painting the exteri-

[10] GC Exh. 5.
[11] GC Exh. 32.
[12] Ibid. and GC Exh. 8.
[13] GC Exh. 8.
[14] GC Exh. 7.
[15] GC Exh. 8.
[16] Tr. 94, 281.
[17] GC Exh. 9.

or of a building. At the time of being transferred, it was raining hard and as a result they could not work that day. They were sent home by the Springwater general contractor. The rain continued on September 25 and neither Oldham nor McMinn could work that day. Respondent had inside jobs on September 24 and 25 that Oldham and McMinn could have worked.

Oldham called Grant Edwards the next morning to ask for work, and Grant Edwards said he did not have any, even though Respondent had other ongoing jobs and a significant workload at the time.[18] After September 24, both Oldham and McMinn's hours working for Respondent were substantially curtailed. Oldham and McMinn had worked over 39 hours per week prior to September 24. After September 24 they averaged 20 and 21 hours per week, respectively.[19]

On Sunday September 29, 2013, Oldham spoke by phone with Gene Edwards about work assignments. Edwards said he did not want any problems from you guys. He said he had a job at the Cannery job in Sherwood, Oregon, but he did not want any problems and he did not want Oldham and McMinn handing out flyers. At the hearing Gene Edwards denied telling Oldham or McMinn that he did not want any problems when he sent them to the Cannery project. However, in his Board affidavit he admitted that he may have told McMinn and Oldham that he did not any problems from them at the Cannery jobsite.[20] I credit McMinn and Oldham. I found Gene Edwards to be a particularly hostile witness whose testimony was marked by inconsistency with his Board affidavit and his own testimony at the hearing. His hostility to the Union based upon his past history with the Union was palpable and in my view colored his testimony and rendered it unreliable.

On October 1, 2013, Oldham and McMinn were painting interior doors at the Cannery job. According to Oldham it was raining and cold, about 42 degrees. Oldham had trouble getting the paint to adhere to the doors he was painting. He had painted about 24 doors and had problems with about six of them. In Oldham's opinion, as a 27-year journeyman painter, the inability of the paint to adhere to the doors was caused by the cold and humidity from the rain. According to Oldham the conditions exceeded the specifications for the paint they were using. Jim Ernstrom (Ernstrom), a sales representative for paint supplier Miller, stated that the temperature conditions, as described by Oldham, would be "right on the bottom" and "close to too cold" and "approaching where you could almost freeze it," which could cause the paint to dry slowly or to show "crazing" or crackling.[21] Oldham immediately called Gene Edwards and reported the problem with the doors. Edwards told Oldham to roll the doors with a paint roller. About 20 minutes later Gene Edwards arrived at the jobsite and tried to roll paint on the doors. This was unsuccessful and Edwards tried to spray the doors and then roll them. Neither Oldham nor McMinn were disciplined by Respondent in any way due to the problems with the doors at the Cannery job.

Gene Edwards claimed at the hearing that Oldham and McMinn sabotaged the doors at the Cannery project and asserted that he could not allow Oldham and McMinn to work on jobs where they could blame other employees for their sabotage. No evidence was adduced that Oldham or McMinn ever blamed other painters for anything. Oldham and McMinn both denied that they sabotaged any of Respondent's work.

Gene Edwards stated at the hearing that he should have discharged Oldham and McMinn for the incident involving the doors at the Cannery project and should have filed a police report over the incident. However the record is clear that Respondent did not discipline Oldham and McMinn at the time of the incident. Rather, Respondent gave these "saboteurs" a $1-per-hour raise.[22] Indeed it was not until about October 11, that Gene Edwards first told Oldham and McMinn that he thought they had sabotaged the doors. Respondent continued to employ Oldham and McMinn for over a month after the incident, and Gene Edwards admitted that there were no problems with their work during that time.

While Respondent called KeyWay Superintendent Roberts to testify that Respondent was charged for a number of hinges that disappeared from the Cannery project, the record is devoid of evidence that Oldham or McMinn took the hinges. Moreover there is no evidence that Respondent relied upon missing hinges as a reason for discharging either Oldham or McMinn.

On October 11,[23] Oldham and McMinn went to Respondent's home to receive their paychecks. Gene Edwards told Oldham there were no jobs for him since he could not put Oldham on larger jobs because they caused too much trouble. Oldham and McMinn then walked into the driveway, where they ran into painter Sean Carter (Carter). Carter told Oldham there had been drug use on the jobsite the previous day by painter Steve McNatt (McNatt) and that Respondent did not care. Grant Edwards admitted that Carter had reported that both McNatt and painter Mendoza had used drugs on the job. Carter then left. Oldham and McMinn went to speak with Gene Edwards about this issue and told him they did not want to work on jobs or with employees who were using drugs. Gene Edwards told them not to worry about this as it was no concern of theirs. McNatt then came up and asked for Carter, saying he was going to kill him and asked where Carter lived. At the hearing, while Gene Edwards denied that McNatt made a threat to Carter that day, Respondent admitted in its answer that that McNatt said Carter "needed his hind end kicked."[24] Grant Edwards said he was going to give McNatt a drug test and if he was clean he was going to fire Carter. Oldham asked Grant Edwards if he was going to test McNatt then. Edwards said he would but when McNatt started to leave, Oldham said that McNatt couldn't leave or any drug test would be invalid. Gene Edwards said that Oldham looked like he knew about drugs and that Oldham and McMinn looked like dope smokers. He said he had a random drug testing policy and that he was going to test Oldham and McMinn. Oldham asked to see Respondent's

[18] GC Exh. 31.
[19] GC Exhs. 26 and 27.
[20] Tr. 411.
[21] Tr. 796–798.
[22] GC Exhs. 32 and 33.
[23] While Oldham and McMinn testified this event occurred on October 18, based upon Carter's timecards the event occurred on October 11.
[24] GC Exh. 1(k), par. 15(d).

drug testing policy and Edwards refused to provide it.

Gene Edwards told Oldham and McMinn to be ready for a drug test the following Monday. Oldham and McMinn asked Edwards where he wanted them to take the drug test. Gene Edwards initially said he had not found a place for them to be tested and later said he was not going to give them a drug test.

At the hearing Gene Edwards claimed Respondent had sent other employees for drug testing. However, he later admitted it had been over 10 years since he had drug tested employees and this was required by the general contractor. He further admitted that Oldham and McMinn were the only employees he had ever required to take a random drug test.[25] Respondent did not give McNatt a drug screen.

On October 21, Gene Edwards told Oldham and McMinn that there would be no drug test for them that day and to follow up with him later. On October 23, Gene Edwards said there would be no drug test for Oldham or McMinn.

Grant Edwards admitted that on October 11, Carter notified him via text message that McNatt had sent Carter 13 text messages threatening Carter with violence.[26] On October 14, Carter forwarded some of McNatt's text messages to Grant Edwards. The messages said:

> "The gypsy jokers [a motorcycle gang] are my best friends," "Snitches get stitches," "You f**** with my life you're dead you f***** with my family you're f****** with this you're going to f****** get your s*** kicked [*sic*]."[27]

The morning of October 14, Grant Edwards told Carter he needed to file a police report about McNatt's threats before he could come back to work. When Carter told Oldham of Grant Edwards' demand that he file a police report, Oldham agreed to go with Carter to file the report. Oldham called Grant Edwards and told him he was going to go with Carter because he and McMinn had both witnessed McNatt's threats toward Carter and to file the report Carter and Oldham left work and went to the police department in Hillsboro, Oregon, and filed a police report. At Grant Edwards' request, Carter provided Grant Edwards with a case number that could be used to access his police report, but Grant Edwards never tried to access the report. Later that day at about 3:30 p.m., as Oldham was getting ready to drive home, Gene Edwards called him and said there was a new policy in place, that anyone who left work needed to get prior permission. Oldham explained that he had contacted Grant Edwards and had gotten permission to leave. Edwards told Oldham that he had many problems with Carter and that he was fired.

On October 28, 2013, Respondent assigned Oldham and McMinn to work on the ADT Security job in Beaverton, Oregon, for 4 days. Bob Edwards was Respondent's supervisor on this job. R&H was the general contractor for this job and Nate Brown was the R&H superintendant. When Oldham and McMinn got to the job, Bob Edwards told them that the job was too big for just the two of them to complete in 4 days. That same day R&H Superintendant Brown asked Oldham how two guys were supposed to finish the job in 4 days. During the course of the job Brown asked Oldham if they were union. When Oldham replied they had worked for union contractors, Brown said Bob Edwards told him they had been sent from the union hall.

On the last day of the job, Oldham and McMinn prepared posters that said R&H hired Edwards Painting who ignores drug use on the job. This poster was displayed during lunch and breaks outside the jobsite. Brown asked them if this was a sanctioned picket.

After finishing work on the ADT job, Oldham called Gene Edwards about further assignments. Gene Edwards said he didn't want to start trouble and had no more work for Oldham or McMinn. When Oldham later called in for work, Gene Edwards said he could not put them on any big jobs because they caused too many problems.

The next job Respondent assigned to Oldham and McMinn was the Terwilliger Plaza job in Portland, Oregon, on November 12, 2013. This job involved the remodel of one condo and R&H was the general contractor. Respondent assigned only Oldham and McMinn to this job. When assigning them Gene Edwards told them not to start any trouble. This warning was repeated by Bob Edwards when he saw them on the job. While on the job on November 12, Oldham and McMinn spoke with a Terwilliger employee who told them that employees had to pay a lot for parking. On the same day, a Terwilliger supervisor told them his parking was paid by the employer. Oldham and McMinn decided to create a poster that stated, "$80 FOR PARKING IS UNFAIR TO THE SUPPORT STAFF! Go to: www.oregonunions.org."[28] The following day they placed the poster on bulletin boards throughout the Terwilliger building. No evidence was adduced that Terwilliger Plaza had a rule prohibiting posting on its bulletin boards.

On November 13, 2013, Bob Edwards told Oldham and McMinn to get their tools and asked if they had put up the posters. When Oldham replied they had, Edwards said, Terwilliger is upset and wants you off the property. I tried to keep you on the job. This decision is coming from Terwilliger. Oldham and McMinn left the jobsite.

That evening Oldham called Gene Edwards for further work. Edwards asked them if they were done over at Terwilliger Plaza. Oldham said they put out a poster, and Terwilliger Plaza did not want them there anymore. Gene Edwards said, "So you handed out a postcard, huh? Hand out flyers, right?" and said he guessed "it is what it is."[29] When Oldham again asked for another job Edwards said he did not have anything right then and that they could not go to bigger jobs because they started too much trouble. Oldham asked him if they should call again on Sunday night, and Gene Edwards said he did not know and that he did not see any small jobs coming back up anytime soon. Oldham asked if they should file for unemployment, and Gene Edwards said they should do what they had to do.

Respondent did not investigate the circumstances surrounding Oldham and McMinn's posting on the Terwillger bulletin boards. Both Gene and Bob Edwards denied seeing the poster

[25] Tr. 461–463.
[26] GC Exh. 30, pp. 1–10.
[27] Ibid., GC Exh, pp. 11–14.
[28] GC Exh. 11.
[29] Tr. 161–162, 325–326.

Oldham and McMinn created and posted. While Bob Edwards initially denied discussing the poster with R&H superintendent Saxe, he later admitted that he assumed the postcard had something to do with Terwilliger Plaza's employees' parking expenses. He later admitted that he "assumed the whole time that [Oldham and McMinn] were trying to unionize Terwilliger Plaza's workforce" and explained, "That was what they did. They posted flyers on projects. […] Scott and Wyatt would post flyers on our projects about the union…."[30]

While Respondent never told Oldham and McMinn that they were being discharged or laid off, it did not assign them any work after November 13 despite further calls from Oldham and McMinn through December 1.

Gene Edwards claimed that he did not fire Oldham and McMinn but he admitted that he has not assigned them work since November 13. He further admitted in an unemployment hearing that after Oldham and McMinn were removed from the Terwilliger Plaza job for posting on bulletin boards, "that was the end of their career."[31] In addition, Gene Edwards admitted that Respondent would not let Oldham work for Respondent "because he works for somebody else." At the hearing Edwards admitted that McMinn is no longer employed by Respondent.[32]

Grant and Bob Edwards both essentially claimed that Oldham and McMinn stopped working for Respondent after the Terwilliger Plaza project due to a lack of work. Grant Edwards stated in his Board affidavit that he had no work for Oldham and McMinn after November 13.[33] Despite Respondent's claim of no work, Respondent's payroll records reflect that from November 2013 to the end of 2013, Respondent steadily employed between 19 and 22 employees and hired or rehired 3 employees. Gene Edwards stated that Respondent maintained a work force through the end of 2013, with 20 or more employees.[34]

3. McMinn applies for unemployment benefits

McMinn applied for unemployment benefits[35] with the State of Oregon on about January 15, 2014. Respondent opposed benefits for McMinn but the benefits were granted on appeal.[36] At the hearing Gene Edwards denied Respondent had opposed unemployment benefits for McMinn. However, in a document Respondent submitted to the State in response to McMinn's unemployment claim, Gene Edwards wrote, "He was band [*sic*] from building for breaking rules of the building, by building management and will not be working again."[37]

The State denied McMinn's claim on the basis that McMinn "was discharged when he was kicked off the job by the building owner" and that he "posted a sign in the building he was performing work in [*sic*] that the owners should not be charging tenants for parking." [38]

McMinn appealed this ruling, resulting in a telephonic hearing before an administrative law judge for the State of Oregon. In the telephonic hearing, Gene Edwards argued that McMinn was removed from the Terwilliger Plaza project. He stated, in response to a question about why McMinn was kicked off the job, "You can't just come up there and post on their bulletin boards anything you want, any type of obscenity or whatever, if you don't have a right to."[39] Edwards also alleged McMinn had sabotaged work at the Cannery and the Art House projects. Finally, he claimed that McMinn intentionally painted the foundation at the Springwater project, though he admitted that McMinn's spraying the foundation was not part of his basis for discharging McMinn.

About April 21, 2014, the administrative law judge issued a decision finding that McMinn was not disqualified from receiving unemployment benefits.[40] The period for Respondent to file an appeal from the administrative law judge's decision had not expired at the time of the instant hearing. Gene Edwards testified that he had not decided whether to file an appeal. Thus, the record is clear that Respondent opposed the unemployment benefits on the basis that McMinn had sabotaged doors on the Cannery job, had improperly mixed paint and had posted flyers at the Terwilliger job.

4. The Craig Prinslow termination

Craig Prinslow was a 28-year journeyman painter and had been a member of Local 10 since 2012. Prinslow called Grant Edwards about a job on July 5, 2013 and Edwards indicated Respondent had work. On July 8, 2013 Prinslow again spoke with Grant Edwards who said there was work on the Four Square job and that Respondent was not a union company and would never be. Edwards asked Prinslow if he was a union member and Prinslow said he was not up on his dues. Edwards said he wanted to make sure Prinslow was not union and would not bring up the union on the job.

On July 12, 2013, Prinslow was assigned to work on the Four Square jobsite with five to six other painters. That day he had a conversation with Grant Edwards. Edwards said he was making sure that Prinslow was not a union member or talking to the employees about the union. Prinslow replied he was not a union member and just wanted to work.

At the hearing Grant Edwards did not describe his exchanges with Prinslow on July 8 and 12. While he generally denied interrogating employees about their union affiliation, he did not specifically deny that he asked Prinslow about his union affiliation. Grant Edwards did not deny Prinslow's testimony that he told Prinslow that Respondent was not and never would be a union shop. Only upon confrontation with his Board affidavit did Edwards admit he may have made such statements to employees.[41] Neither did Edwards deny Prinslow's testimony about statements that he did not want Prinslow or other employees to talk about the Union. I credit Prinslow whose testimony was given in a detailed and honest manner without hostility, contradiction or embellishment. For the reasons stated

[30] Tr. 732.
[31] Tr. 425–426.
[32] Ibid at 413–414.
[33] Ibid at 610.
[34] GC Exhs. 31, 34.
[35] GC Exh. 13.
[36] GC Exhs. 14 and 15.
[37] GC Exh. 20.
[38] Ibid, GC Exhs. 14 and 21.
[39] Tr. 425–426.
[40] GC Exh. 15.
[41] Tr. 854–856.

above I do not credit Grant Edwards.

At the Four Square job on July 30, Prinslow signed a union petition seeking Union representation, wore a Union T-shirt[42] and put a union sticker on his hard hat. He was the only employee wearing a union T-shirt. When he was going into work, Prinslow talked to other employees about the benefits of joining the Union. Later that day Grant Edwards came to the jobsite and asked Prinslow what was with the union shirt and sticker. Prinslow said he got them from the Union. Edwards asked if Prinslow had signed up with the Union and Prinslow said he had. Edwards asked Prinslow if he was a union member when he came to work for him and Prinslow said he was not. He asked Prinslow if he was trying to recruit guys, and Prinslow said he was not, but that he had answered questions the guys had. Edwards said it was a good thing the job was winding down and that he had to let Prinslow go. Edwards said Respondent was not a union shop and never would be. Edwards said the Union would never let Prinslow work for a non union shop. He then asked Prinslow if he had talked about the Union to other employees and Prinslow said he had. Prinslow finished out the day and did not quit the job. Prinslow admitted he went to work on another job on July 31. While being offered a job with another employer on July 29, Prinslow claims he was going to ask Grant Edwards to match the new job offer. He said there was still 30 days work left at the Four Square job. In October Prinslow called Grant Edwards for work and was told there were no jobs.

Grant Edwards admitted that Prinslow told him he had signed with the Union that day because he needed health insurance. Edwards did not deny Prinslow's testimony that he told Prinslow Respondent was not, and never would be, a union shop or that the Union would not let him work for Respondent if he signed the petition, but as noted above, he admitted making similar comments to employees. Edwards failed to deny that he asked Prinslow whether he was a union member when he was hired and whether he was there to recruit guys. Edwards first stated that he told Prinslow that the job he was working on was slowing down and that he would have to let him go.[43] Then, in Respondent's case, Edwards said that he was thinking of discharging Prinslow for slow work performance, but that Prinslow quit.[44] Finally a third version was given on cross-examination that he may have told Prinslow he had to let him go and that he told him he was looking for a way to lay him off so he could collect unemployment.[45]

When Prinslow was terminated on July 30, three other employees were doing similar work, yet none of those employees were discharged. The Four Square project was not winding down at the time and continued until at least October.[46] Respondent had substantial work for months after July 30, and hired seven to nine new employees the month following Prinslow's discharge.[47] Further, Grant Edwards admitted that the work performance of many employees on the Four Square project was poor.

[42] GC Exh. 2.
[43] Tr. 614.
[44] Ibid at 823–824.
[45] Tr. 859–861.
[46] GC Exh. 22.
[47] Ibid. GC Exhs. 31 and 34.

5. The Sean Carter termination

Painter Carter, hired by Respondent on June 23,[48] was one of the first employees to sign the petition that Oldham showed to Gene Edwards on August 30. While Gene Edwards said he did not look at the petition, he admitted he assumed Carter was involved in the Union's organizing campaign because he spent time with Oldham and McMinn. Grant Edwards admitted that he saw Carter wear a union T-shirt. Grant Edwards also admitted that he and Carter discussed the union during smoke breaks and that Carter told him that Oldham and McMinn had asked him to sign a union petition. He admitted that he told Carter he thought Respondent would have a hard time staying busy if its employees unionized.

Grant Edwards admitted that he fired Carter on about August 30 and told Gene Edwards of the discharge the same day. Grant Edwards said he fired Carter for failing to paint enough doors or door frames. At Respondent's office on August 30, after Oldham showed Gene Edwards the petition his employees had signed, Carter told Oldham and McMinn that Grant Edwards fired him. When both Oldham and McMinn asked Gene Edwards if Carter had been fired, Edwards said Carter had not painted enough doors. When Carter asked Gene Edwards if he had a job or if he was fired, Edwards gave an equivocal answer.

Oldham told Gene Edwards he thought Carter had been fired because he signed up for the Union. At the end of the conversation, Gene Edwards asked Carter if he was available for work on Monday and Carter continued working.

Carter continued to work for Respondent on the Four Square project until October 18.[49] On October 18, Grant Edwards told Carter to go to Respondent's office so that Gene Edwards could discharge him. At Respondent's office, Gene Edwards told Carter that he was discharged and that he would be forcibly removed if he set foot on one of Respondent's jobsites again. No reason was given for Carter's discharge. Carter's final timecard reflects that he worked for Respondent for only 1 week after making the police report about McNatt's threats.

Gene and Grant Edwards both stated that Carter had attendance and production problems. Gene Edwards said that Carter never put in a full week during his entire work history, and stated that he was certain Carter missed workdays between the date of his filing the police report and the date of his discharge. Grant Edwards said that Carter should have been discharged several times and that he was the absolute worst employee Respondent had ever had with respect to attendance.

The record is devoid of Carter's alleged attendance problems. Moreover Respondent did not discipline Carter until after he complained about McNatt's drug use on the job and his threats of violence. Moreover, Respondent did nothing to document Carter's alleged production problems.

Respondent does not keep any formal attendance records. Respondent's timecards may reflect when employees missed days, but they generally do not reflect the reasons for missed

[48] GC Exh. 34.
[49] Ibid GC Exh. 22.

days. Respondent maintains neither personnel files nor written records documenting the reasons for employees' discharges. Thus, Respondent was unable to establish that any employee was ever treated consistently with Carter. However, Grant Edwards told Oldham in early June that he was having a problem with some of his employees not showing up on time or taking days off. Respondent did not produce any evidence that any other employee was discharged for attendance issues. Respondent's timecards reflect that painter McNatt missed a number of days of work.[50] No evidence was adduced that Respondent took any action against McNatt for his attendance.

Grant Edwards also claimed that Carter was fired because the Four Square job was ending. However, Gene Edwards admitted that Respondent maintained a large work force through the end of the year at the Four Square job. The record shows that Respondent hired two new employees in October and two in November.[51]

6. The refusal to consider for hire Gustavo Garcia, Roben White, and Roman and Arturo Ramos

a. Gustavo Garcia and Roben White

Gustavo Garcia (Garcia) has been an organizer and field representative for the Union for 6 years. His trade specialty is a drywall finisher and he has little experience painting but he has some painting skills including taping windows and doors. Robin White (White) has been Local 10 president for 5 years and a journeyman painter for 30 years.

On August 7, 2013, Garcia and White, neither of whom was working at the time, agreed to apply for work with Respondent. Both agreed they would work for Respondent indefinitely. On August 8, 2013 both went to Respondent's office at Gene Edwards' home wearing union T-shirts.[52] They were met at the door by Connie Edwards and told her they wanted to apply for work with Respondent. Mrs. Edwards asked if that was what they looked like when they applied for work. She said Respondent was a non-union company and did not hire union painters. She said that they had been union before and would close down the business before going union again. She asked for their names and phone numbers and gave them Gene Edwards' phone number. She said that Gene Edwards did the hiring for Respondent. She said that Respondent was union many years ago and would never go union again. She said they would never hire union painters because they talk to employees about going union. She told them to leave and never come back again because they don't hire union painters. In his Board affidavit Gene Edwards admitted he was not going to hire union plants. Neither Garcia nor White were called for work with Respondent.

b. Roman and Arturo Ramos

Roman Ramos has been a field representative for the Union for seven years. Arturo Ramos is a Local 10 member. Both Roman and Arturo's trade specialty is glazer. Glazers make window frames and they had little experience painting.

Ramon Ramos was not employed in August 2013 when he applied for work with Respondent. Had he been offered work with Respondent he would have worked there indefinitely. On August 9, Roman Ramos and his brother Arturo Ramos went to the Respondent's office to apply for work. They were met by Mrs. Edwards, and Roman Ramos stated Local 10 had sent him. Mrs. Edwards said Respondent "did not hire union and that they are a non union company. Tell Local 10 not to send anymore workers here."[53] Ramon Ramos left his name and phone number with Mrs. Edwards and she gave them Gene Edwards phone number. Ramon Ramos was never called for work with Respondent.

Both Gene and Connie Edwards admitted that the union applicants appeared at Respondent's office wearing union T-shirts, and that Connie Edwards asked who was sending them there. She admitted saying that she did not think union members could work for a nonunion shop. She denied saying Respondent did not hire union painters or that Respondent would never go union. I do not credit Connie Edwards' testimony. It is inconsistent with the three union applicant's testimony and inconsistent with Gene Edwards own admission that he was not going to hire union plants. I credit the testimony of Gustavo Garcia, Roben White, and Roman Ramos whose testimony was detailed and consistent.

While Respondent claims it does not hire applicants who come to its office, Connie Edwards nevertheless admits to have left the contact information of the union applicants on the refrigerator in her home and to have told Gene Edwards it was there. Moreover, Oldham said he was told to go to Respondent's office to fill out an application.

At the hearing, Gene Edwards admitted that he knew union applicants came to his office to apply for work and that the Union was trying to get him to hire union members as plants. Further, in his Board affidavit he admitted he had decided he was not going to hire union plants to work for him.[54] Despite that admission, Gene Edwards testified that Respondent did not hire applicants who applied for work at its office, Respondent was not hiring, and Respondent was not hiring employees without painting experience. Yet he admitted he knew nothing of the applicants' skill levels at the time when they applied.

Despite Gene Edwards' claim that Respondent was not hiring employees who had no painting experience, Oldham testified that about half of the painters who worked with him while he was employed by Respondent had no painting experience. Gene and Grant Edwards both admitted that Respondent hired employees with no painting experience.

While Gene Edwards' claimed that Respondent was not hiring at the time the union applicants applied for work, Respondent's payroll records[55] show that Respondent hired about two to seven painters in August, after the four union applicants tried to get jobs with Respondent. Among those hired were three of Respondent's lowest paid employees, Boris Borrayo, Ernesto Gonzalez, and Jesus Mendoza.[56] Grant Edwards admitted that

[50] GC Exh. 36.
[51] Ibid. GC Exh. 34.
[52] Ibid.
[53] Tr. 365.
[54] Tr. 441.
[55] GC Exh. 34.
[56] Supra. Exhs. 32–33.

Borrayo and Mendoza had little or no painting experience before they started working for Respondent, and Gene Edwards claimed not to know whether Gonzalez had painting experience.

7. August Alteration of Respondent's employee information forms to include an inquiry concerning union affiliation

Around the time when the four union applicants came to Respondent's office, Connie Edwards changed Respondent's employee information form that new employees had to complete, to include a question about union affiliation. Gene Edwards admitted one employee, Terrence Dowd, filled out the altered form around August 30 before discontinuing its use and admitted destroying Dowd's employee information form after receiving General Counsel's subpoena calling for its production.

B. The Analysis

1. The 8(a)(1) allegations

Paragraphs 5 through 17 of the complaint allege a great number of violations of Section 8(a)(1) of the Act. These violations include multiple interrogations, telling employees not to stir up union issues or trouble, telling employees Respondent is not and never would be a union shop, threatening employees with discharge for engaging in union activities, ordering off-duty employees who supported the Union off Respondent's property, promising wage increases and continued work to discourage union activities, threats to call the police and calling the police in retaliation for engaging in union activity, and threatening employees with drug screening for engaging in protected, concerted activity. For ease of review and analysis I will discuss each allegation of the complaint seriatim.

a. Complaint paragraph 5 alleges Respondent's various agents and supervisors interrogated its employees

Interrogation of an employee about their union activities is unlawful where it would reasonably tend to interfere with, restrain, or coerce the employee in the exercise of protected activities. *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984). The Board considers various circumstances surrounding the alleged interrogation, including the background, the nature of information sought, identity of the questioner, the place and method of the interrogation, and whether the interrogation is accompanied by threats or promises. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000); *Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992); *Rossmore House*, 269 NLRB at 1177–1178.

The Board applies an objective test in determining if Section 8(a)(1)of the Act has been violated. Intent is not at issue. Rather the Board considers if the alleged conduct would reasonably tend to interfere with the free exercise of employee rights under the Act. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

i. Complaint paragraph 5(a)(i)–(v) alleges that Grant Edwards interrogated employees on June 7, 13, July 11, 12, and 30 at various projects

About June 7, when Oldham spoke to Grant Edwards about hiring McMinn, Grant Edwards asked Oldham if McMinn was union. On June 13, when McMinn first met Grant Edwards at the jobsite, Edwards questioned him about his union affiliation. On July 11, after learning of the union meeting Oldham and McMinn had planned, Grant Edwards repeatedly asked them about their union activities and affiliation. On July 8 and 12, when Prinslow was interviewed, Grant Edwards told him he wanted to make sure he was not a union member. Grant Edwards interrogated painter Shane Rohde when he began working for Respondent in the summer 2013 about his union affiliation. On July 30, Grant Edwards asked Prinslow about his union activities and affiliation.

Each of these allegations constitute a coercive interrogation in violation of Section 8(a)(1) of the Act. The interrogations were conducted by a high official of Respondent and accompanied by statements that Respondent would never go union and that employees could not work for Respondent if they were union. I find that Respondent has violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(a)(i)–(v).

ii. Complaint paragraph 5(b) alleges that Bob Edwards interrogated employees on August 5 at the Hollyfield project

On about August 5, right after Oldham and McMinn began openly displaying their union support, Bob Edwards questioned them about their wearing union T-shirts and asked if they were union "moles."

I find that this statement was a coercive interrogation asking essentially if Oldham and McMinn were engaged in union activity. While it was obvious from their T-shirts that they were open union supporters, the additional question about being "union moles" suggests that Edwards was seeking additional information about their union activities beyond whether they were mere supporters of the Union. I find that this question violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(b).

iii. Complaint paragraph 5(c) alleges that Gene Edwards interrogated employees on august 30 at respondent's office

About August 30, while Oldham was showing Gene Edwards the union petition, Gene Edwards asked painter McNatt if he signed the union petition.

When the owner of a company asks about an employee's union affiliation and activity, there can be little doubt of its coercive effect on their Section 7 activity. As such Gene Edwards' interrogation of McNatt violated Section 8(a)(1) of the Act as alleged.

iv. Complaint paragraph 5(d) alleges that in august respondent added a question concerning union affiliation to an employee application form

The record reflects that in August 2013 Respondent added a question about union affiliation to its employee information form. While the form existed for only a short time with the question about union affiliation, it appears that at least one job applicant filled out the form.

Asking a potential employee about union affiliation, as a condition of employment, would reasonably coerce a job applicant, implying that Respondent did not intend to hire or employ union members. The Respondent's form was filled out by at

least one potential employee interfering with the employee's Section 7 rights, in violation of Section 8(a)(1) of the Act as alleged.

b. Complaint paragraph 6 alleges that on about July 8 grant Edwards told its employees that it does not want the people it hires to stir up union stuff

An employer's direction that an employee should not to engage in union activities tends to interfere with employee rights to engage in such activities in violation of Section 8(a)(1) of the Act. *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001); *We Can, Inc.*, 315 NLRB 170, 181 (1994). Statements that employees should not start or cause trouble, in the context of the employees engaging in union or protected concerted activities, are likewise unlawful. *Sam's Club*, 322 NLRB 8, 14–15 (1996), enfd. 141 F.3d 653 (6th Cir. 1998).

On July 8, Grant Edwards told Prinslow he wanted to make sure no one he hired would bring up anything that had to do with the Union. Such a statement is clearly a direction not to engage in union activity in violation of Section 8(a)(1) of the Act.

c. Complaint paragraph 7(a) and (b) alleges that Respondent's agents and supervisors told its employees that it is not a union shop and will never be a union shop

Employer statements to the effect that the employer will never be a union shop are unlawful because they would reasonably give employees the impression that it would be futile for them to support the Union, thus interfering with, restraining, and coercing them in the exercise of their right to select a union to represent them, in violation of Section 8(a)(1). *Venture Industries*, 330 NLRB 1133, 1133 (2000); *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Bestway Trucking*, 310 NLRB 651, 671 (1993); *Maxi City Deli*, 282 NLRB 742, 745 (1987).

i. Complaint paragraph 7(a)(i)–(ii) allege that on July 8 and 11 Grant Edwards told its employees that it is not a union shop and will never be a union shop

Also on July 8, Grant Edwards told Prinslow that Respondent would never be a union shop. On July 11, Grant Edwards told Oldham and McMinn that Respondent would never be a union shop. On July 30, when he fired Prinslow, Grant Edwards told him Respondent would never be a union shop. On August 2, when the Union picketed with a banner at Respondent's home-office, Gene Edwards told Oldham and McMinn Respondent would never be a union shop.[57]

Each of these statements gave the impression to its employees that it would be futile to select the Union and violated Section 8(a)(1) of the Act.

ii. Complaint paragraph 7(b)(i)–(ii) allege that on August 8 and 9 Connie Edwards told its employees that it is not a union shop and will never be a union shop

On August 8 and 9, when four applicants came to Respondent's home office to apply for jobs, Connie Edwards told them Respondent would never be a union shop. Similarly on September 14, at the time Oldham and McMinn were distributing union flyers at Respondent's home office, Connie Edwards told them Respondent would never be a union shop.[58]

Connie Edwards' repeated statement to employees and potential employees that it would never be a union shop communicated to employees that it would be futile for them to support the Union and therefore violated Section 8(a)(1) of the Act.

d. Complaint paragraph 8 and 9 allege that on July 11 and August 2 Grant Edwards threatened employees with discharge if they attended a union meeting and because of their union membership

Employer threats of job loss for engaging in union activity coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. *Station Casinos, Inc.*, 358 NLRB 637 (2012). If an employer implies job loss caused by a third party, the Board will find this to be unlawful where the employer had no objective factual basis for making such a statement. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969); *Hoffman Security, Ltd.*, 315 NLRB 275, 277–278 (1994); *Blaser Tool & Mold Co.*, 196 NLRB 374, 374 (1972).

On about July 11, Grant Edwards told Oldham and McMinn that if they signed a union petition, they could not work for Respondent, because the Union would not allow it. Grant Edwards claimed his statement was only a statement about the union's rules. However, since it misrepresented the Union's rules about members working for nonunion contractors it was not a statement of any rule but a threat to union supporters they could not work for Respondent. The statement violated Section 8(a)(1) of the Act.

About August 2, picketers located at the curb near the driveway to Respondent's home office held a three by eight foot union banner that displayed the Local 10 logo. Oldham and McMinn went to speak with the protesters and put on union T-shirts. Oldham and McMinn then went back up the driveway and began speaking with Respondent's employees. Grant Edwards told Oldham and McMinn so it looks like you guys are done. Oldham said that they were not done and that they were there to organize. Grant Edwards said that they could not work for Respondent if they were union because the Union would not let them. Grant Edwards told Oldham and McMinn they couldn't work here if you're union. Grant Edwards' statement was made in the presence of other employees and in the context of Oldham and McMinn's union activity. This statement, coming immediately upon learning of their union activity, in the context of statements that they could not work for Respondent because they were union, amounted to a threat of job loss in violation of Section 8(a)(1) of the Act.

[57] While the latter two allegations were not alleged in the complaint they were fully litigated and closely related to the allegations contained in par. 7(a). I will consider these additional de facto amendments. *Pergament United Sales*, 296 NLRB 333, 334 (1989).

[58] While complaint par. 7(b) alleges only that Connie Edwards told employees that Respondent would never be a union shop on August 8 and 9, the same statement made on September 14 is alleged to be violative of Sec. 8(a)(1) of the Act in General Counsel's brief. Since this matter is closely related to the other allegations in the complaint and was fully litigated at the hearing, I will consider the complaint may support this additional allegation. *Permanent United Sales*, supra; *Eisner Electric, Inc.*, 316 NLRB 597 (1995).

e. Complaint paragraph 10(a) alleges that on August 2 Connie, Gene and Grant Edwards ordered off-duty employees who supported the union to leave its property while permitting other off duty employees to remain

The Board has held that an employer who denies off-duty employees access to non-working areas of its property, absent a legitimate business justification, violates section 8(a)(1) of the Act. *Sodexo America LLC*, 358 NLRB 668, 668–669 (2012); *Tri-County Med. Ctr.*, 222 NLRB 1089, 1089 (1976). *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000); *Automotive Plastic Technologies*, 313 NLRB 462, 463 (1993). The Board has long held that employees have a right to distribute union literature on an employer's premises during nonworking time in nonworking areas. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110–111 (1956); *Republican Aviation Co. v. NLRB*, 324 U.S. 793, 803–804 (1945). Further, an employer's threats to call the police or calls to the police in response to employees' protected activities on its property violates Section 8(a)(1) of the Act. *Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006).

On August 2, when the Union picketed with a banner at Respondent's home office, Oldham and McMinn wore union T-shirts and talked to employees about the Union. In response, Gene, Connie, and Grant Edwards told Oldham and McMinn to leave but allowed other employees to remain. While Respondent contends that Oldham and McMinn were asked to leave because they were blocking the driveway or because they had remained on the property too long, there is no evidence that Oldham or McMinn blocked the driveway or that they had stayed longer on the property than on any other occasion when they got their paychecks.

Respondent has consented to its employees' presence on its property after working hours to deliver their timesheets and to pick up paychecks. The record reflects further that it has been common for employees to remain on Respondent's property for from 10 to 45 minutes while doing so. Respondent's removal of Oldham and McMinn was for the purpose of limiting their right to engage in Section 7 activity, including speaking with other employees about the Union. Such discriminatory conduct in limiting off-duty employees' access to its property for engaging in Section 7 activity violated Section 8(a)(1) of the Act.

f. Complaint paragraph 10(b)(i)–(iii)

The complaint paragraphs allege that on August 5 Bob Edwards told employees there could be no trouble, threatened that employees would be laid off if they signed a petition supporting the union or voted for the union and told employees that Respondent would never go union.

As noted above, an employer may not tell its employees not to engage in union activities without running afoul of Section 8(a)(1) of the Act. *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001); *We Can, Inc.*, 315 NLRB 170, 181 (1994).

Moreover, an employer who threatens job loss for engaging in union or other protected activity violates Section 8(a)(1) of the Act. *Station Casinos, Inc.*, 358 NLRB 637 (2012). This rule applies even if a respondent attributes job loss to a third party if the statement has no basis in fact. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969); *Hoffman Security, Ltd.*, 315 NLRB 275, 277–278 (1994); *Blaser Tool & Mold Co.*, 196 NLRB 374, 374 (1972). Statements that an employer will never be a union shop are likewise unlawful *Venture Industries*, 330 NLRB 1133, 1133 (2000); *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Bestway Trucking*, 310 NLRB 651, 671 (1993); *Maxi City Deli*, 282 NLRB 742, 745 (1987).

On about August 5, Bob Edwards told Oldham and McMinn that he wanted to have them on the project but that they could not have any trouble, that employees who signed the Union's petition would be laid off in the winter, and that he knew Gene Edwards would never go union. Each of these statements violated Section 8(a)(1) of the Act. Telling employees that he wanted no trouble was simply a buzz word for no union activity. As noted above telling employees that a company will never go union is unlawful as is threatening layoff for engaging in union activity.

g. Complaint paragraph 11 alleges that on August 8 and 9 Connie Edwards told job applicants that Respondent does not hire union painters

As already noted above, when an employer makes threats of job loss or other negative consequences for being affiliated with a union or engaging in activities in support of a union, they coerce employees in violation of Section 8(a)(1) of the Act. *Station Casinos, Inc.*, 358 NLRB 637, supra. This applies even when an employer attributes such consequences to a third party without factual basis. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969); *Hoffman Security, Ltd.*, 315 NLRB 275, 277278 (1994); *Blaser Tool & Mold Co.*, 196 NLRB 374, 374 (1972).

On August 8 and 9, when the four union applicants came to Respondent's office to apply for work, Connie Edwards told them Respondent did not hire union painters. While Connie Edwards contended that her statement was only a statement concerning the Union's rules, her statement misrepresented the Union's rules. Accordingly they amounted to telling employees that Respondent did not hire painters who were members of the Union and violated Section 8(a)(1) of the Act.

h. Complaint paragraphs 12 and 13 allege that on August 9 and in mid-August Gene Edwards promised employees wage increases if they refrained from engaging in union activity

The Board has held that when an employer promises benefits in the context of a union organizing campaign the effect is to influence employees to relinquish their support for the union in violation of Section 8(a)(1) of the Act absent evidence that it had a legitimate reason for the promise. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408 (1964); *Dyncorp*, 343 NLRB 1197, 1198 (2004), affd. 233 Fed. Appx. 419 (6th Cir. 2007).

On August 9, Gene Edwards gave Oldham and McMinn a wage increase and he told them that he did not want trouble on his jobs. Edwards added that if they kept it up, they would get another raise. In mid-August, Grant Edwards told Oldham that if he and McMinn stopped their organizing activities, they would have work through the winter.

Gene Edwards linked pay increases to no trouble on the job, merely a buzz word for no union activity. He further linked additional pay raises to no more union conduct. Grant Edwards' promise of future work was likewise contingent upon no

further union activity. These statements by both Gene and Grant Edwards were therefore coercive and unlawful violations of Section 8(a)(1) of the Act.

i. Complaint paragraph 15(a)–(d)

These complaint paragraphs allege that Gene Edwards from early September to October 18 threatened employees with discharge if they signed a petition supporting the Union, threatened to call and called the police because employees were distributing union literature to employees picking up paychecks and told its employees they would be subject to random drug tests because they concertedly complained about employees using drugs on the job.

Employer threats of job loss for engaging in union activities violates Section 8(a)(1) of the Act. *Station Casinos, Inc.*, 358 NLRB 637 (2012).

The Board has long held that an employer who denies off-duty employees access to nonworking areas of its property, absent a legitimate business justification violates Section 8(a)(1) of the Act. *Sodexo America LLC*, 358 NLRB 668, 668–669 (2012); *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). When an employer has a business justification for denying access to nonworking areas, such a restriction cannot be based on Section 7 activity. *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000); *Automotive Plastic Technologies*, 313 NLRB 462, 463 (1993). Moreover, it has long been established that employees have a right to distribute union literature on their employer's premises during nonworking time in nonworking areas. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110–111 (1956); *Republican Aviation Co. v. NLRB*, 324 U.S. 793, 803–804 (1945).

An employer who threatens to call or calls the police in response to employees' lawful union activities on its property violates Section 8(a)(1) of the Act. *Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006).

Finally, the Board has held that employee drug use issues, safety, and drug testing practices are terms and conditions of employment, and concerted employee complaints about such subjects are protected under Section 7 of the Act. *Trompler, Inc.*, 335 NLRB 478, 479–480 (2001), enfd. 338 F.3d 747 (7th Cir. 2003); *Talsol Corp.*, 317 NLRB 290, 316–317 (1995); *Motorola, Inc.*, 305 NLRB 580 fn.1 (1991), enf. denied in part on other grounds 991 F.2d 278 (5th Cir. 1993); *Johnson-Bateman Co*, 295 NLRB 180, 182–184 (1989). It is a violation of Section 8(a)(1)of the Act for an employer to threaten drug testing of employees for engaging in protected activities. *Pacific Custom Materials*, 327 NLRB 75, –81 (1998); *Eldeco, Inc.*, 321 NLRB 857, 867 (1996).

On August 30, Gene Edwards while reviewing the employee petition stated which of the individual petition signers he was going to let go. Edwards' statements were a threat that the various petition signers were going to be laid off for signing the petition in violation of Section 8(a)(1) of the Act.

On September 14 while Oldham and McMinn were distributing union literature at Respondent's home office, Gene Edwards told them to leave, threatened to call and then called the police to remove them. Respondent contends that it was required to call the police because Oldham had caused an altercation among its employees. However, the record is devoid of evidence that Oldham or McMinn did more than engage in peaceful handbilling. While another painter became hostile in reaction to Oldham's protected activity, there is no evidence that Oldham and McMinn engaged in similar conduct. Moreover, it is undisputed that the painting employee's' confrontation with Oldham and McMinn had ended by the time Gene Edwards threatened to call and called the police.

Respondent makes much of the fact that Oldham and McMinn engaged in union activities at Gene and Connie Edwards' home. However, Respondent has invited its employees onto its property during nonworking hours in a nonworking place to submit timecards and to receive their paychecks. Respondent cannot justify a discriminatory denial of access to its property to employees who choose to engage in union activities. Respondent's attempts to remove Oldham and McMinn from its property while they were engaged in union activities was discriminatory and, therefore, violates Section 8(a)(1) of the Act. *Sodexo America LLC*, 358 NLRB 668, 668–669; *Santa Fe Hotel, Inc.*, 331 NLRB at 723; *Automotive Plastic Technologies*, 313 NLRB at 463; *Tri-County Medical Center*, 222 NLRB at 1089.

On about October 11, as a result of Carter, Oldham, and McMinn's concerted complaint about the safety of painter McNatt using drugs on the job, Gene Edwards told Oldham and McMinn that they looked like drug users and that he was going to test them under Respondent's random drug testing policy. It is admitted that Respondent has never had a random drug testing policy nor has it ever randomly drug tested any employee. Clearly, Edwards' statement that he was going to drug test Oldham and McMinn was not as the result of any policy of Respondent's but rather in retaliation for their protected, concerted complaint. It was therefore coercive and unlawful and violated Section 8(a)(1) of the Act.

j. Complaint paragraph 17 alleges that on September 29 Gene Edwards told its employees they were not to cause any problems, start any trouble, or hand out any union literature while on the jobsite

An employer's express or explicit admonishment to an employee not to engage in union activities tends to interfere with employee rights to engage in such activities in violation of Section 8(a)(1). *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001); *We Can, Inc.*, 315 NLRB 170, 181 (1994). Thus, instructions to employees not to start or cause trouble, in reference to or in response to their engaging in union or protected concerted activities, are unlawful. *Sam's Club*, 322 NLRB 8, 14–15 (1996), enfd. 141 F.3d 653 (6th Cir. 1998).

On about September 29, after Respondent removed Oldham and McMinn from a jobsite after they wore T-shirts protesting Respondent's violation of Federal law, Gene Edwards told Oldham that he did not want any problems from him and McMinn and that they should not hand out flyers. This statement amounted to a threat to Oldham and McMinn not to engage in union activities and violated Section 8(a)(1) of the Act.

2. The 8(a)(3) and (1) allegations

In order to establish a violation of Section 8(a)(3) and (1) of the Act, the General Counsel must demonstrate by a preponder-

ance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the burden shifts to Respondent to show that it would have taken the same action even in the absence of the protected activity. *Wright Line*, supra. The employer has the burden of establishing that affirmative defense. Id.

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions, *Mid-Mountain Foods*, 332 NLRB 251, 251 fn. 2 (2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB No. 43 (2014); *ManorCare Health Services – Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn.12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

a. Complaint paragraphs 18(a) and (h) allege that on July 30 Respondent discharged employee Craig Prinslow and in October failed to assign Prinslow work

It is undisputed that Prinslow engaged in union activities, including signing the Union's petition and wearing a union T-shirt and sticker on the job. It is likewise undisputed that Respondent was aware of those activities. Respondent's plethora of threats, directives to refrain from engaging in union activity and interrogations in violation of Section 8(a)(1) of the Act, establish Respondent's animus toward its employees' union activities.

Grant Edwards had interrogated Prinslow at the time of his hire about his union affiliation to ensure he was not union and he assured Prinslow that Respondent would never be a union company. On the day Edwards discharged Prinslow, he asked what Prinslow was doing with the union T-shirt and sticker. Edwards asked Prinslow if he had signed up with the Union and Prinslow admitted he had. After asking Prinslow if he had talked about the Union to Respondent's employees and Prinslow said that he had, it was only then that Edwards fired Prinslow, saying it was a good thing the job was winding down and that he had to let Prinslow go.

Respondent contends that it did not fire Prinslow, but rather Prinslow quit. In this regard Grant Edward's testimony and Respondent's defense resemble an episode of the "Keystone Kops." Edwards first stated that he told Prinslow that the job he was working on was slowing down and that he would have to let him go.[59] Then, in Respondent's case, Edwards said that he was thinking of discharging Prinslow for slow work performance, but that Prinslow quit.[60] Finally a third version was given on cross-examination that he may have told Prinslow he had to let him go and that he told him he was looking for a way to lay him off so he could collect unemployment.[61]

As to Respondent's contention that work was slowing down, when Prinslow was terminated on July 30, three other employees were doing similar work, yet none of those employees were discharged. The Four Square project was not winding down at the time and continued until at least October.[62] Respondent had substantial work for months after July 30, and hired seven to nine new employees the month following Prinslow's discharge.[63]

As to Prinslow's poor work performance, there is no evidence of this other than Grant Edwards' vague and discredited testimony.

The pretextual nature of Respondent's defenses not only establishes Respondent's hostility toward Prinslow's union activities but also defeats any attempt by Respondent to meet its burden of establishing that it would have discharged Prinslow and refused to rehire him even in the absence of his protected activities. Prinslow's credited testimony was unrebutted that while he had a job offer he accepted for July 31, he would have continued to work for Respondent if they had met the wage offer of his new employer. However, Respondent never gave Prinslow such an opportunity as it fired him once it discovered he was actively involved with the Union. Thus General Counsel has established that Respondent fired Prinslow and refused to consider him for rehire in October in violation of Section 8(a)(3) and (1) of the Act.

b. Complaint paragraph 18(b) alleges that on August 2, 9, and 29 Respondent granted its employees wage increases

An employer who grants employees wage increases during a union organizing campaign violates Section 8(a)(3) of the Act, absent a persuasive business justification for the timing of the increase other than the union campaign. *Latino Express, Inc.*, 358 NLRB 823, 823 (2012); *Register Guard*, 344 NLRB 1142, 1142 (2005). It is undisputed that Respondent granted wage increases to a number of employees, including Oldham and McMinn, in August, at the peak of the Union's organizing campaign.

On August 2, the date of the first wage increase, Oldham and McMinn disclosed their support for the Union's organizing efforts by joining the pickets who were displaying a prounion banner at Respondent's office and by wearing union T-shirts

[59] Tr. at 614.
[60] Ibid at 823–824.
[61] Tr. at 859–861.
[62] GC Exh. 22.
[63] Ibid. GC Exhs. 31 and 34.

when they picked up their paychecks at Respondent's office. Respondent handwrote the wage increases onto Oldham and McMinn's extant paychecks leading to the inference that Respondent had not planned to grant the wage increases before seeing Oldham and McMinn's union activity. At the same time Gene Edwards promised Oldham and McMinn that they would get more raises if they did not cause trouble, a buzz word that implied that Oldham and McMinn would receive further wage increases if they abandoned their union activities. Gene Edwards' claim that he gave wage increases at that time of year are unsupported by any records or testimony other than Edward's discredited testimony. The claim is rejected. The timing of the wage increases alone is grounds for an inference that Respondent's motivation for granting them was an unlawful violation of Section 8(a)(3) of the Act.

c. Complaint paragraphs 18(c) and (e) allege that on August 30 and October 18 Respondent discharged its employee Sean Carter

Carter engaged in activity protected by Section 7 of the Act including signing the Union's petition and wearing a union T-shirt at work. It is undisputed that Respondent knew of Carter's union activities. Gene Edwards admitted he assumed Carter was a union supporter. While Gene Edwards denied looking at the petition Oldham showed him on August 30, I find this implausible as the credited testimony reflects that Edwards went down the petition and listed who would be fired. Carter's name appeared on the list.

As noted above there is a plethora of Respondent's display of animus toward its employees' union activities. The timing of Carter's initial termination by Grant Edwards on August 30, came after Grant Edwards had learned of Carter's support for the Union, including his signing the union petition. This timing suggests that hostility toward Carter's union activities was a factor in his discharge. Only after Oldham and McMinn protested that Respondent had fired Carter for engaging in union activities did Gene Edwards decide to reverse his son's decision and rehire Carter, further demonstrating a causal connection between Carter's union activities and his termination.

Respondent contends that Gene Edwards did not know Grant Edwards had fired Carter yet Grant Edwards admitted he told Gene Edwards he had discharged Sean Carter for performance problems earlier in the day on August 30. Unbelievably, Respondent contended that Carter simply continued coming to work after his discharge without authorization. So, Respondent simply allowed Carter to keep working. I find this preposterous explanation is nothing more than a later day pretext to cover up the true nature of Respondent's reason for firing Carter, his union activity. This pretext undermines any attempt by Respondent to meet its burden of establishing that it would have discharged Carter on August 30 even in the absence of his protected activities.

Carter continued working for Respondent until about October 18. On October 11, Carter engaged in additional protected, concerted activities. Together with Oldham and McMinn, Carter complained to Respondent about painter McNatt using drugs on the job. They also complained to Respondent about McNatts' threats of violence and death to Carter for making the complaint. Respondent was aware of Carter's protected activity, since he told Respondent of the complaints. Respondent's animus toward its employees' protected activities has been well documented above. Respondent's statement that these issues were of no concern to Oldham, McMinn nor Carter together with its threats to drug test Oldham and McMinn in response to their protected-concerted complaint, tends to show that the complaint was a contributing factor in Carter's discharge.

Respondent claims that Carter was fired on October 18 since he was the worst employee it had ever employed. Respondent claims that from the outset of his employment on June 23, he had abysmal attendance, consistently refused to work at his assigned jobsites, and had extremely slow production, however Respondent produced no documents to support of any of these assertions. Moreover, I have previously noted my reasons for not crediting either Gene or Grant Edwards' testimony. Any claim that Respondent terminated Carter on October 18 due to lack of work is belied by Respondent's payroll records that show Respondent had a heavy workload and hired or rehired employees around the time of Carter's October 18 discharge.

Given the absence of documentary or credited testimonial evidence to support Respondent's defenses that it fired Carter for his alleged egregious work performance, I must conclude that the reason Carter was terminated was not his poor work performance but rather his Section 7 activity, the final Section 7 straw that broke the camel's back for Gene Edwards. *Alco Electric Co.*, 258 NLRB 819 (1981). *Tres Estrellas de Oro*, 329 NLRB 50, 58 (1999); *PVM I Associates, Inc.*, 328 NLRB 1141, 1152–1153 (1999).

d. Complaint paragraphs 18(d), 18(f) and (h) allege that in September and October Respondent transferred its employees Oldham and McMinn from jobsite to jobsite to isolate them from other employees and failed to assign them work

In *Montgomery Ward*, 290 NLRB 981, 981–982 (1988), the Board held that employer isolation of union supporters from other employees is unlawful.

By August 2, Respondent was aware that Oldham and McMinn were actively engaged in the union's organizing campaign. After wearing prounion T-shirts on the Four Square jobsite on September 24, Oldham and McMinn were removed from that jobsite and sent to a jobsite where Respondent knew they would be unable to work because of heavy rain. From that time, Oldham and McMinn were isolated from other employees and were assigned about half the work they had been assigned previously. Respondent admits that it isolated Oldham and McMinn from other employees by assigning them work where no other employees were working. Since Respondent did not have many small jobs, this assignment resulted in fewer hours for Oldham and McMinn. Respondent contends that it took this action to prevent them from blaming others for their "sabotage" of property on which they were working.

That Respondent harbored animus toward Oldham and McMinn's union activities, is amply described above. Moreover, the timing of their removal from the Four Square jobsite and the drop in their work assignments coincided with their protected activity in wearing T-shirts protesting Respondent's violation of federal labor law. Given Respondent's prior ad-

monitions not to engage in union activity while on its jobsites, I will draw an adverse inference that Respondent's reason for removing Oldham and McMinn from the Four Square jobsite was motivated by their protected, concerted activity. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988).

In addition Respondent's defense for removing Oldham and McMinn from the Four Square job and assigning them to isolated jobs when available is no more than pretext. There is no record evidence that Oldham or McMinn ever blamed any other employee for damaging property. Moreover, I have found that there is no credible evidence that either Oldham or McMinn engaged in any acts of sabotage while working for Respondent. The pretextual nature of Respondent's defenses both shows its hostility toward Oldham and McMinn's their protected activities and precludes Respondent from establishing that it would have taken the same actions even in the absence of those activities.

e. Complaint paragraphs 18(i) and (j) allege that in November Respondent discharged its employees Oldham and McMinn

The evidence clearly establishes that both Oldham and McMinn were engaged in union and other protected, concerted activities as is Respondent's knowledge of and animus toward those activities. The nexus between their protected activity and their discharge has likewise been established.

On November 13, Respondent removed Oldham and McMinn from the Terwilliger job and failed to assign them any further work after representatives of Terwilliger Plaza asked that they leave its property because they posted flyers on bulletin boards that commented on the cost of parking for Terwilliger employees and advised of the option of contacting a union.

There is no doubt that Respondent was aware that Oldham and McMinn were engaged in union activity long before the incident at Terwilliger Plaza. Nor is there any dispute that Respondent knew they were engaged in protected activity in putting up the posters advising Terwilliger employees of their right to contact a union over benefit issues. Gene Edwards' decision to discharge Oldham and McMinn after their removal from the Terwilliger Plaza project was, at least in part, motivated by the content of their message to Terwilliger Plaza's employees. Gene Edwards' statement at the unemployment hearing that "You can't just come up there and post on their bulletin boards anything you want, any type of obscenity or whatever, if you don't have a right to"[64] reflects that Edwards believed Oldham and McMinn had no right to appeal to Terwilliger Plaza employees concerning their terms and conditions of employment and was therefore a legitimate basis for their discharge. Indeed, there was no record evidence that Terwilliger Plaza prohibited a general posting of information on its bulletin boards.

While initially denying that Respondent had terminated Oldham and McMinn, claiming rather that it had no work for them, Gene Edwards admitted that Oldham and McMinn are no longer employed by Respondent. He stated in the unemployment hearing that posting on the Terwilliger Plaza bulletin boards "was the end of their career."

By way of further defense, Respondent contends that Oldham and McMinn were terminated because they sabotaged work. The evidence reflects that Oldham and McMinn credibly testified that walls they painted at the Art House project were the wrong shade of white. They also admitted that there were problems with doors Oldham painted at the Cannery project. The problems were both reported immediately to either Gene or Grant Edwards. There is no evidence that either Oldham or McMinn tried to hide the problems or blame anyone else for the wall color or the paint texture on the doors. While these incidents occurred over a month before Oldham's and McMinn's discharge, Oldham and McMinn were never disciplined for either incident. Indeed, Grant Edwards absolved them of responsibility for the color of the paint on the walls, blaming instead the paint supplier. Despite Gene Edwards claim that the doors at the Cannery project were intentionally sabotaged by Oldham and amounted to criminal conduct, he never disciplined Oldham nor did he file a police report. I conclude that Respondent's claims of sabotage are pretext. *Edward G. Budd Mfg. Co.*, 138 F.2d at 90–91; *Tres Estrellas de Oro*, 329 NLRB at 58; *PVM I Associates, Inc.*, 328 NLRB at 1152–1153; *Alco Electric Co.*, 258 NLRB at 822.

Because Respondent again can point to nothing other than pretext to support its discharge of Oldham and McMinn, it cannot meet its burden of establishing that it would have discharged them even in the absence of their protected activities. I conclude that both Oldham and McMinn were terminated by Respondent in violation of Section 8(a)(3) and (1) of the Act.

f. Complaint paragraph 18(k) alleges that since January 2014 Respondent has opposed McMinn's receipt of unemployment benefits

In *Grand Central Partnership*, 327 NLRB 966, 966 (1999), the Board found that a respondent violated the Act by opposing an employee's unemployment application in retaliation for the employee filing unfair labor practice charges and participating in a Board hearing.

Respondent added insult to injury after discharging McMinn by opposing his unemployment claim with the State of Oregon. In the State unemployment hearing Gene Edwards raised the pretextual defenses claimed herein. Gene Edwards argued that McMinn was removed from the Terwilliger Plaza project stating, "You can't just come up there and post on their bulletin boards anything you want, any type of obscenity or whatever, if you don't have a right to." Edwards also alleged McMinn had sabotaged work at the Cannery project and the Art House projects. Respondent's contest of McMinn's unemployment claim was an extension of its previous discrimination based on McMinn's union and other protected, concerted activity and violated Section 8(a)(3) and (1) of the Act.

[64] Tr. 425–426.

g. Complaint paragraph 19 alleges that on August 8 and 9 Respondent refused to consider for hire Arturo Ramos, Gustavo Garcia, Roben White, and Roman Ramos because they engaged in protected-concerted activity or to discourage employees from engaging in protected-concerted activity

In *FES*, 331 NLRB 9, 12 (2000), supplemented, 333 NLRB 66 (2001), *enfd.* 301 F.2d 83 (3d Cir. 2002), the Board held that an employer may violate Section 8(a)(3) of the Act by refusing to hire or refusing to consider for hire job applicants based upon anti union animus. In order to establish a discriminatory refusal to hire the General Counsel must show

> ". . . under the allocation of burdens set forth in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), ...: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them."

In order to establish a discriminatory refusal to consider applicants for hire the General Counsel must show:

> (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
>
> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions. Id. at 15

In *Toering Electric Co*, 351 NLRB 225, 228, 233 (2007), the Board further explained that the requirements of discriminatory refusal to hire or consider for hire apply only to employees defined under Section 2(3) of the Act, that is:

> . . . someone genuinely interested in seeking to establish an employment relationship with the employer. Simply put, only those individuals genuinely interested in becoming employees can be discriminatorily denied that opportunity on the basis of their union affiliation or activity; one cannot be denied what one does not genuinely seek. We further hold that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer.

In *Toering*, supra at 233, the Board explained that in hiring cases to establish an applicant is an employee under the Act two components must be shown:

> (1) there was an application for employment,[footnote omitted] and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did soon his or her behalf. In the latter instance, agency must be shown.
>
> As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence that an application for employment is anything other than what it purports to be. Consequently, once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer. Assuming the employer puts forward such evidence, the General Counsel, to satisfy the genuine applicant element of a prima facie case of hiring discrimination, must then rebut that evidence and prove by a preponderance of the

evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer. Thus, the ultimate burden of proof as to the Section 2(3) status of the alleged discriminatee-applicant rests with the General Counsel.

Under the *Toering* test, the record reflects that Garcia, White, and Roman Ramos[65] had a genuine interest in employment. Each came to Respondent's office and said they were interested in jobs with Respondent. In speaking with Connie Edwards they did nothing that would suggest they were not genuinely interested in employment. Each testified credibly that they would have accepted a position with Respondent, if offered.

The evidence shows that as of August 8 and 9, when the three attempted to apply for work with Respondent, Respondent had concrete plans to hire, hiring several employees shortly thereafter.

The applicants met the requirements for the positions they were seeking. Garcia and Roman Ramos, though they had no professional painting experience, had some relevant experience. While Gene Edwards claimed that Respondent was not hiring employees without painting experience at the time, this is inconsistent with the record evidence which establishes Respondent hired many employees without prior painting experience, including several employees hired shortly after August 8 or 9. White was an experienced painter.

It has been well established that Respondent harbored animosity toward employees' union activities. Respondent's altered employee information form, requiring applicants to divulge their union affiliation, together with Connie Edwards' statements to the four applicants that Respondent did not hire union painters because they would try to organize its employees, that it would never go back to being union again, and that it would close down its business before it would go union again, demonstrates Respondent's hostility to union applicants.

Moreover, by telling the applicants that Respondent did not hire union painters, Connie Edwards excluded them from the hiring process. In addition while Respondent contends it does not hire applicants who come to its home office, this assertion is inconsistent with Connie Edwards' testimony that she posted the applicants' telephone numbers on the refrigerator at her home for Gene Edwards' consideration.

The evidence establishes that Garcia, White, and Roman Ramos were employees within the meaning of the Act as they had a genuine interest in working for Respondent and would have accepted jobs if offered. All three met the standard of the jobs applied for as they had some painting experience and Respondent in fact hired many totally inexperienced painters. The record further shows that Respondent intended to and in fact hired painters at the time the three applied and hired painters with no experience. Respondent's antiunion animus contributed to the decision to exclude the applicants from the hiring process, and Respondent's pretextual defenses are insufficient to meet its burden of showing that it would not have considered the applicants in the absence of their union activities or affiliation. I conclude that Respondent failed to hire or consider for hire Garcia, White, and Roman Ramos in violation of Section 8(a)(3) and (1) of the Act.

[65] The General Counsel concedes that Arturo Ramos would not have accepted a position with Respondent, if offered, as of August 9, when he attempted to apply.

CONCLUSIONS OF LAW

1. Respondent Edwards Painting, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Painters and Allied Trades, District Council 5, affiliated with International Union of Painters and Allied Trades (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Interrogating employees about their union activities or affiliation or the union activities or affiliation of other employees.

(b) Telling employees that it wants to make sure no one it hires will bring up anything having to do with the Union.

(c) Instructing employees not to discuss the Union or engage in union activities, including by telling them, in reference to their union activities, not to cause trouble or problems.

(d) Instructing employees not to hand out union flyers on its jobsites.

(e) Telling employees that support for the union is futile, including by telling them that it is not, and will never be, a union shop.

(f) Threatening employees with layoff, discharge, or job loss because of their union activities, membership, or support, including attendance of union meetings, signing petitions in support of the Union, or selecting the union as their collective bargaining representative.

(g) Threatening to administer drug tests to employees because they concertedly complain about terms and conditions of employment, including employee drug use on the job.

(h) Telling applicants for hire that it does not hire union painters.

(i) Promising employees benefits, including wage increases and future work, if they cease activities in support of the Union.

(j) Ordering off-duty employees who support the Union to leave its property while allowing other off-duty employees to remain on its property.

(k) Threatening to call or calling the police because employees are distributing union literature.

4. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(3) of the Act:

(a) Discharging employees Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn for engaging in union or other protected, concerted activities.

(b) Opposing employee Wyatt McMinn's receipt of unemployment benefits for engaging in union or other protected, concerted activities.

(c) Transferring employees James Oldham and Wyatt McMinn among jobsites to isolate them from other employees for engaging in union or other protected, concerted activities.

(d) Failing to assign work to employees James Oldham, Wy-

att McMinn, and Craig Prinslow for engaging in union or other protected, concerted activities.

(e) Failing to rehire employee Craig Prinslow for engaging in union or other protected, concerted activities.

(f) Granting employees wage increases in order to discourage employees from engaging in union or other protected, concerted activities.

(g) Refusing to hire or refusing to consider for hire applicants Gustavo Garcia, Roben White, and Roman Ramos for engaging in union or other protected, concerted activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[66]

REMEDY

In addition to the ordinary remedies, General Counsel seeks the extraordinary remedy of having the notice read to employees. The Board had held in *Federated Logistics*, 340 NLRB 255, 258 (2003), that when an employer commits pervasive unfair labor practices by high level managers in the context of an organizing campaign, that such conduct will tend to have a chilling effect. To fully remedy these unfair labor practices the Board will order that the notice to employees be read to employees.

Here, Respondent has engaged in numerous egregious unfair labor practices, These include threats of termination, directions to refrain from engaging in union activity and the firing of four employees who included the main union organizers, all in retaliation for the Union's organizing campaign. There can be little doubt that Respondent's conduct has chilled employee support for the Union. Accordingly, I will order that the notice to employees be read to employees in English and Spanish by Respondent and/or by a Board agent in the presence of Respondent, to assure employees of their rights and Respondent's obligations under the Act.

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

The evidence having established that the Respondent discharged its employees Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn, having failed to assign work to Prinslow, Oldham, and McMinn, having opposed McMinn's unemployment benefits, having granted its employees wage benefits, and having failed to consider for hire Gustavo Garcia, Roben White and Roman Ramos, my recommended Order requires the Respondent to make them whole. My recommended Order also requires the Respondent to offer Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn, immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exist, to substantially equivalent positions, without loss of seniority and other privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. My order in addition requires Respondent to offer Gustavo Garcia, Roben White, and Roman Ramos 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. My recommended order further requires that backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharges and any reference to the unlawful refusal to hire issued to the above-named employees, and to notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982). Further, the Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against them in any other way.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. As the Respondent has a large number of employees whose primary language is Spanish, the Respondent shall be required to post the paper notice in both English and Spanish.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

General Counsel also requests that discriminatees be reimbursed for any excess taxes owed as a result of a lump-sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint herein.

In *Don Chavas LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), Board ordered that it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Don Chavas LLC d/b/a Tortillas Don Chavas*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

ORDER

The Respondent, Edwards Painting, Inc., Oregon City, Oregon, its officers, agents, successors, and assigns shall

[66] 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 shall be waived for all purposes.

1. Cease and desist from

(a) Interrogating employees about their union activities or affiliation or the union activities or affiliation of other employees.

(b) Telling employees that it wants to make sure no one it hires will bring up anything having to do with the Union.

(c) Instructing employees not to discuss the Union or engage in union activities, including by telling them, in reference to their union activities, not to cause trouble or problems.

(d) Instructing employees not to hand out union flyers on its jobsites.

(e) Telling employees that support for the Union is futile, including by telling them that it is not, and will never be, a union shop.

(f) Threatening employees with layoff, discharge, or job loss because of their union activities, membership, or support, including attendance of union meetings, signing petitions in support of the Union, or selecting the Union as their collective-bargaining representative.

(g) Threatening to administer drug tests to employees because they concertedly complain about terms and conditions of employment, including employee drug use on the job.

(h) Telling applicants for hire that it does not hire union painters.

(i) Promising employees benefits, including wage increases and future work, if they cease activities in support of the Union.

(j) Ordering off-duty employees who support the Union to leave its property while allowing other off-duty employees to remain on its property.

(k) Threatening to call or calling the police because employees are distributing union literature.

(l) Discharging employees for engaging in union or other protected, concerted activities.

(m) Opposing employees' receipt of unemployment benefits for engaging in union or other protected, concerted activities.

(n) Transferring employees among jobsites to isolate them from other employees for engaging in union or other protected, concerted activities.

(o) Failing to assign work to employees for engaging in union or other protected, concerted activities.

(p) Failing to rehire employees for engaging in union or other protected, concerted activities.

(q) Granting employees wage increases in order to discourage employees from engaging in union or other protected, concerted activities.

(r) Refusing to hire or refusing to consider for hire applicants for engaging in union or other protected, concerted activities.

(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, offer Craig Prinslow, Sean Carter, James Scott Oldham, and Wyatt McMinn full reinstatement to their former positions, or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, notify the Oregon Employment Department that it no longer opposes Wyatt McMinn's receipt of unemployment benefits and withdraw any appeal it has filed to the Oregon Employment Department's determination that Wyatt McMinn is not disqualified from receiving unemployment benefits.

(c) Make Craig Prinslow, Sean Carter, James Scott Oldham, and Wyatt McMinn whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

(d) Make Craig Prinslow whole for any loss of earnings and other benefits suffered as a result of its refusal to rehire him in October 2013, less any net interim earnings, plus interest.

(e) Make James Scott Oldham and Wyatt McMinn whole for any loss of earnings and other benefits suffered as a result of its failure to assign them work in September, October, and November 2013, less any net interim earnings, plus interest.

(f) Compensate Craig Prinslow, Sean Carter, James Scott Oldham, and Wyatt McMinn for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(g) Within 14 days from the date of this Order, remove from its files all references to the discharge of Craig Prinslow about July 30, 2013;the refusal to rehire Prinslow in October 2013; the discharge of Sean Carter about August 30, 2013; the discharge of Sean Carter about October 18, 2013; the failure to assign work to James Scott Oldham in September through November 2013; the failure to assign work to Wyatt McMinn in September through November 2013; the discharge of James Scott Oldham about November 13, 2013; the discharge of Wyatt McMinn about November 13, 2013; and the opposition to Wyatt McMinn's claim for unemployment benefits since about January 2014, and, within 3 days thereafter, notify each of them in writing that this has been done and that those actions will not be used against them in any way.

(h) Within 14 days from the date of this Order, offer Gustavo Garcia, Roben White, and Roman Ramos 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 they would have enjoyed had Gustavo Garcia and Roben White been hired on August 8, 2013, and had Roman Ramos been hired on August 9, 2013.

(i) Make Gustavo Garcia, Roben White, and Roman Ramos whole for any loss of earnings and other benefits suffered as a result of the refusal to hire them, less any net interim earnings, plus interest.

(j) Compensate Gustavo Garcia, Roben White, and Roman Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(k) Within 14 days from the date of this Order, remove from its files any reference to the refusal to hire Gustavo Garcia, Roben White, and Roman Ramos, and, within 3 days thereafter, notify each of them in writing that this has been done and that this action will not be used against them in any way.

(l) Consider Arturo Ramos for hire for the position for which

he applied, or, if that position no longer exists, for a substantially equivalent position, in the event that he applies for such a position in the future.

(m) 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.

(n) Within 14 days after service by the Region, post at its Oregon City, Oregon facility, copies of the attached notice marked "Appendix."[67] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 June 7, 2013.

(o) Within 14 days after service by the Region, hold a meeting or meetings, during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read in English and Spanish to the employees assembled for this purpose, by Gene Edwards or another responsible official of the Respondent in the presence of a Board agent, and/or by a Board agent in the presence of Gene, Connie, Grant, and Bob Edwards.

(p) Within 21 days after service by the Region, filed with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. September 26, 2014

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 ask you about your union activities or membership or the union activities or membership of other employees.

WE WILL NOT tell you that we want to make sure no one we hire brings up anything that has to do with International Union of Painters and Allied Trades, District Council 5, affiliated the International Union of Painters and Allied Trades (the "Union").

WE WILL NOT tell you not to discuss the Union or engage in union activities, including by telling you, in reference to your union activities, not to cause trouble or problems.

WE WILL NOT tell you not to hand out union flyers on our jobsites.

WE WILL NOT tell you that your support for the Union is pointless, including by telling you that we will not, and will never be, a union shop.

WE WILL NOT threaten you with layoff, discharge, or job loss because of your union activities, membership, or support, including attendance of union meetings, signing petitions in support of the Union, or selecting the Union as your collective-bargaining representative.

WE WILL NOT threaten to drug test you because you concertedly complain about your terms and conditions of employment, including employee drug use on the job.

WE WILL NOT tell applicants for hire that we do not hire union painters.

WE WILL NOT promise you benefits, including wage increases and future work, to discourage you from supporting the Union.

WE WILL NOT order you to leave our property because you support the Union while allowing employees who do not support the Union to remain on our property.

WE WILL NOT threaten to call or call the police because you are distributing union flyers.

WE WILL NOT fire you because of your union membership or support or because you act together with other employees for your benefit and protection.

WE WILL NOT oppose your receipt of unemployment benefits because of your union membership or support.

WE WILL NOT refuse to rehire you because of your union membership or support.

WE WILL NOT give you wage increases in order to discourage you from supporting a union.

WE WILL NOT refuse to hire you or refuse to consider you for hire because of your union membership or support.

WE WILL NOT in any like or related manner interfere with

[67] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

your rights under Section 7 of the Act.

WE WILL offer Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn their jobs back along with their seniority and all other rights or privileges.

WE WILL notify the Oregon Employment Department that we no longer oppose Wyatt McMinn's receipt of unemployment benefits and withdraw any appeal we have filed to the Oregon Employment Department's determination that Wyatt McMinn is not disqualified from receiving unemployment benefits.

WE WILL pay Craig Prinslow, Sean Carter, James Oldham and Wyatt McMinn for the wages and other benefits they lost because we fired them.

WE WILL pay Craig Prinslow for the wages and other benefits he lost because we refused to rehire him.

WE WILL pay James Scott Oldham and Wyatt McMinn for the wages and other benefits they lost because we failed to assign them work.

WE WILL compensate Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay for Craig Prinslow, Sean Carter, James Oldham and Wyatt McMinn to the appropriate quarters.

WE WILL remove from our files all references to the discharge of Craig Prinslow, Sean Carter, James Oldham, and Wyatt McMinn, the opposition to Wyatt McMinn's unemployment claim, the refusal to rehire Craig Prinslow, and the failure to assign work to James Scott Oldham and Wyatt McMinn, and WE WILL notify them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL offer to Gustavo Garcia, Roben White, and Roman Ramos the jobs they applied for, or similar jobs, and give them their seniority and other benefits from the date they should have been hired.

WE WILL pay Gustavo Garcia, Roben White, and Roman Ramos for the wages and other benefits they lost because we failed to hire them.

WE WILL compensate Gustavo Garcia, Roben White, and Roman Ramos for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay for Gustavo Garcia, Roben White, and Roman Ramos to the appropriate quarters.

WE WILL remove from our files all references to the failure to hire Gustavo Garcia, Roben White and Roman Ramos and WE WILL notify them in writing that this has been done and that the failure to hire them will not be used against them in any way.

WE WILL consider Arturo Ramos for hire for the job he applied for, or a similar job, if he applies for such a job in the future.

EDWARDS PAINTING, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-116399 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.