STATE OF MICHIGAN
SUPREME COURT

Defendants-Appellants' appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder
Per Curiam

ANTHONY HENRY and KEITH WHITE,

Plaintiffs-Appellees,

- v -

LABORERS' LOCAL 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON,

Defendants-Appellants,
and

BRUCE RUEDISUELI,

Defendant,
AND

MICHAEL RAMSEY and GLENN DOWDY,

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- v -

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Supreme Court No. 145631

Court of Appeals No. 302373

Wayne County Circuit Court
No. 10 000384 CD

Wayne County Circuit Court
Hon. Jeanne Stempien

DEFENDANTS-APPELLANTS' REPLY BRIEF ON APPEAL TO PLAINTIFFS-APPELLEES RAMSEY'S AND DOWDY'S APPEAL BRIEF

ORAL ARGUMENT REQUESTED

Supreme Court No. 145632

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No. 10 004708 CD

Wayne County Circuit Court
Honorable Jeanine Stempien

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ARGUMENT

I. PLAINTIFFS' WPA CLAIMS ARE PRE-EMPTED BY THE NLRA

Plaintiffs' Complaint alleges conduct that falls squarely within "protected concerted activity" under the National Labor Relations Act (NLRA).

Plaintiffs allege that in the fall of 2009 Anthony Henry and Keith White discovered "what appeared to be illegal conduct by the individual Defendants." This suspected illegal activity included Local 1191 members performing work at the TULC facility "without proper clothing or fall protection and without union wages"; "without protective clothing as required by law" and without pay at "the appropriate pay rate/scale." (15a). Plaintiffs further allege that Anthony Henry and Keith White reported this suspected illegal activity to the DOL; that the DOL interviewed Plaintiffs as part of its investigation and that Plaintiffs were terminated "in retaliation for reporting" the suspected illegal activity. (15a-18a).

These allegations unquestionably relate to work performed in the context of employment. This is shown by Plaintiffs' use of the term "wages," which means a fixed payment, "typically paid on a daily or weekly basis, ***made by an employer to an employee***, especially to a manual or unskilled worker." *Oxford On-Line Dictionary,* emphasis added. It is also shown by page 87 of Plaintiff Ramsey's March 3, 2011 deposition testimony that the term "union wages," as used in the Complaint, refers to the pay scale (about $24/hr.) of a collective bargaining agreement (CBA) between the Laborers' Union and Associated General Contractors (AGC). A CBA, of course, sets forth wages and benefits of bargaining unit *employees*.

Defendants' First Set of Interrogatories asks Plaintiffs to identify all state or federal laws that required the use of protective clothing for the TULC work as alleged in the Complaint. Plaintiffs cite numerous MIOSHA and OSHA regulations which pertain to employment (emphasis added):

- 29 CFR 1926.28 ("The ***employer*** is responsible for requiring the wearing of appropriate personal protective equipment ....").
- 29 CFR 1910.132(a)-(c) (regulation which, *inter alia*, makes the "***employer***" responsible where "***employees*** provide their own equipment").
- 29 CFR 1910.133 (stating that "the ***employer*** shall ensure" eye and face protection).
- 29 CFR 1910.135 (stating that "the ***employer*** shall ensure" the use of protective helmets).
- 29 CFR 1926.100(a) ("***Employees*** working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, . . .shall be protected by protective helmets.")
- 24 CFR 1926.102(a) ("***Employees*** shall be provided with eye and face protection . . .")
- 29 CFR 1926.104 (pertaining to lifelines, safety belts and lanyards used for safeguarding "***employees***").
- MOISHA R 408.13384 and 13385 ("An ***employer*** shall ensure that each affected ***employee*** shall wear protective footwear...").
- MIOSHA R. 408.13370 ("An ***employer*** shall ensure that each affected ***employee*** shall be provided with, and shall wear head protection and accessories . . .").
- MIOSHA R 408.13375 (designating the various protective helmets to be furnished by the "***employer***").
- MIOSHA R 408.13390 (relating to belts, harnesses, lifelines and lanyards to be provided to safeguard the "***employee***").

In an abrupt about-face, Plaintiffs' brief to this Court repeatedly refers to the union members working at TULC as "volunteers" and argues that there is no NLRA

preemption because rights guaranteed under Sections 7 and 8 of that Act "only apply to 'employees,' not volunteers." Plaintiffs' brief at 37. Remarkably, after more than three years of litigation, Plaintiffs now characterize union members who worked on the TULC as volunteers.

Plaintiffs' hasty retreat before this Court does not change the nature of their claims or federal preemption of their claims. Federal preemption depends on whether Plaintiffs' claims are arguably covered by the NLRA. See *Calabrese v Tendercase of Michigan, Inc.,* 262 Mich. App. 256, 264 (2004) (finding NLRA preemption because "*plaintiff's allegations* ... arguably fall within the NLRB's jurisdiction"); *Radzikowski v BASF Corp.*, 2004 WL 2881814 (Mich. App.) (finding NLRA preemption because "*plaintiff's claim* concerns alleged activity by defendant that is at least arguably prohibited by the NLRA . . . "). Emphasis added. Because Plaintiffs allege that they were fired for complaining to the DOL that TULC workers were not paid union wages or afforded safety protections applicable to employees, their WPA claims are preempted by the NLRA.

Plaintiffs observe that *Defendants* have characterized the TULC workers as volunteers. Plaintiffs' brief at 38. But, this is irrelevant. Preemption depends on *Plaintiffs' claims*, not the positions taken by *Defendants* in defense of those claims.

In claiming that TULC workers fall outside of the NLRA's definition of "employees," Plaintiffs cite *WBAI Pacifica Foundation,* 328 NLRB No. 179 (1999). But, *WBAI Pacifica Foundation* applies only when there is no economic aspect to the relationship. That decision was deemed inapposite to persons who were paid $214 in expense money (regardless of expenses actually incurred) for their "volunteer" work.

Seattle Opera Ass'n, 331 NLRB No. 148, 165 LRRM 1273 (2000). So, even if union members agreed to work at TULC on a voluntary basis, this alone would not deprive them of protection under the NLRA. Just as importantly, Plaintiffs who were admittedly employees of Local 1191 as defined in the NLRA, claim that they acted in concert to demand that TULC workers be treated as employees. Under these circumstances, Plaintiffs' claim that their alleged retaliatory discharge falls outside of the NLRB's arguable jurisdiction must be rejected.

Plaintiffs argue that the lack of "proper clothing, safety or wages" is not what prompted the DOL Complaint. Plaintiffs' brief at 35. Rather, Plaintiffs now urge, the alleged "kickback scheme" is what was reported to and investigated by the DOL. *Id.* (This is the "scheme" whereby Plaintiffs alleged, falsely and without any facts, that the notation of "picket line" duty on expense checks somehow suggested that Defendant Aaron was receiving "kickbacks").[1]

This attempt to downplay Plaintiffs' claims regarding the failure to pay union wages, or provide protective clothing or fall protection, is inconsistent with the record. It is inconsistent with Plaintiffs' Complaint which describes the suspected illegal activity reported to the DOL as the failure to pay union wages or provide protective clothing or fall protection. It is contrary to Plaintiffs' sworn interrogatory answers which cite the suspected illegal activity as the violation of OSHA and MIOSHA regulations concerning employee safety. And, Plaintiff Ramsey testified that his meeting with the DOL concerned "the way these individuals were paid" and the issue of "protective clothing."

[1] Members working at TULC received an amount equal to members serving on picket line duty. The portrayal of the notation on checks as sinister and evidence of "kickbacks" or "embezzlement" is ludicrous. Defendant Aaron never received "kickbacks" or committed "embezzlement" and thus the record is completely devoid of any evidence of such wrongdoing and the DOL ended its investigation without any finding of wrongdoing,.

See page 51 of Ramsey's March 3, 2011 deposition transcript. Plaintiff Anthony Henry similarly testified as follows at pages 162-163 of his March 25, 2010 deposition (parenthetical material and emphasis added):

> Q. And did you meet with the U.S. Department of Labor on the 16th (i.e., September 16, 2009 when he filmed the TULC work).
>
> A. No, I didn't.
>
> Q. When did you meet with them?
>
> A. Probably two days later.
>
> Q. You mean after you had already talked to the Michigan Department of Labor?
>
> A. Yes.
>
> Q. So when you said you were referred back, you had never gone to the U.S. Department of Labor?
>
> A. Yes, I had gone to report - - to report this, and that was - -
>
> Q. Report what?
>
> A. ***To report the unsafety*** and everything.

Plaintiffs claim that a DVD of the TULC work, which was secretly filmed by Anthony Henry, was given to the DOL. See pages 178-179 of Plaintiff Henry's March 25, 2010 deposition. Obviously, this DVD sheds no light on alleged kickbacks, and its only purpose was to provide visual support for Plaintiffs' claims regarding the lack of protective clothing and fall protection. Plaintiffs Henry and White confirm this on page 3 of their brief in support of their motion to file their FAC: "Plaintiffs met with Mr.

Cummings (a DOL agent) and ***provided the DOL with . . . a DVD showing workers without proper clothing or protective gear***." Emphasis added.

In their futile effort to avoid NLRA preemption, Plaintiffs assert that their "retaliatory discharge for their reports of suspected illegal activity to the DOL was not and could not have been presented to the NLRB." Plaintiffs' brief at 35. This is false.

Participation in a DOL investigation regarding wages and working conditions is protected concerted activity under the NLRA. *Romar Refuse Removal, Inc.,* 314 NLRB No. 107, 147 LRRM 1182 (1994) (the employees' participation in a "DOL proceeding is independently concerted activity, even apart from the fact that the Union was also involved in the employees actions"; requiring posting in which the employer represented that it would not retaliate for participating in a DOL proceeding); *Louis Arndt d/b/a Cristy Janitorial Service,* 271 NLRB No. 136, 117 LRRM 1028 (1984) ("We agree with the judge's finding that employee Gretchen Stevens was engaged in protected concerted activity when she and other employees complained about their wages to the Wage-Hour Division of the United States Department of Labor."); *Lederach Elec., Inc.,* 2011 WL 2960879 (NLRB Div. of Judges) (employer violated §8(a)(1) of NLRA by discharging employee in retaliation for engaging in protected concerted activity consisting of a complaint to the Pennsylvania DOL); *Salisbury Hotel*, 283 NLRB No. 101, 125 LRRM 1020 (1987). ("We also find Resnick's call to the Department of Labor" to be protected concerted activity).

In a verbal sleight of hand, Plaintiffs cite case law holding that §8(a)(4) of the NLRA, which prohibits discrimination against an employee who has filed charges or given testimony under "this subchapter," applies only to testimony or charges made to

the NLRB. Plaintiffs' brief at 39. Plaintiffs then argue that, because §8(a)(4) protects only employees who testify before the *NLRB*, Plaintiffs' claim of retaliation for participating in a *DOL* investigation is not preempted. Plaintiffs' brief at 39-40. But, Plaintiffs' argument lacks merit. As shown by the above cases, retaliation for participation in a DOL investigation involving wages or working conditions interferes with an employee's §7 right to engage in protected concerted activity and thus violates §8(a)(1) of the NLRA.

Plaintiffs cannot avoid NLRA preemption by emphasizing their bogus claim of embezzlement and kickbacks. Plaintiffs' WPA claim is based on their discharge following a single DOL complaint involving the TULC work. Plaintiffs admittedly complained to the DOL that Defendants failed to provide the TULC workers with union wages and protective clothing applicable to employees. Because Plaintiffs' WPA claim is based on alleged retaliatory discharges for reporting suspected wage and safety violations, the claim is arguably covered by the NLRA and is therefore preempted by that Act.

II. PLAINTIFFS' WPA CLAIMS ARE PRE-EMPTED BY THE LMRDA

The LMRDA specifically requires a union to adopt a constitution and bylaws. Among other things, the union constitution is to contain provisions regarding union officers and other representatives. 29 U.S.C. § 431.

Here, the union constitution specifically gives the elected Business Manager explicit authority to discharge business agents (referred to as field representatives in the union constitution). The union constitution states:

> The Business Manager shall be in charge of, direct and supervise the activities of Field Representatives and

> Organizers. *The Business Manager shall have the authority to discharge Field Representatives and Organizers.*

(1036a, emphasis added)

The "overriding objective" of the LMRDA, 29 U.S.C. § 401 *et. seq.*, is to "ensure that unions would be democratically governed and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan v Leu,* 456 U.S. 431, 441 (1982). "[T]he ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.*

Plaintiffs' lawsuits are contrary to the LMRDA. They seek to deprive Local 1191's elected Business Manager, Michael Aaron, of his right, under the union constitution, adopted pursuant to the LMRDA, to discharge appointed Business Agents. In contravention of the LMRDA, and the duly-adopted union constitution, Plaintiffs' lawsuits seek to force Business Manager Aaron to retain appointed Business Agents despite their opposition to his policies and their political campaign to defeat him in a union election. Plaintiffs' lawsuits are classic examples of an effort to use state law claims in a manner that conflicts with the "overriding objective" of the LMRDA.

Plaintiffs erroneously cite *Ardingo v Local 951, United Food and Commercial Workers Union,* 333 Fed. Appx. 929 (6th Cir. 2009). In *Ardingo,* the district court dismissed all but one of plaintiff's claims (including the claim for discharge in violation of public policy) on the grounds of LMRDA preemption. Only plaintiff's claim of discharge in violation of the union's just cause policy survived preemption. The Court held that, when the union itself has adopted a just cause policy, the LMRDA poses no obstacle to a claim seeking to enforce that policy.

Packowski v United Food and Commerical Workers Local 951, 289 Mich. App. 132 (2010) rejected this holding of *Ardingo*. But, even if this Court agrees with *Ardingo*, LMRDA preemption exists here. In contrast to the just cause policy adopted by the union in *Ardingo*, Local 1191 has a union constitution which provides that Business Agents serve at the will of the Business Manager. Plaintiffs even signed letters recognizing that the Business Manager could remove them at any time. Plaintiffs' state law claim under the WPA would thwart Defendant Aaron's exercise of his rights under a union constitution (the right to discharge Business Agents) adopted pursuant to the LMRDA.

III. FEDERAL PREEMPTION WOULD NOT IMMUNIZE UNIONS FROM WPA CLAIMS

Plaintiffs argue that, if the Court adopts Defendants' argument, labor unions would effectively be unaccountable in a state court for violating a Michigan citizen's WPA civil rights and that persons engaged in criminal activity would be further insulated. Plaintiffs' brief at 47. This hyperbole is nonsense.

If this Court recognizes that Plaintiffs' claims are preempted by federal law, employees of all employers could invoke the WPA in a wide range of circumstances. An employee could pursue a WPA claim based on adverse employment action for reporting suspected violations of law completely unrelated to the NLRA and LMRDA, such as forgery, perjury, failure to pay taxes, insurance fraud, extortion, etc. Moreover, as a remedy exists under the NLRA for discharges in retaliation for protected concerted activity, the absence of a WPA claim would not leave the employee without a remedy.

In the absence of federal preemption, an employer sued for an alleged retaliatory discharge based on a report concerning wages, hours or working conditions may face a

jury trial and WPA's statutorily-created damage claims (such as emotional distress damages) that are unavailable at the NLRB. But, because federal preemption exists, the available remedy for such a claim is limited to that permitted under federal law.

CONCLUSION

For the reasons stated in their appeal brief and this reply brief, this Court could find that Plaintiffs' WPA claims are preempted by the NLRA and LMRDA.

Respectfully submitted,

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Dated: August 2, 2013

UNPUBLISHED DECISIONS

2011 WL 2960879 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges

LEDERACH ELECTRIC, INC
AND
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 380

Case 4-CA-37725
JD-37-11
Lederach, PA

July 21, 2011

Henry R. Protas, Esq., of Philadelphia, Pennsylvania, for the Acting General Counsel.

Robert Krandel, Esq., of Blue Bell, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on May 23 and 24, 2011. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by making threatening and coercive statements to employees; and Section 8(a)(3) and (1) of the Act by switching the work assignment of an employee and by discharging four employees because of their union activity. The discharges are also separately alleged as violations of Section 8(a)(1) because they were based on employee complaints with the Pennsylvania Department of Labor and Industry about improper deductions from their pay, a separate protected activity. The Respondent filed an answer denying the essential allegations in the complaint. [FN1]

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in the case, including the testimony of the witnesses, and my observation of their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Pennsylvania corporation with a facility in Lederach, Pennsylvania, is engaged as an electrical contractor in the construction industry. During the past year, Respondent purchased and received goods valued in excess of $50,000 from suppliers in Pennsylvania, who obtained those supplies directly from sources outside Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(5) of the Act.

Respondent also admits that the Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

Background

James Lederach is the president and the sole stockowner of Respondent. His wife, Judy, was, until

October 2010, the corporate secretary and office manager of Respondent. The hierarchy of Respondent, after President Lederach, is as follows: Two salaried project managers, Darren Moyer and Frank Slover, both of whom are President Lederach's sons-in-law. In addition, Respondent employs hourly-paid job foremen, who, according to Lederach, are "under the project managers and they run the job on the job." Tr. 11. During the relevant time period covered by this case, roughly from April through October 2010, Respondent had a total of 18 employees, which includes the foremen, but not the project managers. Tr. 12.

Frank Slover's Status as Supervisor and Agent

Respondent took the position in its answer, during the hearing, and even in its brief, that Project Manager Slover, President Lederach's son-in-law, was not a supervisor or agent of Respondent. I find, contrary to Respondent's position, that Slover was both a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Slover was one of only two salaried project managers, who represented President Lederach in job meetings with general contractors. Tr. 36. Slover thereafter directed job foremen "how to execute the work." Tr. 233. And they had to follow his directions. Tr. 169. Slover thus had the authority to make job assignments and move employees from one job to another, utilizing his experience and judgment. Tr. 14-15, 34-36, 167-168, 243-244. He had authority to remove an employee from a job because of productivity problems or misconduct. Tr. 14-15, 167. Slover admitted he "disciplined" an employee for failing to follow appropriate dress policies. Tr. 237. If employees did not follow his directives on dress policies, he would send them home. Tr. 243. And he had this authority without having to consult President Lederach beforehand. Tr. 167. President Lederach also admitted that, if one of his project managers recommended suspensions of employees, he followed their recommendations a "majority of the time, because they used their "best judgment" in making those recommendations. Tr. 35. In addition, as set forth in more detail below, Slover was specifically involved in and in charge of one of Respondent's major projects during the timeframe covered in this case. He dealt with employee Chris Breen's personnel problems and specifically assigned him to perform trench work on that job, after learning that Breen was a union member. Slover thereafter met with a representative of the Union in connection with resolving unfair labor practice charges filed against Respondent. And he held an employee meeting where he required employees to sign acknowledgements that they had received copies of Respondent's Company policy.

The above clearly demonstrates that Slover had the authority, in the interest of Respondent, to responsibly direct the work of employees, assign them work, discipline them by sending them home and directing them to follow Company or job policies, all utilizing independent judgment. He also had the authority to effectively recommend suspending employees, again utilizing independent judgment. Thus, he possessed several of the indicia of supervisory status set forth in Section 2(11), even though possession of only one is enough to establish supervisory status. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); and *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

Even apart from Slover's supervisory position, the evidence clearly shows that he was an agent of the Respondent. He had both actual and apparent authority to speak for Respondent. He represented Respondent at meetings with general contractors with respect to the rules and direction of a particular job, and he transmitted those rules and directives to Respondent's job foremen, who, in turn, transmitted those rules and directives to rank-and-file employees. The foremen had to follow Slover's directives. Moreover, it is clear on this record that President Lederach placed Slover in a position of authority, as project manager, in a way that made it clear to employees and others that Slover was speaking for Re-

spondent. Not only was he sent to represent Respondent at job meetings with general contractors, but, as shown in greater detail later in this decision, he spoke for Respondent when meeting with a representative of the Union about resolving unfair labor practice charges and when meeting with employees about following Company policy. In these circumstances, there can be no doubt that Slover was an agent of Respondent. See *Wal-Mart Stores*, 350 NLRB 879, 884 (2007); and *Pan-Oston Co.*, 336 NLRB 305, 306 (2001).

Respondent's Relationship with the Union

Respondent calls itself a nonunion employer. About 85 percent of its work involves Federal, State or local government projects that require the payment of prevailing wages and benefits for employees. On those jobs at least, Respondent often competes with union employers. Tr. 21. During the relevant time period, Respondent had major work at two elementary schools in Montgomery County, both prevailing rate jobs. The General Nash elementary school was a renovation project and the Glenside school involved construction of a new building.

The Union has attempted to have Respondent either recognize the Union or use its members since at least 2005, when Union Business Representative Francis (Fran) Clark went to Respondent's office and spoke with President Lederach. At that time, Lederach declined to use union members. Clark testified that he thereafter reported violations by Respondent of State prevailing wage laws to the Pennsylvania Department of Labor and Industry. Although Respondent has, in the past, been investigated for alleged prevailing wage violations by the Department, it appears that those matters resulted in amicable settlements. One such settlement, dated March 13, 2007, was entered into the record as an exhibit in this case. GC Exh. 4.

Respondent Hires Employee Chris Breen and Later Learns He is a Union Member; the Union Files Unfair Labor Practice Charges and Withdraws Them After More Union Members Are Hired

In March 2010, Clark learned that Lederach had obtained some prevailing wage jobs, probably the Montgomery County school projects mentioned above. He once again made an effort to speak to Lederach about using union members on those jobs. When Clark raised the matter in another visit to Lederach's office, Lederach rejected Clark's offer. He replied, according to Clark, "you've cost me enough money already," and asked Clark to leave the premises. Tr. 49-50. Thereafter, Clark decided to send unemployed union members to apply for work at Respondent. He directed that they not hide their union status. They were refused employment.

In the meantime, Respondent had hired Chris Breen, a union member from one of the Union's sister locals (Local 670 in Trenton, New Jersey). Breen, who began work on June 9, 2010, had not revealed his union membership to Respondent before he was hired. When Clark learned that Breen had been hired, he filed charges alleging that Respondent's failure to hire the union members he had referred to Respondent was discriminatory. An initial charge was filed on June 29, 2010, and an amended charge, adding more alleged discriminatees, was filed on July 19, 2010. GC Exhs. 6, 7.

Breen worked primarily at the Glenside school project. From sometime in early June 2010, when Breen began working at Glenside, until October 2010, when he was laid off, Respondent's work force on that project increased from about 6 or 7 employees to about 15 employees. Tr. 76-78.

On Friday, July 26, Breen was asked by Respondent to sign a document indicating he was unemployed when he was hired. The purpose of the document was to provide a tax subsidy to the employer in connection

with hiring the unemployed. Breen, however, did not understand the purpose of the document; and, while he was in the job trailer office at Glenside, he called Union Representative Clark on his cell phone to ask Clark's advice. Clark advised not signing the document unless Breen understood it. Breen then turned the phone over to Project Manager Slover, who spoke briefly to Clark. In that conversation, Clark identified himself as a union representative. Later that same day, Slover asked Breen to come to the job trailer and again asked Breen to sign the unemployment document. Breen declined because he said he still did not understand the document. Tr. 80-83. Slover then called President Lederach, and, during a part of their conversation overheard by Breen, Slover stated, "Well, we're not discriminating anymore. We have a Union employee now working for us." Tr. 83. Breen's testimony about the telephone conversation between Slover and Lederach was uncontradicted.

Still later that day, Slover told Breen he was quite surprised to learn that Breen had called Clark. Tr. 86. It is unclear whether Breen ever signed the unemployment form; nor did Respondent thereafter make an issue of his failure to sign it. Breen, however, insisted that he was unemployed when he was hired by Respondent, and, despite an effort by Respondent to show otherwise at the hearing, there is no record evidence to dispute Breen's testimony on this point.

Immediately after the conversation between Slover and Lederach in Breen's presence on July 26, Slover directed Breen to perform a different job task. He told Breen to work in a conduit trench outside the school building with another employee and an excavator. Before he was reassigned, Breen had been working above ground in the building itself. Indeed, he had been performing inside work not only earlier that day but for the entire time he had been on the Glenside job. Tr. 83-86. Trench work of this sort is a much more unpleasant task. Tr. 84. Breen remained on the trench assignment for about 3 days. Tr. 86. [FN2]

On July 27, the day after learning of Breen's union status, Slover again called Breen into the job trailer and asked if he was there to "sabotage" the job. Breen assured him that was not the case. Tr. 87, 101. Slover also asked Breen whether the unfair labor practice charges filed against Respondent could be dropped. Breen said he was not in a position to negotiate that issue. Tr. 87-88. The next day, Slover again talked to Breen. He asked how Respondent's employees could be integrated into the Union. Breen simply provided Slover with Union Representative Clark's phone number. Tr. 88. [FN3]

On August 2 or 3, Clark met with Slover and Project Manager Moyer at a coffee shop in the area. They discussed resolution of the unfair labor practices charges filed by the Union against Respondent. As a result of this meeting, on August 9, Respondent hired four union members Clark had referred to Respondent earlier in the year. Tr. 56-57. Thereafter, the Union withdrew its unfair labor practice charges. GC Exh. 8. [FN4]

The four new hires--Jeff Wallace, Chris Rocus, Cameron Troxel and Chad Scofield--were placed on Respondent's General Nash school renovation project. Wallace, Rocus and Troxel were members of the Union. Scofield was a member of a sister local, but he had also been referred to Respondent by Clark. Tr. 58.

The Layoffs of Wallace, Troxel and Rocus from the General Nash Job

On August 31, Respondent laid off Scofield for work-related reasons. There is no allegation that that layoff was violative of the Act. However, after Scofield was laid off, on the same day, Lederach spoke to the other union members on the General Nash job. He told them about Scofield's layoff, but he told them that he had no intention of laying them off if they did good work. Tr. 122, 135. Lederach also mentioned that there would be more work starting soon and he

needed more manpower. Tr. 157-158. The above is based on the uncontradicted testimony of employees Wallace and Rocus since Lederach did not testify about this conversation.

Also on August 31, Scofield, Wallace, Troxel and Rocus signed separate complaint forms with the Pennsylvania Department of Labor and Industry alleging a prevailing rate violation on the part of Respondent. On the same day or the next day, Union Representative Clark faxed the completed forms to the Department of Labor and Industry. The employees had earlier discussed among themselves problems they had with not being paid time and a half for overtime and having health and fringe benefits withheld from their pay, allegedly in violation of the prevailing wage provisions applicable to the General Nash job. They also brought the issue to the attention of Union Representative Clark. Tr. 119, 132-133. The employees had $4 per hour withheld from their pay, allegedly for fringe benefits that were required to be paid to employees under prevailing wage rules. Those benefits included such matters as health insurance, sick and vacation pay. Respondent withheld that amount from employee paychecks. The union members had health care through the Union. Troxel testified that, after he received his first paycheck, he called President Lederach and told him that he did not want to participate in Respondent's fringe benefit package because he was already covered. Lederach replied that he had no choice in the matter and had to withhold that amount from the paychecks. Tr. 140-141.

Lederach did not specifically deny having the above conversation with Troxel. He testified that he told all the applicants, presumably the union members hired in August, that Respondent was withholding deductions for health insurance, vacation, holidays, and apprentice training and that that was somehow allowed under the prevailing wage laws. Tr. 182. He also testified that, at some point, after the complaints were filed, the employees came to him and said they were not being paid properly. Tr. 182-183.

In early September, after Clark had faxed the complaints to the Pennsylvania Department of Labor and Industry, he had occasion to call Slover on the telephone. In that conversation, Slover told Clark that the union employees should have come to him before filing the complaints. When Clark said he said he just left it up to the State to decide whether there were prevailing wage violations, Slover reacted angrily, stating, "we're going to come out swinging." Tr. 61-63. [FN5]

Also at about this time, on about September 2, Slover called a meeting of employees on the General Nash job. He presented them with a document entitled "Company Policy," and had the employees acknowledge receipt of that document by affixing their signature to an acknowledgement form. The document set forth certain of Respondent's rules and benefits, including the statement that health insurance coverage started after 6 months of employment. GC Exh. 2, Tr. 143, 123-125, 160. Later that day, according to the credible testimony of Troxel, Slover told him that the union employees had "stabbed him in the back by going over his head with this paperwork." Tr. 143. Troxel replied that he had spoken to Lederach about the "deductions" and that Lederach had informed him that he had no choice but to make them. Tr. 144. Slover responded that Troxel should have come to him and not Lederach about the deductions. Although there is not absolute clarity in Troxel's initial testimony, it is clear that, in context, the "paperwork" he mentioned referred to the deductions from his paycheck that he had earlier discussed with Lederach and that formed the basis of his complaint, and that of the other union members, with the Department of Labor and Industry. Troxel reaffirmed his initial testimony on crossexamination and further confirmed it by reference to his pretrial affidavit, which Troxel read into the record and adopted as a truthful account of his conversation with Slover. Tr. 147-149. Indeed Troxel's affidavit testimony not only clarifies his earlier testimony, but more sharply illustrates Respond-

ent's knowledge of the complaints and its concern over them. In the affidavit, Troxel stated that Slover told him that he had the employees acknowledge that they had received the Company policy statement "because of complaints concerning monies being deducted from paychecks . . . . He said he was pissed off and asked me why did you go to Fran Clark instead of me." Tr. 147-148. [FN6]

On September 9, President Lederach laid off employees Wallace, Troxel and Rocus. These were the only employees laid off at that time; the remaining employees on the General Nash job were transferred to the Glenside job. The three laid-off employees testified that Lederach laid them off in separate conversations at the General Nash jobsite. According to Wallace, Lederach told him that he was going to lay him off along with Troxel and Rocus because the job was winding down and he had no other work for them. When Wallace asked whether Lederach liked their work, Lederach got angry and said, "you guys were just here to fuck with me. You're trying to organize my company . . . and that's not going to happen." Tr. 131. When Wallace asked about being rehired, Lederach replied he would not hire Wallace if he knew Wallace "was Union." Tr. 131. Troxel testified that when Lederach laid him off, Lederach referred to him and his "union buddies"; and when he mentioned possibly going to the Glenside job, Lederach said, "[g]o ahead and file more charges, see if I care." Tr. 146. Rocus did not testify that Lederach made any specific statements about the Union in their September 9 conversation. Tr. 161-162.

Lederach did not specifically contradict Troxel's testimony about what was said in their September 9 conversation. He testified he did not "recall" using the F word with Wallace (Tr. 191), or telling any of the employees, when he laid them off, that they were trying to organize him and he was not going to put up with that. Tr. 192. He made no distinctions concerning individual conversations and testified that he told all the employees, "[I]f I would ever call you back and you would want to work for me rather than the Union, I would take you." Tr. 192. He further testified that this was the only comment he recalled making to the employees because he had no problems with their work. Tr. 192.

I credit the testimony of Troxel and Wallace that Lederach made the statements that were attributed to him when Lederach laid them off on September 9. They appeared to be candid witnesses, whose testimony was firm and not shaken on crossexamination. Lederach, on the other hand, testified mostly that he could not recall what was said in the conversations at issue. What he did testify about was, however, corroborative of Troxel and Wallace on some critical aspects of their testimony, namely, that there was some discussion of the Union and the possibilities of rehire. Indeed, Lederach's testimony that he would call the employees back if they wanted to work for him rather than the Union not only corroborates the testimony of Troxel and Wallace, but also bears directly on Lederach's motivation for the layoffs.

After Wallace, Troxel and Rocus were laid off, they received a separate reimbursement check from Respondent purportedly covering the roughly $4 per hour fringe benefit amount that was withheld from their pay during their period of employment (Tr. 125-127, 163-164, 202-203, GC Exh. 14). At the same time, Breen, who was still employed, also received a similar reimbursement check. Tr. 202-203, 94. [FN7]

The Layoff of Breen from the Glenside job

After Respondent discovered that Breen was a union member, Slover, who was the project manager on the Glenside job, made references to his union status. As indicated above, Slover assigned Breen more onerous trench duties and asked Breen whether he was sent to "sabotage" Respondent's operation. On July 29, Breen was wearing a short-sleeved T-shirt with a union emblem on the back. Slover asked Breen to do him a

favor and not wear the union shirt on the job because he did not want trouble from the general contractor. Breen said that was not a problem. According to Breen, "[I] took it upon myself, I turned my shirt inside out, and not upon Frank's request, and that's how I worked the rest of the day." Tr. 89. Slover later told Breen he did not "have to do that," but Breen said it was his "choice." Tr. 89. [FN8] It appears that, even after this conversation, however, Breen wore union insignia on the job. On another occasion, on August 17, Breen was permitted to leave early because of heat exhaustion. The next day, when he returned to work and explained his absence to Slover, the latter commented that he thought Breen had "Unionitis." Tr. 90. [FN9]

In early September, at about the same time that Respondent laid off union members from the General Nash job and transferred the remaining employees on that job to the Glenside job, where Breen was working, Breen himself was told not to report for work for several days. On September 8, Slover approached Breen and told him that he was "done playing games" with Union Representative Clark and had nothing more to say. Tr. 92. The next day, Slover told Breen he should take a couple of days off. He did and he returned to work on the Glenside job on September 16. Tr. 92-94. The above is based on Breen's uncontradicted testimony. Slover did not testify about either the conversation of September 8 or telling Breen to take a couple of days off in early September.

On October 7, before the end of the workday, Slover approached Breen and said he was being laid off. Breen questioned the layoff because, as he told Slover, there was still plenty of work to be done. Tr. 95, 106. In response to questions from Breen, Slover conceded there were no problems with his work, but he declined to say whether he would bring Breen back if work picked up. Tr. 99. The above is based on Breen's credible testimony. Slover's testimony on the point, while slightly different, is basically corroborative. Where their testimony conflicts, I credit Breen for reasons I have already stated in generally crediting Breen over Slover.

Although Lederach did not personally lay Breen off, he testified in a way that suggested he did and indeed talked to Breen about the layoff. See Tr. 192-193. He testified that Breen asked whether Respondent would call him back, then he made a cryptic comment, "and I recall a letter that we had gotten from Fran Clark that he was a temporary employee sent to organize our shop." Tr. 193. Respondent never produced such a letter and nothing in the record supports Lederach's testimony that Clark sent such a letter or that Respondent received it. Lederach later conceded that he had not directly laid off Breen and did not speak to Breen, although he testified he authorized the layoff. Tr. 206. He did, however, testify about what he did after the layoff. Lederach faxed a short handwritten note to Union Representative Clark stating, "Just to inform you your Salt Chris Breen was layed (sic) off today due to cutbacks in labor force." GC Exh. 13. Lederach did not explain why he faxed that note to Clark. There certainly was no reason to do so because the Union did not have representational rights to such notice and Breen was not hired as a result of the unfair labor practice charges filed by the Union. Nor was any other employee of Respondent the subject of "cutbacks" at the time. [FN10]

B. Discussion and Analysis

The Independent 8(a)(1) Allegations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by (1) "requiring an employee not to wear a Union t-shirt;" (2) "remarking that an employee who had been absent the day before had a case of unionitis," thereby disparaging the employee's honesty; (3) accused an employee of "stabbing [a supervisor] in the back" because he and others had filed claims with a state agency "concerning deductions from their pay;" and (4) telling an employee he

would not be rehired because the employee was a union member.

As shown in the factual statement set forth above, there is uncontradicted testimony that Slover told employee Troxel that his claim that Respondent was making improper deductions from his wages amounted to stabbing him in the back. This was not an isolated comment because there is also uncontradicted testimony that Slover made similar comments to Union Representative Clark, who had actually faxed employee claims of improper deductions to the Pennsylvania Department of Labor and Industry. Four employees had filed the claims after discussing the alleged improper payments among themselves. Troxel had even discussed the alleged improper payments with Lederach when he received his first paycheck. There is no doubt that the discussion of alleged improper payments amounted to concerted protected activities. Thus, Slover's comments to employee Troxel constituted an interference with concerted protected activities and an implicit threat of reprisal for engaging in such activities. Accordingly, such comments violated Section 8(a)(1) of the Act. See *Hialeah Hospital*, 343 NLRB 391, 301 (2004).

It was also unlawful for Lederach to have told employees that he would not rehire them because of their union membership. As shown in the factual statement, he made such comments to both Troxel and Wallace when he laid them off on September 9. Indeed, his own testimony about the layoff conversation confirms that he made such a statement and suggests he made the statement to all three union employees he laid off on September 9. Such a statement clearly amounts to a threat of retaliation for engaging in union activity and thus constitutes a violation of Section 8(a)(1) of the Act. See *Lin R Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999).

I will dismiss the other two allegations that Slover made unlawful statements to Breen. Although the credited testimony shows that Slover did indeed ask Breen not to wear a shirt with a union insignia on the Glenside job, there is no evidence that his remarks amounted to an order or that the request was coercive in the circumstances. Breen himself testified that he "took it upon myself" to simply turn the shirt inside out so that the insignia was not visible. He also testified that Slover later told him he did not have to "do that." Moreover, there is considerable evidence that, even after this isolated incident, Breen wore union insignia on the job. In the face of such evidence, there is no additional evidence that Slover intervened to prohibit the wearing of union insignia on the job. Thus, I find that Slover's request, on this one occasion, was not coercive. I shall therefore dismiss this allegation of the complaint. I likewise find that Slover's remark that he thought Breen's excused absence on one occasion was a case of "unionitis" was not violative of the Act. The remark was devoid of context that would suggest a threat of retaliation and there is no evidence that Breen was penalized for his absence. Here again, the incident was isolated and not repeated. In the circumstances, Slover's remark was not coercive and I dismiss the complaint allegation that it was.

The Allegations of Discrimination

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by switching employee Breen's work assignment because it discovered he was a union member and thereafter discharging him because of his union membership and to discourage union activities. The complaint also alleges that Respondent discharged employees Wallace, Troxel and Rocus because of their union membership and activities, in violation of Section 8(a)(3) and (1); and because they filed complaints with the Pennsylvania Department of Labor and Industry about allegedly improper deductions from their pay, in violation of Section 8(a)(1). All of these allegations charge discrimination, although the 8(a)(1) allegation involves discrimination based on concerted protected activity rather than union activity. [FN11]

In cases, such as this one, that turn on alleged discriminatory motive, the analytical framework is based on the Board's *Wright Line* decision. [FN12] Under *Wright Line*, the General Counsel must make an initial showing that the employee's protected or union activity was a motivating factor in the adverse employment action. Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Bally's Atlantic City*, 355 NLRB No. 218, slip op. 2 (2010). The issue is not simply whether the employer "could have" taken action against the employee in the absence of protected activity, but whether it "would have." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006). Put another way, to satisfy its burden, the employer "cannot simply present a legitimate reason for its actions," but must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Peter Vitale Co.*, 310 NLRB 865, 871 (1993).

The Acting General Counsel has met his initial burden of showing that Respondent laid off employees Wallace, Troxel and Rocus because of their union membership and activities. They were clearly known union members, whose hiring had been forced upon Respondent because of unfair labor practice charges filed against it by the Union. Respondent had grudgingly accepted their hire and it is clear that its officials did not like having union members in its work force. This is shown by Lederach's testimony that he viewed these employees as working not for him but for the Union, as well as the testimony about Slover's reaction when he learned that Breen was a union member. Respondent's animus against the Union is also shown by the independent Section 8(a)(1) violations I have found. The evidence of causation is conclusively shown by what Lederach said when he laid off Wallace and Troxel. He stated that the union members had simply been sent to organize his work force, which, as he stated, was "not going to happen." When Troxel asked whether he was going to be transferred to the Glenside job, like other General Nash employees, Lederach dared him to file more unfair labor practice charges. Lederach's own testimony reveals his motivation. He essentially admitted that he told the employees he would not rehire them if they belonged to the Union. In addition, the three union members were the only ones laid off at the time; all the remaining employees on the General Nash job were transferred to another of Respondent's jobs, the Glenside project. In these circumstances, the Acting General Counsel has clearly met his initial burden of showing improper antiunion motivation for the layoffs.

The Acting General Counsel has also made an initial showing that the decision to lay off employees Wallace, Troxel and Roxus was based on their having complained about allegedly improper deductions from their wages and filed such complaints with the Pennsylvania Department of Labor and Industry. As shown in the factual statement, the employees discussed among themselves and with their union representative, complaints they had about what they believed were improper deductions from their wages. Respondent had withheld health and fringe benefits payments from the employees' paychecks while they were employed, even though they were not covered at least by Respondent's health insurance; and the employees felt that Respondent failed to pay time and a half for overtime. Through their Union, they thereafter filed formal complaints concerning these matters with the Pennsylvania Department of Labor and Industry. Such activity clearly amounts to protected concerted activity. See *BCE Construction*, 350 NLRB 1047, 1047 fn. 3 (2007).

I find that Respondent knew about these complaints. Troxel had discussed his complaints about the alleged improper deductions with Lederach, who said he had no choice in the matter. Uncontradicted testimony shows that Slover discussed the alleged claims of improper deductions both with Union Representative Clark and with employee Troxel within days of the complaints having been filed with the Pennsylvania

Department of Labor and Industry. Lederach himself admitted that the union member employees had discussed the alleged improper payments with him after the complaints were filed (Tr. 182-183).[FN13]

The finding of discriminatory causation for complaining about improper wage deductions is well supported by the record. Slover expressed concern that the employee complaints had been filed without first bringing them to his attention. Within a few days after these expressions of concern by Slover, the union employees, who had made the charges of improper deductions, were laid off. Not only does the timing of the layoffs point to discriminatory causation, but the laid off employees were the only ones who had raised the issue of improper deductions. And they were the only General Nash employees who were laid off. Finally, additional support for the finding of discrimination is shown by Respondent's payment of reimbursement checks for the improper payments. The checks were given to Wallace, Troxel and Rocus immediately after their layoffs. Respondent's contention that it was always its policy to reimburse the employees upon their termination is refuted by the fact that it also reimbursed Breen at this time, even though he was still employed. In these circumstances, the Acting General Counsel has met his initial burden of showing that the layoffs were based on the union employees having complained, among themselves and through their Union, about improper deductions, a concerted protected activity.

Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, cited in full above, 355 NLRB No. 218, slip op. 3. I find that Respondent has not overcome that substantial burden to persuasively show it would have laid off employees Wallace, Troxel and Rocus, in the absence of their union activities and their protected concerted activity of mutually complaining about alleged improper deductions from their wages. As shown above, these union members were the only employees laid off from the General Nash job on September 9. The rest of the General Nash employees were retained and transferred to the Glenside job.

Respondent's defense on the September 9 layoffs is twofold: First, it contends that the work on the General Nash job was winding down and someone had to be laid off; second, it contends that Wallace, Troxel and Rocus were the last employees hired and therefore justifiably the first ones in line to be laid off. Respondent's position is unpersuasive. While it may be true that the General Nash job was winding down, it is not clear how much work was remaining or whether the three union members were the ones who had to be laid off. Indeed, it is not clear why they could not have been placed on another job. The rest of the General Nash work force was transferred to the Glenside job, and, except for Breen, who, as shown below, was discriminatorily laid off in October, the next employee laid off by Respondent, Lou Snyder, was not laid off until April of 2011. Indeed, there is uncontradicted testimony that, on August 31, just a month before the union employees were laid off, Lederach told them that there would be more work starting soon and he needed manpower. Moreover, Lederach himself testified that from September 2010 to the date of the hearing, Respondent had another "large project, Lakeside Elementary School." Tr. 188. Thus, I cannot accept as determinative the conclusory testimony of discredited witnesses Slover and Lederach that there was no work for Wallace, Troxel and Rocus. In any event, it is insufficient for Respondent to rely solely on oral testimony to support an economic defense. See *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004).

Significantly, Respondent has not submitted documentary evidence as to the hours worked on the General Nash and the Glenside jobs. That evidence exists because those jobs were prevailing rate jobs and Respondent was required to submit records of hours worked to the Commonwealth of Pennsylvania to assure that prevailing wages and benefits were being paid in accordance with legal requirements. That ev-

idence would have been the best evidence of whether work was slowing down at General Nash and whether there was not enough work at Glenside to retain Wallace, Troxel and Rocus. Indeed, there might also have been work available at the Lakeside job, but, here again, no documentary evidence was submitted concerning that job. Respondent's failure to submit such evidence, clearly within its possession, leads to the inference, which I make, that such evidence would not have supported its position. It is settled law that where relevant evidence that would properly be part of a case is within the control of a party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the trier of fact may draw an inference that such evidence would have been unfavorable to him. *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1997). See also *Grosvenor Resort*, 350 NLRB 1197, 1197 fn. 8 (2007); and *RCC Fabricators*, 352 NLRB 701, 701 fn. 5 (2008).

At the very least, the absence of documentary evidence to support the lack of work at any of its jobs shows that the Respondent has not met its burden of overcoming the initial evidence of discrimination in the layoffs of Wallace, Troxel and Rocus. Respondent has not shown that it would have laid off those employees in the absence of their union activities and in the absence of their complaints about allegedly improper deductions from their paychecks.

The Acting General Counsel has also satisfied his initial burden of showing that employee Breen was discriminated against when he was given an unpleasant work assignment after Respondent learned that he was a union member, and again when he was laid off from the Glenside job.

In accordance with my credibility findings set forth in the above factual statement, I find that, on July 26, Project Manager Slover assigned Breen to work in a trench because he had just learned that Breen was a union member. The job is dirty and unpleasant. And the assignment of Breen to do trench work in the middle of the day was unusual. He had regularly been working inside the Glenside school building immediately before the assignment and indeed throughout his time on the Glenside job. Because the evidence clearly shows as an initial matter that Respondent made the assignment because of Breen's recently revealed union membership, the General Counsel has met his initial burden of showing discrimination. Nor has the Respondent shown that Breen would have been assigned this unpleasant task at this time, absent his union membership. Respondent's only defense to this charge is that everyone worked in the trench at one time or another. That is not sufficient to overcome the evidence of discrimination, as shown particularly by the timing of the assignment in this case. Nor did Respondent persuasively show why it was necessary to give this particular assignment to Breen at the time it was given. No particular reason was given as to why Breen, of all the employees on the job, was pulled off his existing assignment and given the trench work; or why other employees could not have been given that assignment at that time. In these circumstances, I find that the assignment of trench work to Breen on July 26 was discriminatory and violative of the Act.

The evidence also shows that Respondent laid Breen off from the Glenside job because of his union membership and activities. As shown above, Breen was discriminatorily given a more arduous work assignment after Respondent learned of his union membership. Just a month before, Respondent had discriminatorily laid off three other union members from the General Nash project. At that time, President Lederach had clearly stated that he would not rehire union members. The record also contains uncontradicted testimony that Slover told Breen in early September that he was done "playing games" with the Union. Further evidence of union animus is shown by Lederach's unnecessary notification to the Union that Respondent was laying off its "salt." Breen, the only union member on Respondent's payroll at the time, was the only person laid off from the

Glenside job in early October. Just a month before, a number of employees had been transferred to the Glenside job from the General Nash job. Some of the employees retained by Respondent had been hired after Breen. Thus, on an objective basis, Breen's layoff was unusual. In these circumstances, I find that the Acting General Counsel has established his initial burden of showing that Breen's layoff was unlawfully motivated. [FN14]

Respondent has not met its burden of proof to overcome the Acting General Counsel's initial showing of discrimination in the layoff of Breen. Respondent contends that Breen was laid off because of lack of work. As I have indicated above, Respondent's lack of work defense is not persuasive, in part because of the failure to produce documentary evidence in support of that defense. In addition, as to Breen's situation, many employees with less seniority were retained while Breen was released. For example, employees Wieand, Kulick, and Nimmerichter were hired after Breen, but they were retained. Indeed, they had recently been transferred from the General Nash job and had no prior experience working on the Glenside job. In contrast, Breen had worked on the Glenside job almost from its inception. Moreover, it is clear that Respondent had no problem with the quality of Breen's work. Respondent contends that Wieand, Kulick and Nimmerichter had worked for Respondent at some time in the past so their total seniority was greater than Breen's. But Respondent submitted no documentary evidence regarding its seniority policy or how it computes seniority. There is thus no way to assess Respondent's seniority defense or even its claim (in the second to last page of its unpaginated brief) that these employees had been recalled from a prior layoff.

Significantly, employee Lou Snyder, who was also hired after Breen, had no history of prior employment with Respondent. Yet he was also retained. Respondent's explanation for Snyder's retention over Breen was that Lederach hired Snyder because Respondent wanted to please an excavating company with whom Respondent did business. But it turns out Snyder was recommended not by the principals of the excavating company, but by Snyder's brother, who was simply an employee of the company. Respondent's explanation for retaining Snyder thus has no rational basis and cannot provide a defense to the charge of discrimination. Respondent's failure to persuasively establish an economic defense or persuasively explain laying off Breen and retaining other less senior employees leaves unrebutted the evidence that he was laid off because of his union membership and activities. Thus, Respondent has not shown that it would have laid Breen off when it did in the absence of his union activities.

Conclusions of Law

1. By impliedly threatening reprisals for engaging in protected concerted activity and by threatening not to rehire employees because of their union membership and activities, Respondent violated Section 8(a)(1) of the Act.

2. By permanently laying off employees Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus because of their union membership and activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By assigning employee Chris Breen more arduous work, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By permanently laying off employees Jeff Wallace, Cameron Troxel and Chris Rocus because they engaged in protected concerted activities in connection with complaints about improperly withheld payments, Respondent violated Section 8(a)(1) of the Act.

5. The above violations are unfair labor practices within the meaning of the Act.

6. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully laid off employees Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus, I shall order it to offer them full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and 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. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended [FN15]

ORDER

The Respondent, Lederach Electric, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Threatening reprisals for engaging in protected concerted activity or threatening not to hire or rehire employees because of their union membership or activities.

(b) Permanently laying off, or otherwise discriminating against employees, because of their union membership or activities, or because they complain about improper wage payments or engage in other protected concerted activity.

(c) Assigning employees to more arduous work because of their union membership or activities.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to 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 employees Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this order, remove from its files any reference to the unlawful actions taken against Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus, and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post, at its facility in Lederach, Pennsylvania, copies of the attached notice marked "Appendix." [FN16] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by 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 e-mail, posting on an intranet 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 all former employees employed by the Respondent at any time since September 30, 2010.

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

Dated, Washington, D.C. July 21, 2011

Robert A. Giannasi
Administrative Law Judge

[FN1]. At the opening of the trial, the General Counsel amended the complaint to clarify a jurisdictional allegation, which was then admitted, and to withdraw paragraph 7 of the complaint.

[FN2]. Slover initially testified, in response to questions from Respondent's counsel on direct, that he could not "recall" assigning Breen to do trench work on July 26, or ever. Tr. 240 Later, on redirect, he was more decisive in his denial that he made such an assignment. Tr. 247. For reasons discussed in the following footnote, I credit Breen over Slover in this instance, as well as in other instances where their testimony conflicts. I found Breen to be a very credible witness, whose testimony survived vigorous crossexamination. On the other hand, I found that Slover was not entirely forthcoming, especially when testifying about his job duties. I thought he was trying to avoid being labeled a supervisor or an agent, in support of Respondent's litigation theory, rather than testifying candidly. For example, in response to a question from counsel for the Acting General Counsel on the trench assignment issue, Slover was asked whether, notwithstanding his denial that he assigned Breen to do trench work, he had the authority to do so. His sarcastic response was, "I had the authority to do a lot of things." Tr. 247. My assessment of his testimonial demeanor did not inspire confidence. Moreover, Breen's testimony that he was assigned to work in the trench is supported to some extent by that of Foreman Chris Premaza, who testified that Breen did indeed work in the trench "a lot." Tr. 253. Premaza also testified that it was he who assigned that task to Breen. Tr. 252. But he was not specific as to when he made the assignment, suggesting that he did so simply by "grabbing" whoever was around because the job needed to be done quickly. Tr. 252-253. I found Breen's testimony more specific and detailed than that of Premaza on this point and therefore credit Breen over Premaza where their testimony conflicts.

[FN3]. The above is based on Breen's credible testimony. Slover's testimony on this point is less than decisive. He was asked whether he "recalled" accusing Breen of sabotaging the Glenside job. He responded, "No, I don't believe I did." Tr. 238. But he admitted asking Breen what his purpose was for being

on the job (Tr. 246), thus corroborating at least part of Breen's account. Nor did Slover deny the remainder of Breen's testimony about this conversation, most of which involved withdrawal of the unfair labor charge. The unfair labor practice charge was indeed withdrawn after Respondent hired some union members, as discussed more fully below. Breen's testimony was attacked on cross-examination, but it was supported by his pretrial affidavit. See Tr. 109-110. Indeed, Breen's credibility as a general matter is also supported by the fact that he took extensive notes of what took place at the Glenside job. Those notes were turned over to Respondent's counsel for use in crossexamination and no questions were asked about those notes. In these circumstances, I do not credit Slover's denial that he used the word "sabotage" in their conversation. I also credit Breen over Slover in all other instances where their testimony conflicts.

[FN4]. Slover did not contradict Clark's testimony about the meeting between him and Slover and Moyer concerning the unfair labor practice charges. According to employee Cameron Troxel, when President Lederach hired him on August 5, Lederach specifically told him that he was being hired because of the unfair labor practice charges filed against Respondent. Troxel assured Lederach that he would have no problems with Troxel. Tr. 154. Lederach did not testify about that conversation so Troxel's testimony on this point is uncontradicted.

[FN5]. The above is based on the credible testimony of Clark, who was firm and clear in his testimony on this point. He was not cross-examined concerning his conversation with Slover. Nor did Slover specifically deny the substance of the conversation. He did answer Respondent's counsel's question, "Do you recall ever discussing [claims filed with the Department of Labor and Industry regarding improper deductions from wages] with Fran Clark," by stating, "No." Tr. 241. He also testified he did not recall any discussion with either Clark or Breen about improper deductions from wages. Tr. 242. Of course, no one alleged that Breen was ever involved in claiming improper deductions. In any event, Slover's lack of recall about these subjects is less than a complete denial and renders his testimony less reliable than Clark's on this point.

[FN6]. Troxel's testimony about his conversation with Slover was uncontradicted. Slover did not deny making the statement to Troxel and he did not deny having the meeting where employees were required to acknowledge receipt of the Company's policy statement.

[FN7]. According to Lederach, after the union employees were laid off, "[W]e, on our own . . . back paid them the money we had deducted from those benefits." Tr. 183. Based on my assessment of Lederach's reliability as a witness, discussed in more detail later in this decision, I do not accept that testimony, insofar as it suggests that Lederach made these payments on his own without considering the complaints to the Pennsylvania Department of Labor and Industry.

[FN8]. The above is based on Breen's credible testimony. Slover testified that the only time he told Breen not to wear something was when Breen was wearing a cutoff shirt with no sleeves, which had a union marking on it. He testified that the policy on the Glenside jobsite prohibited sleeveless shirts. Tr. 236. He also testified that he only "disciplined" one other employee about clothing and that was someone who wore a sleeveless shirt. Tr. 237. I find that Breen's testimony about the T-shirt incident is more reliable than that of Slover, based, in part, on my assessment of their demeanor and on my having credited Breen over Slover when their testimony conflicted on other matters.

[FN9]. The above is based on Breen's credible testimony. Slover did not specifically deny making the "unionitis" statement to Breen. He simply testified he could not "recall" making such a statement to any employee. Tr. 238-239. Slover also responded to a

question from Respondent's counsel as to whether he ever joked with Breen about Breen's union membership, by stating, "[m]aybe I did, I don't recall anything specific." Tr. 240. Although it is unclear whether the latter was meant to refer to the "unionitis" remark, I credit Breen's more detailed version of the conversation.

[FN10]. I have difficulty crediting Lederach on any issues of importance in this case. In addition to his confusion as to whether he spoke to Breen during the layoff conversation, I found his testimony about the alleged letter from Clark, which was not supported by the evidence, bizarre. That testimony, as well as that about the faxed note to Clark, seemed to be based on his union animus. Indeed, he seemed unable, because of his animus toward the Union, to testify objectively about many of the events in this case. For example, when testifying about laying off the union employees, he stated, "The majority of the times when we talked to these individuals that [they] are saying they are working for Fran Clark, they're not working for Lederach Electric." Tr. 207. Lederach conceded that these union employees never gave any indication that they were not going to continue working for Respondent. Tr. 207. And, indeed, there is no evidence that any of the union members made statements of the kind Lederach claimed in his quoted testimony. Nor did Respondent have any problems with their work, other than with that of Scofield, who was properly discharged or laid off for cause.

[FN11]. Although the complaint alleges that the employees were discharged, the record evidence shows that they were laid off, and I so find. The distinction is not significant in this case, however, because it is clear that Respondent did not intend to recall them and thus the layoff was permanent.

[FN12]. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied455 U.S. 989 (1982).

[FN13]. Counsel for the Acting General Counsel submitted into evidence a letter from the Pennsylvania Department of Labor and Industry to Respondent's attorney with a copy to Respondent, purportedly relating to claims of improper payments made by the union members. The letter was dated October 28, 2010; another letter from the attorney to President Lederach was dated November 2, 2010. GC Exh. 15. Although the General Counsel submitted the letters only to show that Lederach's testimony concerning the issue was not credible, Respondent attempted to show that the letters supported its position that it never knew about the complaints filed with the Department of Labor and Industry. As I have indicated above, such knowledge is established by uncontradicted testimony that Slover mentioned knowledge of those complaints and by Lederach's admission that he discussed the alleged improper payments with the union member employees after the complaints were filed. I rely on that testimony to show not only knowledge of the filing of the claims, but also Respondent's concern over the filing of those claims. This is also supported by the fact that the union employees were given reimbursement checks for the alleged improper payments shortly after the complaints were filed with the Department of Labor and Industry and well before the letters mentioned above were received. Thus, I reject the general denials of Lederach and Slover that they knew about the filing of the complaints, as coming from witnesses whom I have discredited on other matters. I also reject Respondent's argument on lack of prior knowledge based on the dates of the letters. The letters discussed above do not specify when and under what circumstances claims were filed with the Department of Labor and Industry. Nor do they refer to any claims or anything that prompted the letters. They simply announce an investigation of improper payments. Thus, the letters do not establish lack of knowledge by Respondent of the claims filed by the union members prior to that point.

[FN14]. The complaint alleges that Breen was among

the employees who filed claims with the Department of Labor and Industry and that he, as well as Wallace, Troxel and Rocus, was discharged for that reason. There is no evidence that Breen filed such a claim, although he was issued a reimbursement check, along with the others, to make up for improperly deducted wages and benefits. Moreover, Breen was laid off a month after Wallace, Troxel and Rocus and a month after he was issued the reimbursement check. There is thus neither a predicate nor a causal connection to warrant a finding of discrimination based on filing a complaint with the Department of Labor and Industry. In these circumstances, I cannot find that Breen was laid off because he filed a complaint with the Department of Labor and Industry. Accordingly, I dismiss that aspect of the complaint to the extent that it includes Breen.

[FN15]. If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[FN16]. 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

*1 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 threaten reprisals for engaging in protected concerted activity or threaten not to hire or rehire employees because of their union membership or activities.

WE WILL NOT permanently lay off, or otherwise discriminate against employees, because of their union membership or activities, or because they complain about improper wage payments or engage in other protected concerted activity.

WE WILL NOT assign employees to more arduous work because of their union membership or activities.

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

WE WILL offer employees Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful actions taken against Chris Breen, Jeff Wallace, Cameron Troxel and Chris Rocus, and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

LEDERACH ELECTRIC, INC

(Employer)

Dated _____ By

_____

(Representative)

(Title)

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

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours 8:30 a.m. to 5 p.m.

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

THIS POSTING MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF THE POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OF COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.

2011 WL 2960879 (N.L.R.B. Div. of Judges)

END OF DOCUMENT

Not Reported in N.W.2d, 2004 WL 2881814 (Mich.App.)
(Cite as: 2004 WL 2881814 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Gerald RADZIKOWSKI, Plaintiff-Appellant,
v.
BASF CORPORATION, Defendant-Appellee.

No. 250198.
Dec. 14, 2004.

Before: MURPHY, P.J., and WHITE and KELLY, JJ.

[UNPUBLISHED]
MURPHY, WHITE and KELLY, JJ.
MEMORANDUM.

*1 Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendant in this employment discrimination case. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Plaintiff argues that the relevant count of his complaint was not preempted by the National Labor Relations Act (NLRA). We disagree.

Whether a court has subject-matter jurisdiction is reviewed do novo. *Calabrese v Tendercare of Michigan, Inc*, 262 Mich.App 256, 259; 685 NW2d 313 (2004).

Under the preemption doctrine of *San Diego Building Trades Council v Garmon*, 359 U.S. 236, 245; 79 S Ct 773; 3 L.Ed.2d 775 (1959), a state claim is preempted when it concerns "an activity that is actually or arguably protected or prohibited by the NLRA." *Calabrese, supra* at 260, quoting *Bullock v Automobile Club of Michigan*, 432 Mich. 472, 492-493; 444 NW2d 114 (1989). The *Garmon* preemption doctrine "requires that when the same controversy may be presented to the state court or the NLRB [National Labor Relations Board], it must be presented to the Board." *Calabrese, supra* at 260-261, quoting *Sears, Roebuck, & Co v San Diego Co Dist Council of Carpenters*, 436 U.S. 180, 202; 98 S Ct 1745; 56 L.Ed.2d 209 (1978). The NLRA prohibits an employer from discriminating against an employee with regard to "tenure of employment" "to encourage or discourage membership in any labor organization." *Calabrese, supra* at 262, quoting 29 USC 158. The clear implication of plaintiff's allegation that defendant terminated him for discussing unions is that defendant took this action to discourage membership in a labor organization. It is immaterial whether there was evidence that *plaintiff* acted with an intent to further unionization or other concerted activity by employees. Defendant was prohibited by the NLRA from discriminating against plaintiff to discourage membership in a union regardless of plaintiff's intent. Accordingly, plaintiff's claim concerns alleged activity by defendant that is at least arguably prohibited by the NLRA and, thus, could have been presented to the NLRB. The circuit court properly granted defendant's motion for summary disposition with regard to plaintiff's claim because it was preempted by federal labor law.

In light of this conclusion, it is unnecessary to reach the parties' additional arguments regarding whether plaintiff presented adequate evidence that his discharge was related to his alleged union-related conversation.

Affirmed.

Mich.App.,2004.
Radzikowski v. BASF Corp.
Not Reported in N.W.2d, 2004 WL 2881814 (Mich.App.)

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