JD–10–08
Philadelphia, PA

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

A. GALLO CONTRACTORS, INC., a/k/a
A. GALLO CONSTRUCTION, INC.

and

WILLIAM MCGEE, an individual, Case 4–CA–35336

JAMES CUNNINGHAM, and
FRED DUMONT, individuals, Case 4–CA–35393

JASON MAAHS, an individual.[1] Case 4–CA–35483

David Faye, Esq. (Region 4, NLRB),
of Philadelphia, Pennsylvania, for the General Counsel

Andrew M. Smith, Esq. (Andrew M. Smith & Associates),
of Maple Shade, New Jersey, for the Respondent

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve a small construction contractor operating primarily in Pennsylvania and West Virginia in the spring and summer of 2007. In April 2007, the contractor unwittingly hired a union organizer to perform insulation work, questioning him about his union membership before hiring him, and at trial admitting that had it known of the organizer's union affiliation it likely would not have hired him. After two and a half weeks of work by the organizer, two fellow union organizers appeared at the workplace to talk to employees including their compatriot. The visit provoked the ire of the project manager, who engaged in a heated argument with the organizers. The specifics are disputed, but at the end of the conversation the employee-organizer left the jobsite—fired he says, walked off the job says the employer. The General Counsel sides with the employee-organizer and alleges that he was unlawfully fired and that comments made by the project manager during the confrontation and when he first hired the employee-organizer were unlawful. In addition, in April 2007 two other union organizers applied for work with the contractor by submitting job applications that openly stated their union affiliation. They were not hired. The General Counsel alleges that the contractor unlawfully failed to hire or consider these two applicants. The General Counsel also alleges that in May 2007 the contractor unlawfully threatened unspecified reprisals against one of the union organizer applicants. Finally, the General Counsel alleges that in late May 2007 the employer unlawfully threatened, interrogated, and created the impression of surveillance of an employee.

[1] I have corrected the caption to reflect the record evidence (GC Exhs. 1(g) and (k)) demonstrating that Jason Maahs was the charging party in Case 4–CA–35483, and not, as pled in the August 16, 2007 complaint (GC Exh. 1(p)), the International Association of Heat and Frost Insulators and Asbestos Workers Local 14, AFL–CIO.

STATEMENT OF THE CASE

Based on unfair labor practice charges filed by Stanton W. Bair, William McGee, James Cunningham, and Fred Dumont, the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint on July 31, 2007 (in Cases 4–CA–35336 and 35393), alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (Act) against A. Gallo Contractors, Inc. a/k/a A. Gallo Construction, Inc. (Gallo or the Respondent). On August 16, 2007, based on unfair labor practice charges filed by Jason Maahs, the General Counsel issued a second complaint (Case 4–CA–35483), alleging additional violations by Gallo of Section 8(a)(1). Gallo filed timely answers to the complaints denying all violations of the Act.

This dispute was tried in Philadelphia, Pennsylvania on November 5 and 13, 2007. Counsel for the General Counsel and counsel for the Respondent filed briefs in support of their positions that were due December 21, 2007.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses and other indicia of credibility, I make the following findings of fact, conclusions of law, and recommendations.

JURISDICTION

The Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2) and (6) and (7) of the Act. I also find, based on the record and the Respondent's admission (Tr. 74), that at all material times Local 14, Local 23, and Local 89 of the International Association of Heat and Frost Insulators and

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[2]The Respondent's brief was postmarked December 21, and therefore, untimely. Board Rules and Regulations 102.111(b) ("documents which are postmarked on or after the due date are untimely"). The brief also lacked the required statement of service. See, Sec. 102.42 of the Board's Rules and Regulations). Given the Board's often exacting enforcement of such rules (see, e.g., *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002); *Carpenters (R.M. Shoemaker Co.)*, 332 NLRB 1340, 1341 (2000)), on January 3, 2008, I issued an Order to Show Cause why the Respondent's brief should not be rejected. After consideration of the Respondent's response, and the General Counsel's lack of opposition to the Respondent's position, I have decided to accept the Respondent's brief. The minimal delay in filing resulted in no prejudice to any party. For instance, it did not result in the Respondent having an opportunity to view the General Counsel's brief before finalizing its own, or in any other way prejudice the General Counsel. The delay in filing was not the result of a misreading of the rules, a mistake the Board is reluctant to excuse. See, *Unitec*, supra and *Carpenters*, supra. Rather, the delay appears to have been the result of the same work-related exigencies and circumstances that led the Respondent's counsel to request a four-day extension of time, a modest request that was granted and established the December 21 deadline for the filing of briefs. Essentially, counsel tried but failed to file the brief in time. See, *WGE Federal Credit Union*, 346 NLRB 982 (2006). The failure to include the statement of service was inadvertent, and it appears that the brief was served on all parties at the time it was mailed. Under these circumstances, and in the absence of opposition to the acceptance of the Respondent's brief, I have fully considered the Respondent's brief and it is not rejected.

[3]The General Counsel's unopposed motion to correct the transcript, filed December 20, 2007, is granted and received in evidence as GC Exh. 18.

Asbestos Workers, AFL–CIO (collectively referred to as the Union) have been and are labor organizations within the meaning of Section 2(5) of the Act.

FINDINGS OF FACT

A. Background

The Respondent Gallo performs general construction, renovation, and insulation services in the construction industry. Gallo was established in May 2003. A former employee testified that the owner of Gallo is Gary Love. However, Gary Love testified that Gallo is owned by his (soon to be ex-) wife Julia Love. In any event, the record demonstrates that Gary Love, who held the title Operations Manager, plays a lead role in the operation of Gallo. He is in charge of hiring and terminations. He is an admitted agent and supervisor within the meaning of the Act. Gary Love's brother, Joe Love Jr., has worked for Gallo since its inception. He is the project manager for Gallo, and also an admitted agent and supervisor.

A previous employer, Tempco Installation, and later, Tempco Insulation, was owned and operated by members of the Love family, and specifically Gary and Joe Love Jr., played significant roles at Tempco. In 2001, the Union (Locals 23 and 89) organized Tempco and was certified as the Tempco employees' collective-bargaining representative. Two of the charging parties in the instant cases, Union Organizers Dumont and Cunningham, were involved in organizing and/or representing employees of Tempco. Tempco entered into collective-bargaining contracts with the Union, including benefit funds agreements, which were the subject of a lawsuit by the Union and its fund against Tempco after Tempco ceased operations in February 2003. In July 2007, the Union and its fund sued Gallo in an effort to collect the fund benefits owed by Tempco.[4]

In late 2003 or early 2004, James Cunningham, the president of and organizer for Local 14, received a call from a union member who told him that he had run into Joe Love at a materials outlet store. The union member alerted Cunningham that "they were back in business" under the name "Galloway." Cunningham looked into it and determined that the name of the company was A. Gallo (and not Galloway).

B. The effort to organize Gallo

In late 2006 or early 2007, union officials determined that they would seek to organize Gallo through a "salting" campaign. The Union decided to have three organizers—Dumont, Cunningham, and McGee—seek employment at Gallo. McGee, whom Gallo officials did not know, would attempt to get hired by calling Gallo or through personal contact at a jobsite. Cunningham and Dumont, whom Gallo officials knew from Tempco, would submit employment applications.

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[4]There is some confusion in the record as to when Tempco Installation and Tempco Insulation operated. The weight of the evidence suggests that Tempco Installation operated first, and that it dissolved and was followed by Tempco Insulation. However, the record is somewhat confusing because the words "Tempco Installation" are referred to in the transcript by witnesses, even at times that I suspect the witness meant (or may have actually said) "Tempco Insulation."

The Union's first contact with a Gallo employee was with Jason Maahs. Maahs began working at Gallo in the summer of 2005. When hired, he already had significant personal relationships with Gallo personnel. He had just graduated from high school where he was friends with Gary Love's daughter. In addition, Maahs was close to Gallo's comptroller, Joe Andl, whom Maahs regarded as a stepfather. Maahs did not fill out an application for the job and believes he was hired because of these personal relationships.

Maahs was laid off at the end of the summer of 2005 and recalled in October 2006 to fulltime employment with Gallo. On March 13, 2007,[5] while working a Gallo job at a high school in Carbon County, Pennsylvania, Maahs was approached by two union representatives, McGee and Paul Johnson, who solicited him to join the Union. During the conversation Maahs gave them his phone number, which they told Maahs they would provide to Union Organizer Cunningham. The next day, Cunningham contacted Maahs and they met several times in the following weeks. Maahs signed an authorization card and also had discussions with fellow employee John Lynch, who was his cousin, about Lynch joining the Union.

On March 19, McGee, an organizer for Local 23, contacted Gallo and spoke with Joe Love about employment. Love did not know McGee. McGee asked if Gallo was hiring insulators. Love asked McGee if he was a "union insulator." McGee told him "no" and said that he was "highly interested in seeking employment with this company." Love said he had to first check with his brother and would call McGee back the next day. When Love did not call him back McGee left several voice mail messages with Love over the course of the next couple of weeks. On March 30, Love called McGee and asked if McGee was interested in working three days a week. McGee said yes. Love said he would get back to McGee. On April 9, Love told McGee to report to work the next morning at the Manheim Middle School in Lancaster County Pennsylvania. McGee did, and with the exception of one day he chose to take off he worked fulltime for the next two and half weeks.[6]

By both McGee and the Love brothers' accounts, McGee's short tenure at Gallo was stellar. Gary Love testified that McGee would have been able to continue working for many months. However, McGee's employment ended on April 25, after an incident, the details of which are sharply disputed by the parties.

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[5]All subsequent dates referenced in this decision are from 2007 unless otherwise indicated.

[6]I have credited McGee's account of the hiring process over Joe Love's scanty and at times contradictory version of events. Although Joe Love initially testified that he called McGee first, on cross examination he agreed that it was "a possibility" that his first contact with McGee was a phone call from McGee. He recalled McGee calling and asking if Gallo was hiring insulators. On cross examination Joe Love testified that he could not recall asking McGee if he was a "union insulator" but in both his direct and cross examination he was careful not to affirmatively deny that he asked McGee about this, although his testimony touched on the subject a number of times. In his direct examination he denied that McGee had told him he was a union member (McGee corroborates that) and he denied that knowledge of McGee's union affiliations would have made any difference in the decision to hire McGee (a position refuted by his brother Gary Love, who made the final hiring decisions for Gallo). I also find implausible Love's testimony that during their discussions McGee told Love he had "a little" experience as an insulator. McGee had a lot of experience, and there is no reason that in attempting to obtain the job he would have understated his qualifications. Love's testimony on these subjects stands in contrast to McGee's sharp and detailed recollection of his hiring, and I credit McGee's account.

On April 25, between 8:30 and 9:30 a.m., two union organizers, Stanton Bair, an official with Local 23, and his cousin, Rodney Bair, a retired member of Local 23, arrived at the jobsite at Manheim Middle School. They first approached McGee who was working on a ladder in a hallway. After a short discussion, Stan Bair went upstairs looking for other employees with whom he could speak. He saw an individual on a ladder installing insulation and another individual at the bottom of the ladder.

At the time Bair did not know either of them, but later learned that Joe Love was on the ladder and Vince Yearly was holding the ladder. Yearly was an employee brought to the jobsite the previous week. Gary Love testified that Yearly was a personal friend who worked fulltime for Verizon, but was looking to make some additional money during his vacation from Verizon. He was hired only for a two-week period.

Bair approached the two men and asked if they would be interested in talking about the Union, or joining the Union. As recounted in both Bair and Love's testimony, Love told Bair that he was not interesting in discussing the Union. According to Bair, in testimony undisputed by Love, Love also told Bair that he didn't want Yearly talking with anyone in the Union either. Bair told Love that he had spoken to an employee downstairs—meaning McGee—who was interested. This angered Love who came down from the ladder and headed directly downstairs and straight towards McGee. Bair followed him down.

At this point the witnesses' accounts of the incident vary somewhat. The three union witnesses, Stan and Rod Bair, and McGee, provided generally corroborative accounts of the incident, although there were some differences in their recall. That is not surprising. They were describing a heated, fast developing dispute that was over in a matter of minutes. Under those circumstances, it is not surprising that the details of the dialogue were confused. However, there was significant commonality to their story, and the small differences in account suggested a lack of collaboration rather than falsity. Moreover, my conclusion is that the conversation was, in fact, confusing, because Love went back and forth with his directives to McGee on whether he could speak to the union representatives, as he was unsure how to handle the situation.[7]

According to both Stan Bair and McGee, upon confronting McGee, Love initially directed that McGee not talk to the union representatives. Clearly, Love did not understand that McGee knew or was in league with the Bairs. Initially, Love did not, as asserted by the Respondent, limit this directive to not speaking to the union representatives on "A. Gallo time." McGee seemed incredulous, and according to both McGee and Bair, Love relented, saying that it was okay for McGee to talk to the union representatives but stating that when they were done he wanted to meet McGee outside. Love headed outside, and McGee, somewhat confrontationally, followed him demanding to know what Love wanted to say to him and asking, "[y]ou mean I can't talk to these guys." Stan and Rodney Bair followed McGee and Love outside. At some point, the issue of whether the organizers could talk to McGee on their own

[7]Having said that, in assessing their accounts, I have tended to discount Rod Bair's version of the argument with Joe Love. His account was less precise, and more amenable to suggestion and revision on both direct and cross-examination. His memory of the event was not as sure or sharp as Stan Bair's or McGee's, who, whatever the minor differences between their stories, were steadfast and sure in conveying their recollection, even when pressed on cross-examination. Most important, Rod Bair testified while in significant physical pain from a back injury. Such pain is enervating for sure, and I think it contributed to his limitations as a witness.

time, or in the evening, came up, but the witnesses attributed that question to various individuals. In any event, McGee and Stanton Bair agree that as things heated up, Love returned to his earlier position on the matter, announcing that "if you talk to these guys, then you can't work here anymore." At that point McGee protested, asking, rhetorically, "[y]ou mean that I can't work here no more just because I'm talking to these guys." According to Bair, Love answered "[t]hat's right." According to McGee, Love then said, "[y]our'e off the job. . . . Go." When McGee asked whether he had been fired, Love shook his head yes and walked away.[8]

Love went back to the school and called Gary Love to tell him about the incident. McGee left. Less than an hour later McGee received a voice mail message on his cell phone from Gary Love. The message was played at the hearing. Love stated:

> This is Gary Love with A. Gallo, I was just talking with my brother and I hear that you had a problem out there at Manheim and you walked off the job site. I don't know what happened between the two of you[ ], but don't talk to union BA's when you're on my time whether you g[o]t two weeks of work or not. I am paying for the full rate. The bottom line is you walked off the job, you terminated your own employment. If you choose to try to collect unemployment, I will fight it. So, I don't appreciate you working for me for tw[o] weeks, some asshole BA walks on my job site and you threaten to blow smoke up your ass. So, bottom line is, you're not fired, you walked off the job site terminating your employment. So, if you have any questions, you can call [xxx-xxx-xx]73.

McGee did not call Love back.

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[8]This account of events, as set forth above, must be contrasted to and credited over Love's conflicting but meager account of events. Love testified that he rushed downstairs to ask McGee if he had spoken to the business agents. Asked why, he said, because he "was doing [i]t on our time." When McGee admitted he had talked to the union business agent, Love denied having any more conversation with McGee other than asking him to come outside and talk. He did that, he says, so that he could tell McGee in "private" that he should only talk to the union agents on his own time. Once outside, he said that McGee, without anything being said by Love, "went off" on him yelling about having worked hard for two weeks. Love denied telling McGee he couldn't talk with the business agents, asserting instead that "I told him that he should talk to them on his own time, either at lunch or after work." Love's account had vagueness to it, and even that was the product of leading questioning. The focus Love says he placed on whether McGee was working when the union agents approached him felt to me like the articulation of a legal strategy, rather than an accurate account of what occurred and his motives at the time. Indeed, it was an issue stressed by the Respondent's counsel, and repeatedly signaled in questioning. But the testimony appeared strained. This was not a production line factory. The organizers entered a school building largely devoid of workers and found McGee, working alone, on a ladder. The organizers' discussion with McGee was minimal and over by the time Love learned of it. The contention that his anger motivating him to rush downstairs to confront McGee was solely the product of concern over work time solicitation is unlikely. There is no evidence suggesting that organizer interference with employee work was an issue Love had previously encountered. There is no evidence of a preexisting rule (nondiscriminatory or otherwise) that would purport to bar McGee from talking about the union while he worked. Love asserted that he did nothing that could be perceived as terminating McGee. However, his testimony did not address the specifics of the claim by McGee and the Bairs that he had told McGee "he's done" or "off the job" or that he shook his head affirmatively when McGee asked if he was fired.

Later that day McGee also heard from Joe Love. According to McGee, Joe Love also left a voicemail, stating "Bill this is Joe Love. It's 4:20. Don't show up Friday for your paycheck. It will be mailed to you."[9]

C. Cunningham and Dumont apply for employment with Gallo

Following the success of McGee's hiring by Gallo, Union Officials Cunningham and Dumont submitted employment applications to Gallo on April 18. Although working as union organizers and officials for some years, both Cunningham and Dumont had extensive experience in the insulation field.

Cunningham filled out a generic application form (not a form developed by Gallo, which does not have such forms) and faxed it over to Dumont, an organizer and the financial secretary for Local 89 based in Trenton, New Jersey. Dumont also filled out a form and faxed his and Cunningham's applications to Gallo, along with a cover letter from Dumont. The cover letter, written on Local 89 stationary and signed by "Fred B. Dumont[,] Local #89 Organizer," indicated that a representative from an insulation distributor had told Dumont that Gallo was hiring. The letter noted that he and Cunningham were experienced insulators "who regularly volunteer as insulators thus keeping our skills up to date." The letter stated that the applicants were "willing to travel and anxious to work for your company." The letter also offered that "[w]hile we intend to speak to your current employees about the benefits of joining our Labor Unions we will NOT perform any organizing activities during the course of the paid work day." (Emphasis in original.)

In filing these applications, Dumont and Cunningham were not responding to an advertisement for jobs, or a job posting placed by Gallo. Rather, they relied on their knowledge of the work Gallo had across Pennsylvania at the time, and a suggestion by a materials distributor whom Dumont knew that Gallo might be hiring.

Cunningham and Dumont's applications were received by the Respondent. Joe Love's response to the applications was to tell an employee something to the effect of, "they're doing it again."[10]

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[9]McGee's account of the voicemail message from Joe Love was introduced into evidence without objection. In his testimony, Love did not dispute leaving this message or the substance of the message. Given this, I credit McGee's undisputed account of the message from Love.

[10]Dumont testified, without objection, that a Gallo employee with whom he was in contact, John Lynch, had told him that "I know you sent applications in, cause Joe [Love] said, the assholes are doing it again." Joe Love's effort to rebut this hearsay testimony served to lend it credence. Love testified that he was aware of Dumont and Cunningham's April 2007 applications and that he recalled commenting to an employee of Gallo about the fact that the organizers had applied, and that "possibly" the conversation was with John Lynch. Asked if he recalled telling Lynch or any other employee, in reference to Cunningham and Dumont's applications that "the assholes are doing it again," Love responded: "Those exact words, no responsibility," which I believe to be an admission that he said something like that, if not "those exact words." Under questioning by Gallo counsel, Love admitted to a conversation with Lynch, presumably at a jobsite, in which he said "they're doing it again" but claimed he was referring to the lawsuit for benefits first filed by the Union against Tempco and then against Gallo. This is not believable. The Union's second lawsuit, filed against Gallo, was not filed until July 2007, and therefore Lynch was already laid off and would be an unlikely interlocutor for Love. Whatever Love was referring to when he told Lynch that the "they" or "the assholes" were doing

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The Respondent did not contact Cunningham and Dumont in response to the receipt of their applications. Gary Love testified that there was "no reason" that he did not consider Dumont or Cunningham for employment to replace McGee, when McGee left Gallo one week after Dumont and Cunningham's applications were received. He testified that after sending their applications neither Cunningham nor Dumont contacted him again, so "consideration wasn't even made" before he hired Oritz, Hinkelmon, and Curley. Love testified that beginning the week ending May 10, no one from Gallo tried to reach Cunningham or Dumont about whether or not they were interested in accepting employment with Gallo.[11]

D. Union contact with Yearly, and Gallo's response

On May 6, Dumont telephoned Vince Yearly, the friend of Gary Love and temporary Gallo employee. Dumont identified himself as an organizer and asked if they could speak. Yearly said he could not speak at that time but would call back the next day. He did not call back, but on May 8 Gary Love did and left a voice message on Dumont's phone. When Dumont retrieved the message and heard who it was he put the message on speakerphone so that Union Organizer Johnson, and McGee, who were with Dumont, could hear the message. According to the testimony of Dumont, corroborated by McGee and Johnson, the message began, "Fred, this is Gary Love." The message continued, as reported by Dumont:

> You've overstepped your boundaries. You're way out of your league. I'm calling my Attorney. You're going to pay. . . . You're going to pay. I've already talked to my Attorney. If you're' any kind of man you'll call me back.[12]

E. Comments to Maahs in late May

At the end of May, Jason Maahs was working at a Gallo project in West Virginia. Gary Love asked Maahs, in front of three other employees, if he had joined the Union. Maahs testified that Love said, "if I had that I would be laid off because this had happened before and that it was going to be personal because it [a]ffected his family." Maahs told Love that he had not joined

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it again, must have occurred while Lynch was working. The hearsay testimony corroborates Love's admission that he said something like, "the assholes are doing it again" and I find that he was, in fact, referring to Cunningham and Dumont's applications. Notably, the undisputed evidence shows that a couple of years earlier Dumont and Cunningham had applied to Gallo, thus adding to the plausibility that Love's statement that they were "doing it again" was in reference to the applications, and not to a yet unfiled second lawsuit.

[11]Later in the hearing, directly contradicting his earlier testimony, Love claim that before he hired additional employees in May he "reached out to [Cunningham and Dumont] knowing I had work coming up, but they didn't get back to me." I cannot credit Love's assertion that he "reached out" to Cunningham and Dumont before hiring additional employees. It contradicted his own testimony, and was presented so vaguely and flippantly, as to defy belief. Both Cunningham and Dumont denied any contact with Love (and were unaware of any effort by Love to reach them) regarding their applications for hire.

[12]There was no objection to receipt of this testimony describing the voice mail message. Moreover, Gary Love did not deny placing the call or leaving the message, and did not dispute any of the particulars of the message as reported by Dumont, Johnson, and McGee. Given this, I find that he made the call, left the message, and that it was accurately reported by Dumont.

the Union. Later that same week, Love told Maahs that he had received a phone call telling him that Maahs had joined the Union. Once more Maahs denied this.[13]

F. Gallo employment in the spring and summer of 2007

At the time of the hearing the only Gallo employees were Supervisors Gary and Joe Love. Excluding the Love brothers, and the comptroller Andl, Gallo began 2007 with four employees: Louis Marchino, Henry Reyes, John Lynch, and Jason Maahs. In mid-March, Gallo hired Emanuel Ortiz. Lynch, Reyes, Maahs, and Ortiz worked steadily until being laid off at the end of June.

Marchino quit in early April, as he was unwilling to work on the Gallo project in West Virginia, which required living there during the workweek. Marchino was replaced by a current employee, which opened up the position on the Manheim school project that was filled by McGee. As described, McGee began work April 9, and worked until April 25.

The Respondent subsequently hired four additional employees. Vince Yearly worked for approximately a two-week period in the latter half of April, during his vacation from his primary employer. Collin Hinkelmon was hired in mid-May and laid off by the end of June. Raphael Ortiz was hired in early May and worked steadily through October. Robert Curley was hired in June and laid off before the end of June.

Love testified without contradiction that he preferred to hire by word of mouth, or based on referrals from friends or family. Love's uncontradicted testimony supports the finding that Gallo does not advertise for workers, solicit applications, or have a history of hiring employees through unsolicited applications.

Of the employees hired after Dumont and Cunningham's applications, nearly all had some personal connection or were recommended to the Love's. Yearly, a friend of Gary Love's, was hired for two weeks during his vacation from his primary employer. Hinkelmon was a friend of Love's daughter in high school, and his father approached Love at the high school and asked for a job for Hinkelmon. Love hired him temporarily for the summer, understanding that he would be returning to college in the fall. Curley's father also approached Gallo at the high school Curley used to go to and referred him to the job with Gallo. Curley's father was also close with Joe Love. Like Hinkelmon, Love hired Curley as summer help knowing that he would return to college in the fall.[14] In the case of Raphael Ortiz, Love knew his girlfriend and

[13]This account is based on Maahs' undisputed and credited testimony. Love was present in the hearing room for Maahs' testimony, and testified himself, but neither he nor any other witness disputed Maahs' testimony about these conversations. In any event, I found Maahs to be a highly credible witness. All of his testimony was presented straightforwardly, without any suggestion of embellishment or effort to tailor his testimony. He was careful in his answers which were consistent even when he needed to correct inadvertent misstatements by questioning counsel.

[14]Because Gallo was removed from their West Virginia project, Love laid off Curley and Hinkelmon (among others) and therefore their work did not last the entire summer as planned.

she referred Ortiz for employment. She had gotten him to apply a year earlier, but there was no position for him. Through her he reapplied in December 2006 and was hired in May.[15]

Of the employees working in 2007 before Cunningham and Dumont applied, there is no record evidence as to the circumstances of the hiring of Marchino or Reyes. Maahs, who was another high school friend of Love's daughter, was hired because of his relationship to Love as well as his close relationship to Gallo comptroller Andl. John Lynch, another employee who worked until being laid off in late June, was Maahs' cousin, although the circumstances of his hiring are not part of the record.

McGee's hiring is disputed by the parties in this regard. Gary and Joe Love testified that Maahs recommended McGee to Joe Love. Maahs vehemently denied that he had anything to do with McGee's hiring or even knew (at the time, at least) whether McGee was able to get hired by Gallo. McGee's testimony did not touch on this aspect of his hiring. As discussed, above, he described initially calling Joe Love about employment, and following up with multiple calls over the course of several weeks as part of the hiring process. This initiative by McGee is certainly not inconsistent with a Maahs recommendation. Maahs could have recommended McGee after McGee's initial call in the intervening weeks while the Love's made up their mind to hire McGee. As discussed, below, I do not believe it is necessary to resolve this credibility dispute. I will assume, without deciding, that Maahs played no role in McGee's hiring, I do not believe it makes a difference to the outcome of this case.

Neither Marchino, who quit employment with Gallo in early April, nor McGee, who worked his last day on April 25, was immediately replaced by Gallo. Rather, other employees were shifted in to pick up the work. The shifting of work to fill Marchino's position left an opening in Manheim that McGee filled. When McGee left, Joe Love, and other employees, ultimately including Raphael Ortiz, performed McGee's work. Gary Love testified that at the time Cunningham and Dumont applied, on April 18, Gallo did not need to hire additional workers. However, in early May, Ortiz was hired and then later in May additional summer help was hired as work demands increased, particularly at school projects where efforts are made to complete the work during summer months when students are not on site.

ANALYSIS

A. March 19 alleged interrogation of McGee

As I have found, on March 19, as part of the initial conversation regarding the possibility of hiring McGee, Love asked McGee if he was a "union insulator." The General Counsel alleges that this was an unlawful interrogation of an applicant in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act protects employees' right to engage in "concerted activity" for the purposes of "collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. A violation of Section 8(a)(1) does not depend on the employer's motivation, or on the subjective reaction of the employee, or on whether the interference succeeded or failed. Rather, the Board's test is whether the conduct reasonably tends to

[15] I recognize that Love's pretrial affidavit suggested that Maahs referred Hinkelmon, Curley, and Ortiz, but in his testimony, Maahs denied referring any employees to Gallo. I credit Love's testimony, corroborated by Maahs, over the contrary suggestion in Love's affidavit.

interfere with the free exercise of the employee rights under the Act. *KSM Industries*, 336 NLRB 133 (2001).

There is abundant case law to support the proposition that the questioning of an applicant about his union affiliation is "inherently coercive." See *Hi-Tech Interiors, Inc*., 348 NLRB No. 18, slip op. at 1 fn. 3 (2006); *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988), enfd. mem. 888 F.2d 1381 (3d Cir. 1989) ("questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful"). The fact that McGee was, in accordance with his Section 7 rights, seeking employment as part of an effort to organize the Respondent does not alter this conclusion in any way. See *M. J. Mechanical Services*, 324 NLRB 812, 812–813 (1997), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998); *Sproule Construction Co.*, 350 NLRB No. 65 (2007). Love's interrogation of McGee violated Section 8(a)(1) of the Act as alleged.[16]

B. Alleged unlawful directive to McGee and alleged unlawful discharge

The General Counsel alleges that the April 25 incident in which Joe Love confronted McGee regarding the visit of the union organizers resulted in two distinct violations of the Act. First, the General Counsel alleges that Love's comments to McGee regarding speaking to the organizers violated Section 8(a)(1) of the Act. Second, the General Counsel contends that Love discharged McGee because of McGee's protected union activity and to discourage such activity, in violation of Section 8(a)(1) and (3) of the Act.

1. The independent 8(a)(1) violation

As I have found, supra, upon learning from Stan Bair that he had talked to McGee, Love rushed downstairs and directed McGee not to talk to the union representatives. Although he relented, and said that McGee could talk to the union representatives if he first talked to Love outside, once outside Love told McGee that "if you talk to these guys, then you can't work here anymore."

Each of these remarks clearly violates Section 8(a)(1), as they constrain an employee in his fundamental right to talk with a union. *Advanced Architectural Metals*, 351 NLRB No. 80,

[16]I recognize that in *Sproule Construction Co.*, supra, the Board majority did not pass on the finding of the administrative law judge that the questioning of an applicant about his union affiliation was "inherently coercive." Rather, the Board majority in *Sproule Construction Co.*, supra at slip op. 1, fn. 2, applied the totality-of-the-circumstances test enunciated in *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985), to determine that questioning of an employment applicant's union status was coercive. I note that the Board majority in *Sproule* did not purport to overrule the case law, cited supra, that finds such questioning inherently coercive. In any event, as in *Sproule*, were I to apply *Rossmore House* to the instant circumstances, I would conclude that the questioning of McGee was coercive, given that it occurred while the applicant was seeking employment, the applicant felt the need to conceal his union affiliation, and the Respondent offered no legitimate explanation for the questioning. Indeed, the questioning was not legitimate, as Gary Love admitted that he probably would not have hired McGee had he known that McGee was affiliated with the Union. Thus, the questioning was not casual, but part of a litmus test for employment, an effort by Love to seek information that would be used in the determination of whether to hire McGee. Under all of the circumstances, the questioning would reasonably tend to coerce employee exercise of Sec. 7 rights.

slip op. at 9 (2007) (violative of Sec. 8(a)(1) for supervisor to direct employee that if he had problems he should talk to her and not to union).[17]

2. The 8(a)(3) violation

The General Counsel alleges that Gallo unlawfully terminated McGee in violation of Section 8(a)(3) of the Act. Section 8(a)(3) provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). A discharge motivated by an employee's support for or activities on behalf of a union violates Section 8(a)(3). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

While the General Counsel alleges that the antiunion sentiments expressed by Joe Love during his altercation with McGee motivated the discharge, the Respondent contends that McGee was not terminated during the dispute with Joe Love, but only after the fact, as a response to his leaving the job site. The Respondent claims McGee "terminated himself" for walking off the job.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management. Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright-Line* analysis). In *Wright Line* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that the employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd mem. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This includes proof that the employer's asserted reasons for the adverse personnel action are pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (internal quotations omitted)).

[17] I have rejected, as factually false, the Respondent's only defense: the claim that Love told McGee that he could not talk to the union representatives on "our time" and must talk to them on "his time." Because of my rejection of the claim that Love's directive was limited in that manner, it is unnecessary to consider whether, under these particular circumstances, such a directive would have comported with the Act. I further note that this case does not concern the issue of the organizers' right to enter the school to speak to employees or the employer's right to prevent them from doing so. There is no evidence of any rule prohibiting the organizers from entering the premises, and the employer did not request that the organizers leave the premises. The Respondent does not argue on brief that it had a right to bar the union organizers from the premises, and it certainly does not argue that it had a right to threaten or discipline McGee for the Bairs' entry onto the school site during working hours.

Under the *Wright Line* standard, the General Counsel meets his initial burden by showing "'(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.'" *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994)).

Such a showing proves a violation of the Act subject to the following affirmative defense available to the employer: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the action in question or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB No. 79, slip op. at 10 (2006). Rather, it must "persuade" by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities"); *Weldun International*, 321 NLRB 733 (1996) ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence") (internal quotation omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998).

When evaluation of the General Counsel's initial case, or the Respondent's defense, includes a finding of pretext, this "defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.*, supra at 898; *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). "This is because where 'the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.'" *Rood Trucking*, supra, citing, *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Turning to the General Counsel's burden under *Wright Line*, there is no dispute that McGee was engaged in protected activity at the Gallo worksite. Not only was he generally motivated to seek employment in order to facilitate the union organization of Gallo employees, but specifically, the confrontation with Joe Love on April 25 was sparked by his discussion with union organizers, conduct that goes to the core of Section 7 activity under the Act.[18] Moreover, turning to the second *Wright Line* factor, it is clear that the Respondent was aware of McGee's

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[18]As noted, supra, there is no evidence that the Respondent maintained a rule (non-discriminatory or otherwise) intended to bar employees from talking about the union during worktime. Thus, there can be no question but that McGee's brief discussion with Cunningham and Dumont constituted protected activity. *Panchito's*, 228 NLRB 136 (1977) (overruling ALJ's conclusion that discussion of union during working time was unprotected as there is no evidence that employer had a no-solicitation rule in place); enfd. 581 F.2d 204, 207 fn.3 (9th Cir. 1978) ("An employee may discuss unionizing on working time, absent a lawful employer rule against it"); *Orval Kent Food Co.*, 278 NLRB 402, 405 (1986) (An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks).

protected activity. This is not to say that the Respondent knew that McGee was a union organizer, who had sought employment as part of a union campaign to organize Gallo. It appears not to have known this at the time of his termination. However, Joe Love did know that McGee had talked with the union organizers, Stan Bair told him so and McGee confirmed it. And it was this protected activity that prompted Joe Love to climb off his ladder, go downstairs and confront McGee.

Finally, it is the General Counsel's burden to demonstrate that the protected activity in question was a substantial or motivating reason for the Employer's action. The General Counsel accomplished this. First there is significant evidence of antiunion animus by the Respondent both before and after the April 25 incident with McGee.[19] Second, and even more to the point, given my acceptance the Bair and McGee's account of the April 25 incident, and my discrediting of Joe Love's (see, supra), the conclusion that McGee's union activity prompted the discharge is inescapable. Although Love's statements to McGee during the incident were contradictory, and changed in the heat of the moment, as I have found, when McGee asked Love, "[y]ou mean that I can't work here no more just because I'm talking to these guys," Love answered "[t]hat's right," and Love said, "[y]our'e off the job. . . . Go." McGee asked him whether he had been fired, and Love shook his head yes and walked away in response. That is a discharge, and its motive is not implicit. It was in angry and explicit retaliation for union activity.

I do not doubt that Love did not plan to discharge McGee. He did it in the heat of the argument, and as a result of his own uncertainty about how to handle to the presence of union organizers. But Gary and Joe Love's subsequent calls to McGee are not exculpatory, as the Respondent contends. Gary Love's message to McGee was in no sense an effort to invite McGee back, remediate his brother's actions, or even an effort to mediate the dispute and determine what happened. It was *confirmation* to McGee that he was terminated, although on grounds intended to be more defensible than that articulated by Joe Love during the heat of the incident. Gary Love attributed the termination not to union activity, not to the dispute with Joe Love, but to McGee "walk[ing] off the job."[20] This was a pretext, invented in the aftermath of the incident to shift the blame for the termination from the indefensible and unlawful motives

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[19]This evidence includes the unlawful interrogation of McGee during the process of hiring McGee (discussed above), Gary Love's admission that he likely would not have hired McGee had he known that he was affiliated with the Union, and the comments to Maahs, as discussed, infra. All of this general antiunion animus, some of it directed towards McGee himself, supports the General Counsel's prima facie case that the Respondent's actions toward McGee were motivated by antiunion animus.

[20]Gary Love stated:

> . . . . The bottom line is you walked off the job, you terminated your own employment. If you choose to try to collect unemployment, I will fight it. So, I don't appreciate you working for me for tw[o] weeks, some asshole BA walks on my job site and you threaten to blow smoke up your ass. So, bottom line is, you're not fired, you walked off the job site terminating your employment. So, if you have any questions, you can call 856-912-3373.

articulated by Joe Love, to McGee. It is an explanation for the discharge that is thoroughly inconsistent with Joe Love's treatment of McGee during the incident on April 25.[21]

I find that Respondent's reasons for terminating McGee were as Joe Love explained them during the incident to McGee. Gary Love's followup explanation for the discharge, and the explanation maintained at the hearing—that McGee "terminated [his] own employment" by walking off the job—is a pretext and an attempt disguise the fact that antiunion animus was the true motivation for the discharge. This conclusion not only adds further weight to the General Counsel's case but pretermits the "need to perform the second part of the *Wright Line* analysis.'" *Rood Trucking*, supra. The Respondent's discharge of McGee violated the Act as alleged.

C. Alleged failure to hire and consider for hire Dumont and Cunningham

The General Counsel alleges that Gallo violated the Act by failing to hire, and by failing to consider for hire, Union Organizers Dumont and Cunningham who applied to work at Gallo on April 18.

As discussed, supra, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." By its terms and by caselaw, this protection from discrimination has long been extended to applicants for employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941). Consequently, an employer can violate Section 8(a)(3) by refusing to hire or to consider hiring an applicant because of union considerations. *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

The governing standard for refusal-to-hire and refusal-to-consider violations was articulated by the Board in *FES*.

To establish a discriminatory refusal to hire, the General Counsel must first show 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 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

[21] I note that the Respondent's contention on brief (R. Br. at 7) that it took no adverse action against McGee and that Gary Love called McGee simply "to discuss what happened" is not accurate. Gary Love's message to McGee—"you're not fired, you walked off the job site terminating your employment"—was clear. He was saying that McGee was terminated for walking off the job, not for the incident with Joe Love. I have found the Respondent's claim pretextual, but by its own account it terminated McGee. This message was reinforced, without equivocation, by Joe Love's follow-up call later that afternoon, when he left a voicemail for McGee stating: "Bill this is Joe Love. It's 4:20. Don't show up Friday for your paycheck. It will be mailed to you." The offer to McGee in Gary Love's message that he "can call" if he "has any questions" did not abrogate the termination.

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. *FES*, supra at 12.

To establish an unlawful refusal to consider an applicant, the General Counsel must show that the respondent excluded applicants from a hiring process, and that antiunion animus contributed to that decision. Once this showing is made, the burden shifts to the respondent to show that it would not have considered the applicants for employment even in the absence of their union activity or affiliation. *FES,* supra at 15.

In *Toering Electric Co.*, 351 NLRB No. 18 (2007), the Board imposed on the General Counsel the additional burden of proving that the applicant was "genuinely interested in seeking to establish an employment relationship with the employer." In establishing this requirement, a Board majority recognized that "[i]n many instances, there is no question that an individual who applies for work with an employer does so pursuant to a good faith interest in accepting a job if offered on acceptable terms. However, in some cases, it is apparent that alleged applicants have no such interest." *Toering*, supra. slip op. at 1. The Board majority's concern was directed to some hiring discrimination cases involving "salting" campaigns where union members or staff apply for employment with an unorganized employer. *Toering*, supra at fn. 3. Traditionally, salting campaigns are undertaken so that "salts" can "'obtain employment and then organize the employees.'" *Toering*, supra at fn. 3 (quoting the definition of salting found in *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn.1 (9th Cir. 1996)). The salt's purpose in applying for employment may also include uncovering antiunion hiring discrimination on the part of the employer and filing charges to remedy that discrimination, much like a "tester" in civil rights discrimination cases. The Board majority in *Toering* was of the view that where an applicant is not genuinely interested in obtaining employment there should be no finding of hiring discrimination under the Act. In order to ensure that only salts actually seeking employment with the employer could be found to be discriminatees, the Board in *Toering* held that the General Counsel must prove the applicant's "genuine interest" in seeking to become an employee.

While establishing this requirement, the Board in *Toering* made clear that absent evidence offered by the employer contesting the "genuineness" of the applicant's motives, the fact of an application itself would establish the applicant's bona fides:

> [W]hile 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.

Toering, supra at slip op. 9 (footnotes omitted).

I turn first to the threshold question of Cunningham and Dumont's genuine interest in employment. It is undisputed that Cunningham and Dumont were "salts," i.e., union members applying for employment as part of a union campaign. Accordingly, their effort to seek employment must be evaluated in light of *Toering*. In this regard the General Counsel has amply satisfied his burden. Moreover, the employer's evidence purporting to contest the genuineness of Cunningham and Dumont's interest in employment is lacking. Thus, it is undisputed that Cunningham authorized Dumont to submit his application, and Dumont did, and submitted his own as well. It is undisputed that Gallo received these applications.

Under *Toering*, once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application. However, the evidence put forward in this case by the Respondent (see R. Br. at 10) is without force on this issue. The Respondent contends only that Cunningham and Dumont had not worked as insulators for pay in many years, were not simultaneously applying for work with other companies at the time they applied to Gallo, and that Dumont had authored and distributed a leaflet, perhaps two years earlier, "bad mouthing Gallo." The Respondent concludes that "[c]learly, the initial motivation behind submitting the applications was not employment, but rather they were submitting these applications as part of the admitted salting campaign." (R. Br. at 10).

Respondent conclusory non sequitur is revealing of the limits of its position. As a general proposition, part of a traditional salting campaign *is* submitting bona fide applications for employment. As the Board majority in *Toering* recognized, the fact that applications are submitted as part of a salting campaign does not suggest "that an application for employment is anything other than what it purports to be." *Toering*, supra. A salting campaign is not evidence of a lack of genuine interest in employment. Nor is lack of recent paid employment in the field (assuming qualifications for the work). Nor is evidence that in April 2007 Cunningham and Dumont were only applying to Gallo, and not more generally seeking employment. Again, that these union organizers only applied at Gallo suggests no more than that their interest in paid work as insulators was limited to work they could find as part of the salting campaign. The Respondent obviously believes that showing that an applicant is a salt should limit the application's protections under the Act, but the Supreme Court has rejected that view. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (unanimously approving Board's holding that paid union organizers who seek employment are statutory employees).

The record is devoid of any evidence that in applying at Gallo Cunningham and Dumont conducted themselves in any manner inconsistent with a genuine interest in employment. They did not turn ever turn down employment at Gallo. Their applications were free of inappropriate or offensive comments that one would not expect to see from someone seeking work. To the contrary, the cover letter earnestly expressed a desire for employment and a willingness to travel, professed that they had experience and kept their skills up to date through volunteering, and pledged not to engage in organizing activity "during the course of the paid work day." Dumont's application was not stale, it listed his work history up through his current job as a union organizer. Cunningham's omitted dates, and was less clear on the time periods of his experience, and neither application was dated, but these are ambiguities, not evidence of a lack of genuine interest in employment.

Finally Dumont's authorship and distribution of a leaflet in 2005, which, among other things, lists some of the problems Gallo was having with regulatory authorities is in no way "disloyal" or otherwise inconsistent with an interest in employment, especially two years later. The leaflet seeks to organize employees, in part, with the promise that as union members they will have job opportunities beyond and notwithstanding Gallo's fortunes. It does not support the Respondent's position that in April 2007 Dumont was not genuinely interested in employment.

In sum, the Respondent has offered nothing of substance to counter the undisputed submission of applications for employment by Cunningham and Dumont. In addition to the applications and cover letter, Cunningham and Dumont's credible testimony support the view that they were seeking employment. Moreover, the fact that their compatriot in the salting campaign, McGee, accepted work at Gallo, at least suggests that Dumont and Cunningham would similarly have accepted employment if offered. Pursuant to *Toering*, the General Counsel has established that Dumont and Cunningham were genuinely seeking employment.

Turning to the traditional test under *FES*, supra, to make out a refusal-to-hire violation the General Counsel must show that the Respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct and also must show that the applicants had the experience or training relevant to the requirements for the position, or in the alternative, that the requirements were pretextual or applied as a pretext. Finally, to establish his initial burden the General Counsel must show that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the Respondent bears the burden of showing that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES*, supra at 12.

I conclude that under the somewhat unique circumstances of this case, the General Counsel has met his initial burden but that the Respondent has demonstrated that it would not have hired Cunningham and Dumont even in the absence of their union affiliation.

There can be no doubt on this record that the Respondent's antiunion animus was vibrant, and the chance of it hiring someone who identified himself as a union organizer in his application nil. Indeed, Gary Love admitted that he "probably" would not have hired McGee had he known of his union affiliation.

It is also proven that the Respondent was hiring, and did hire employees in the weeks after Cunningham and Dumont submitted their application. In May, the Respondent hired three additional employees. Two of the three remained employed for only a month or so, working until a general layoff near the end of June. One, Raphael Ortiz worked steadily through October. A fourth, hired in late April, was hired temporarily for two weeks. Moreover, Cunningham and Dumont had the experience and skills to perform the insulation work required by Gallo. Their experience is not a serious issue, given that the employees hired over them in May had no insulation installation experience.

The difficulty with the General Counsel's case is found in the Respondent's hiring practices which, as Love emphasized, focused on hiring family and friends to perform work for this small employer. By all evidence, Gallo did not advertise for employees, did not solicit applications from individuals without connection to the company, and did not hire based on unsolicited applications. With the exception of Cunningham and Dumont, Gallo never received unsolicited applications. Although there are a few employees for whom there is no information in the record about how they came to be hired, for those that were (and that is most of them) the evidence is unequivocal: none were hired based on simply mailing (or faxing) an application into Gallo. Yearly hired for only two weeks just after Cunningham and Dumont applied, was a friend

of Gary Love's, and the undisputed evidence is that his hiring was a favor so that Yearly could earn some extra money while on vacation from his primary employer. Curley, Hinkelmon, and Maahs, were all graduates of the high school attended by Gary Love's daughter. They were her friends, and in the case of Curley and Hinkelmon their fathers' spoke to Love about getting their sons hired by Love. Lynch was Maahs' cousin. Ortiz, the only employee who filled out an employment application, was connected to the Love's through his girlfriend. The undisputed evidence is that she was a friend of Love's. McGee was the sole employee who did not have a prior personal relationship with the Loves or someone the Loves knew. Yet his hiring too, stands in sharp contrast to the efforts of McGee and Cunningham. Even assuming, as Maahs claimed, and contrary to the Loves' testimony that McGee was not recommended for employment by Maahs McGee was hired after repeatedly contacting Love over the course of several weeks and following up when Love did not return his calls. This initiative stands in sharp contrast to Cunningham and Dumont's efforts, which were confined to sending an unsolicited application and never again seeking to initiate contact with Gallo regarding the possibility of being hired. The fact is the record reveals no Gallo employee who was hired that way.

The Loves knew Dumont and Cunningham as union organizers, and not as prospective employees. It is clear to me that they had no chance of being hired because of their union affiliation and open interest in union organizing. However, the question must be asked, if two individuals, unknown to the Respondent, or unknown in any way related to the work to be performed, had, without solicitation, introduction, warning, or further followup, faxed a resume over to Gallo, would Gallo have hired them? I think on this record, the preponderance of the evidence suggests that they would not be hired, at least not when applicants with a more personal connection were available for hire. Gary Love's comments about Cunningham and Dumont would likely have applied to unknown individuals who dropped applications off and had no further contact with Gallo: "they never contacted me again after the applications were submitted, and the other individuals got a hold of me and I proceeded forward with those individuals."

Based on the hiring practices demonstrated by the Respondent, it is most reasonable to conclude that Gallo would have preferred and hired his friends and his daughter's friends over insulators whose unsolicited resume came across the Loves' desk, and who never contacted him further. *Smokehouse Restaurant*, 347 NLRB No. 16, slip op. at 5 fn. 13 (2006) ("As with hiring policies that favor former employees and applicants recommended by current managers and employees, it is human nature to want to hire 'known quantities'"). This satisfies the Respondent's burden to show that, even absent Cunningham and Dumont's union activities, the Respondent would not have hired them during the period in question.

There is, of course, the possibility that the Respondent's practice of hiring family friends, or in the case of McGee, those who assiduously pursued employment, was a pretext, or a device designed to ward off the covert union affiliated employee. While an "employer's neutral application of a lawful preferential hiring policy is a defense to refusal-to-hire allegations," such a "policy is not a valid defense to an allegation of antiunion discrimination where the employer's deviations from the policy" or "its manipulation of the hiring process to frustrate applications from union supporters" justifies "an inference that the entire hiring process was tainted by antiunion animus." *The McBurney Corp.*, 351 NLRB No. 49, slip op. at 2 (2007), referencing, *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005), review denied 243 Fed. Appx. 898 (6th Cir. 2007), and *Jesco*, *Inc.*, 347 NLRB No. 92 (2006).

In this case, given the antiunion animus that is proven, including that manifested during the hiring of McGee, there is no ignoring the possibility that the Respondent's "hire those you

know" policy was tainted by antiunion animus. But the evidence is insufficient establish this. In cases such as *Zurn*, supra, *Jesco*, supra, and *Brandt Construction Co.*, 336 NLRB 733 (2001), enfd. 325 F3d 818, 833-834 (7th Cir. 2003), the Board reviewed the history of applicants and hires to evaluate whether the hiring process was manipulated or deviated from in order to avoid hiring union supporters, or whether enough union affiliated employees were hired to controvert claims of a discriminatory hiring process. On the instant record an inference of systematic hiring discrimination cannot be drawn. Thus, while it is true that the only union affiliated employee to be hired was McGee, who hid his union affiliation, and had to in order to be hired, it is also true that there is no inkling on the record that other applicants for hire were vetted or evaluated based on union considerations. There is no evidence that union affiliated or union sympathetic employees who otherwise fit the hiring profile preferred by the Respondent were rejected for hire. This type of evidence was not pursued at trial, and, indeed, there is no claim by the General Counsel that the hiring process generally was tainted by antiunion animus. The evidence is insufficient to warrant an inference to that effect. I will recommend dismissal of the allegations related to the refusal to hire Cunningham and Dumont.

A separate issue is the allegation that the Respondent unlawfully refused to consider Cunningham and Dumont for hire. As stated, supra, in order to prove this allegation, the General Counsel must show that the respondent excluded applicants from a hiring process, and that antiunion animus contributed to that decision. Once this showing is made, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *FES,* supra at 15.

Proof of this violation is not foreclosed by my conclusion that the Respondent has shown, by a preponderance of the evidence, that in these circumstances it would not have hired Cunningham and Dumont even in the absence of their union affiliation. A refusal-to-hire and a refusal-to-consider allegation are separate, albeit related claims. See, e.g., *Tradesman Int'l, Inc.*, 351 NLRB No. 27, slip op. at 5 (2007). As he did with the refusal-to-hire allegation, the General Counsel has met his initial burden with regard to the refusal-to-consider allegation. I reject Gary Love's claims that he consciously and in good faith considered Cunningham and Dumont for hire. His antiunion animus, which he and the Respondent attribute to their "past experience" with unionization at Tempco, would not permit such consideration.

The burden, then, is on the Respondent to show that even in the absence of Cunningham and Dumont's union affiliation, the Respondent would still not have considered their applications.

The Respondent's hiring practice certainly favored family friends and, in McGee's case, applicants who actively pursued employment. That practice has convinced me that the Respondent would not have preferred two applicants who sent unsolicited applications and never followed up, over available applicants recommended by friends or employees. But that conclusion does not mean that it is also more likely than not that the Respondent's practice was so rigid as to preclude consideration of unsolicited applications. To the contrary, the Respondent's hiring practices were neither rigid, nor formal. The Respondent has shown only that it did not advertise or seek applications from unknown applicants. It does not contend that it would not consider them. Indeed, Gary Love, at one point in his testimony, asserted that Gallo gave consideration to Cunningham and Dumont's applications. I do not believe that. But I do believe Gallo would consider unknown applicants, although as I have found, I also think it more likely than not that those unknown applicants would ultimately lose out in the hiring process to the extent more familiar and recommended applicants were available for hire, as there were in this case. However, if familiar and recommended applicants were unavailable,

then a nondiscriminatory consideration of applicants unknown to the Loves could amount to more than a courtesy. Absent an available familiar or recommended applicant, the Respondent might well hire an unknown applicant (if its antiunion animus was not aroused). In any event, the Respondent has failed to prove that—in the absence of indications of union activity by the applicant—an unknown applicant would not even be considered. Accordingly, I conclude that the Respondent violated the Act, as alleged, by failing to consider Dumont and Cunningham for employment because of their union affiliation.

D. May 8 alleged threat

As discussed, above, on May 6, Dumont telephoned Gallo employee, and Love's friend, Yearly to discuss organizing. Two days later, Gary Love called Dumont and left a voice mail message on Dumont's cell phone stating:

> You've overstepped your boundaries. You're way out of your league. I'm calling my Attorney. You're going to pay. . . . You're going to pay. I've already talked to my Attorney. If you're' any kind of man you'll call me back.

The General Counsel alleges that this is a threat in violation of Section 8(a)(1) of the Act, with a reasonable tendency "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). At the time of this call, Dumont was not simply a union organizer, but an applicant for employment with the Respondent. I have no doubt—and since the Respondent's witnesses did not address this incident, I have been given no reason to doubt—that Love's call was in response to Dumont's protected activity of calling Yearly two days earlier to discuss union activity. Telling an applicant that they are "going to pay" because they engaged in protected activity is a very clear threat of retaliation for that union activity. It violates the Act as alleged.

The Respondent's brief does not address this incident or make any argument related to it. At trial, Respondent's counsel suggested that Love's call could have related to pending litigation filed by the Union and its benefits fund against Gallo or Tempco to collect benefits contributions allegedly owed by Tempco. If true, this would not advance the Respondent's position. Unless mounted with malice or in bad faith, a lawsuit suit to collect benefits is protected activity for which an employer may not retaliate against an applicant. See, *Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *U Ocean Palace Pavilion*, 345 NLRB 1162, 1170 (2005). But more to the point, I do not accept counsel's suggested explanation for the comment. No evidence supports this alternative explanation for Love's call (as noted, supra, the suit against Gallo was not yet filed), while the timing of Love's threat strongly supports the conclusion that Dumont's call to Yearly triggered and was the subject of the threat. In any event, Love's unstated motives for the call are not relevant. "The General Counsel's burden is to demonstrate, by a preponderance of the evidence, that [Love's] comment could reasonably be construed as violative of Section 8(a)(1)." *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001). Love's comment did not articulate a lawful explanation for his call. He "ran the risk that his statement—or any ambiguity in his statement—could be construed by an employee as containing an unlawful threat." Id.

E. Late May Allegations of interrogation, a threat and creation of Impression of Surveillance

At the end of May, Maahs was working at a Gallo project in West Virginia. In front of three other employees, Gary Love asked Maahs if he had joined the Union. Love then told Maahs that if Maahs had joined the Union he "would be laid off because this had happened before and

that it was going to be personal because it [a]ffected his family." Maahs told Love that he had not joined the Union.

This interrogation and threat to lay off Maahs if he had joined the Union are obvious violations of Section 8(a)(1).

The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). The Board has identified a number of factors that are "useful indicia"[22] in making this determination,[23] however, there are no particular set of factors that are to be "to be mechanically applied in each case." *Rossmore House*, supra at 1178 fn. 20; *Westwood Health Care Center*, 330 NLRB at 939. Rather, the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, supra.

Generally, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboard Casinos of Missouri, Inc.*, 329 NLRB 77 (1999). Considering the specific circumstances, that conclusion cannot be avoided here. The top operating officer of the employer questioned Maahs, in front of other employees, and the sole identifiable purpose for the question was as a predicate for, and part and parcel of an obviously unlawful and coercive threat to lay off Maahs if he learned of Maahs' union membership. This straightforward threat of job loss if Love learned that Maahs had joined the union undoubtedly had a tendency to interfere, restrain and coerce Section 7 rights in violation of Section 8(a)(1). Of course, under such circumstances, Maahs felt compelled to deny union membership when interrogated about it. Thus, as to the interrogation, It is not just that "the questioning did not occur in a context free of other coercive conduct" (*Demco New York Corp.*, 337 NLRB 850, 851 (2002); see, *Millard Refrigerated Services*, 345 NLRB 1143, 1146–1147 (2005), but that it was a constituent part of a threat of job loss. As such, the interrogation was highly coercive and violated Section 8(a)(1) of the Act as alleged.

Later that same week, Love told Maahs that he had received a phone call telling him that Maahs had joined the Union. The General Counsel alleges that this statement by Love unlawfully created the impression of surveillance of Maahs' union activities. In *Sam's Club*, 342 NLRB 620 (2004), the Board held that,

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[22] *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), quoted approvingly in *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

[23] These include the "Bourne factors", enunciated in Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964) and set forth in *Westwood Health Care Center*, supra at 939:

(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply.

> The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. The Board does not require that an employer's words to an employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means.[24]

In *Sam's Club*, supra, a supervisor was found to have created an impression of surveillance when he told an employee that he had heard the employee was circulating a petition about wages. The Board held that such a statement "leads reasonably to the conclusion that the Respondent has been monitoring [the employee's] activities." 342 NLRB at 620–621. In drawing this conclusion, the Board relied upon the fact that the employee had not circulated the petition openly and the supervisor did not reveal the manner in which he had learned the information about the employee's activities. Similarly, in this instance, Maahs had not been open about his union affiliation. Indeed, he had hid it and denied it when interrogated by Love. Nor did Love explain how he had learned this information and nothing in his statement suggested that the information was lawfully acquired.[25] To the contrary, by communicating specific knowledge about Maahs that Maahs had kept secret from Love, Love strengthened the impression of surreptitious surveillance of protected activity.[26] Love's comment is violative of the Act as alleged. *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993) (manager's comment to employee that "I heard you joined the union" unlawfully creates impression of surveillance).

CONCLUSIONS OF LAW

1. The Respondent A. Gallo Contractors, Inc. a/ka A. Gallo Construction Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Association of Heat and Frost Insulators and Asbestos Workers, Locals 14, 23, and 89, are labor organizations within the meaning of Section 2(5) of the Act.

3. On or about March 19, 2007, the Respondent violated Section 8(a)(1) of the Act by interrogating William McGee regarding his union membership.

4. On or about April 25, 2007, the Respondent violated Section 8(a)(1) of the Act by directing employee William McGee not to talk with union representatives, and by telling him that he could not be employed by the Respondent if he spoke with union representatives.

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[24] 342 NLRB at 620, citing *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 4th Cir. 2001).

[25] *Classic Sofa, Inc.*, 346 NLRB 219, 221 fn. 10 and surrounding text (2006).

[26] *Donaldson Bros. Ready-Mix, Inc.*, 341 NLRB 958, 963 (2004) (specifically identifying union leaders including employee to whom the comment was addressed "gave [the employee] reasonable grounds to believe that management knew [the employee] and others were union organizers and that it had a source of information regarding the employees' union activities").

5. On or about April 25, 2007, the Respondent violated Section 8(a)(1) and (3) of the Act by discriminating against employee William McGee for the purpose of discouraging membership in a labor organization by discharging him in retaliation for his union activity.

6. Beginning on or about April 18, 2007, and continuing thereafter, the Respondent violated Section 8(a)(1) and (3) of the Act by discriminating against employees James Cunningham and Fred Dumont for the purpose of discouraging membership in a labor organization by refusing to consider Cunningham and Dumont for employment because of their union affiliation.

7. On or about May 8, 2007, the Respondent violated Section 8(a)(1) of the Act by threatening employment applicant Dumont with unspecified reprisals in retaliation for his effort to discuss the Union with an employee of the Respondent.

8. On an unspecified date in late May 2007, the Respondent violated Section 8(a)(1) of the Act by interrogating employee Jason Maahs regarding his union membership and by threatening him with layoff if it learned that he joined the Union.

9. On an unspecified date in late May, 2007, the Respondent violated Section 8(a)(1) of the Act by creating the impression that the Respondent was engaged in surveillance of employee union activity when Gary Love told employee Jason Maahs that he had received a phone call telling him that Maahs had joined the Union.

10. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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 Respondent, having unlawfully discharged employee William McGee as of April 25, 2007, must offer McGee reinstatement to the position he occupied prior to his discharge, or to an equivalent position should his prior position not exist, without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make McGee whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as McGee was a salt, the duration of his backpay period and his continuing entitlement to an offer of instatement shall be determined in accordance with O*il Capitol Sheet Metal Inc.*, 349 NLRB No. 118 (2007).

The Respondent, having unlawfully failed to consider for employment applicants James Cunningham and Fred Dumont, shall consider Cunningham and Dumont for future employment in accord with nondiscriminatory criteria, and notify them, the Union and the Regional Director for Region 4, in writing of future openings in positions for which these individuals applied or substantially equivalent positions. The Respondent will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance. If it is shown at the compliance stage of this proceeding that, but for the failure to consider these

applicants, the Respondent would have selected them for job openings arising after the beginning of the hearing, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall be ordered to hire them for any such positions and make them whole for any loss of earnings and other benefits they may have suffered due to the unlawful actions taken against them in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as Cunningham and Dumont applied as salts to work for the Respondent, the duration of any backpay period and any entitlement to an offer of instatement shall be determined in accordance with *Oil Capitol Sheet Metal Inc.*, supra.

The Respondent shall remove from its files, including McGee's personnel file, and any files referencing Cunningham or Dumont, any reference to McGee's discharge or the failure to consider Cunningham or Dumont, and shall thereafter notify McGee, Cunningham, and Dumont in writing that this has been done and that the discharge and failure to consider for hire will not be used against them in any way.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 4 of the Board what action it will take with respect to this decision. 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 March 19, 2007.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, A. Gallo Contractors, Inc. a/ka A. Gallo Construction Inc., Maple Shad, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating any employee regarding his union membership.

(b) Directing any employee not to talk with union representatives.

(c) Telling any employee that he cannot work for the Respondent if he talks with union representatives.

(d) Discharging any employee in retaliation for his efforts to speak with union representatives.

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

(e) Refusing to consider for employment job applicants because they are members of a union.

(f) Threatening any applicant for employment with reprisals for attempting to speak to an employee about union issues.

(g) Threatening any employee with layoff if he is found to be a member of a union.

(h) Creating the impression that any employee's union activities are under surveillance.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 William McGee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee William McGee whole with interest, in the manner set forth in the remedy section of this decision for any loss of earnings or other benefits resulting from their discharge.

(c) Consider job applicants James Cunningham and Fred Dumont for future job openings in accord with nondiscriminatory criteria, and notify them, the Union, and the Regional Director for Region 4 of future openings in positions for which these individuals applied or substantially equivalent positions. The Respondent shall provide such notification until the Regional Director concludes that the case should be closed on compliance.

(d) Hire applicants James Cunningham and Fred Dumont for any job openings arising after the beginning of the hearing, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, and for which it is shown at the compliance stage of this hearing that but for the failure to consider these applicants, the Respondent would have selected them, and make them whole for any losses, with backpay computed as described in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files, including William McGee's personnel file, and any files referencing Cunningham or Dumont, any reference to McGee's discharge or the failure to consider Cunningham or Dumont, and shall within 3 days thereafter notify McGee, Cunningham and Dumont that this has been done and that the discharge and failure to consider for hire will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Maple Shade, New Jersey, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 4, 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. 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 March 19, 2007.

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

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

Dated, Washington, D.C. February 14, 2008

_____
David I. Goldman
Administrative Law Judge

[28]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

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 interrogate you regarding your union membership.

WE WILL NOT direct you not to speak with union representatives.

WE WILL NOT tell you that you cannot work for us if you speak with union representatives.

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

WE WILL NOT discharge you for engaging in union activities.

WE WILL NOT refuse to consider for employment any job applicants because of their membership in a union.

WE WILL NOT threaten any job applicant with unspecified reprisals for attempting to contact employees to discuss the union.

WE WILL NOT threaten you with layoff in retaliation for being a member of a union.

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

WE WILL, within 14 days from the date of this Order, offer William McGee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William McGee whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL consider job applicants James Cunningham and Fred Dumont for future job openings in accord with nondiscriminatory criteria, and notify them, the Union, and the Regional Director for Region 4 of future openings in positions for which these individuals applied or substantially equivalent positions. If it is shown in the compliance stage of this proceeding that there were job openings arising after the beginning of the hearing, or arising before the hearing that the General Counsel neither knew nor should have known had arisen, and for which, but for the

failure to consider these applicants, we would have selected Cunningham or Dumont, we shall hire them and make them whole for any losses of earnings and other benefits resulting from our failure to hire them, less net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of William McGee, and the unlawful failure to consider James Cunningham and Fred Dumont for hire and WE WILL, within 3 days thereafter, notify McGee, Cunningham, and Dumont in writing that this has been done and that the discharge and failure to consider for hire will not be used against them in any way.

A. GALLO CONTRACTORS, INC., a/k/a
A. GALLO CONSTRUCTION, 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, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.