JD(ATL)–29–08
Orlando, FL

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

EDLEN ELECTRICAL EXHIBITION
SERVICES, INC., OF ORLANDO

and Case 12–CA–25582

MICHAEL D. MATHERS, an Individual

and Case 12–CA–25623

JASON DRIVER, an Individual

Thomas W. Brudney, Esq., for the General Counsel.
Robert W. Rasch, Esq., for the Respondent.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. These cases were heard in Orlando, Florida, on June 2 and 3, 2008, pursuant to a consolidated complaint that issued on February 29, 2008.[1] The complaint alleges that the Respondent threatened employees with discharge for filing grievances in violation of Section 8(a)(1) of the National Labor Relations Act, denied a work assignment to, and laid off, Charging Party Mathers because of his union activities in violation of Section 8(a)(1) and (3) of the Act, and discharged Charging Party Driver because of his union activities in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies that it violated the Act.[2] I find that the Respondent did violate the Act substantially as alleged in the complaint.

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

Findings of Fact

I. Jurisdiction

The Respondent, Edlen Electrical Exhibition Services, Inc., of Orlando, the Company, provides electrical set-up and supply to tradeshows, including recreational vehicle (RV) tradeshows and other mobile commercial industrial tradeshows, throughout the United States from its facilities based in Orlando, Florida, from which it annually sells and delivers goods and materials valued in excess of $50,000 directly to entities in states other than the State of

[1] All dates are in 2007 unless otherwise indicated. The charge in Case No. 12–CA–25582 was filed on October 4 and amended on November 26. The charge in 12–CA–25623 was filed on November 9 and was amended on December 5.
[2] The name of the Respondent was amended at the hearing. Page 161 of the transcript has been corrected.

Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers and its Local Union No. 606 (Local 606), its Local Union No. 143 (Local 143), and its Local Union No. 494 (Local 494), are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Company, established in 1989, is owned by James Boone and a partner. Boone is President of the Company. The offices of the Company and shop from which its 20 to 25 employees work are located in Orlando, Florida. The Operations Manager and Vice President is Louise Murray, who oversees various aspects of the business including administrative and personnel matters. Manager Mike Fisher oversees the electrical work performed by the employees who work under his direction and the direction of two other supervisors. Most of the work performed by the Company is performed in the Orlando area where there are numerous attractions, including Walt Disney World and Universal Studies, and hotels at which the Company provides electrical services to vendors who promote their products at various tradeshows. The Company also provides set up and electrical services out-of-state at golf tournaments, tool shows, and RV shows. The two out-of-state locations relevant to this proceeding were an RV tradeshow in Hershey, Pennsylvania, in September 2007 and a tool tradeshow in Milwaukee, Wisconsin, in October 2007.

The Company initially recognized Local 606 pursuant to a Section 8(f) agreement in 1993. On October 27, 2003, the Company recognized the Union as the employees' Section 9(a) representative. The Company is a member of the Central Florida Chapter of the National Electrical Contractors Association (NECA) and is bound by the national agreement on portability between the International Union and the NECA. The portability agreement provides that contractors who are signatory to an agreement with one local union may send employees "who are knowledgeable of the contractor's work practices and customer's requirements" into the jurisdiction of other local unions to perform work, subject to certain restrictions including payment of the applicable local wage.

Business Manager of Local 606 Harry Brown explained that he would not be aware every time a signatory contractor with Local 606 was performing work in the jurisdiction of another local union. He would call another local to find out the requirements of that local union only if someone called him and "asked me to make the call." President Boone testified that, typically, for a job of short duration such as a tradeshow, the local union having jurisdiction would not require the Company to sign a local agreement, that it was "more of an aggravation and a problem [for] them to set this up" and that, usually, they would require that the Company "let them know we are in their territory" and were following the rules of their home local, Local 606. Boone had signed local agreements when the Company was working in New Orleans and in South Bend when requested to do so.

On previous occasions that the Company had performed work in Hershey, Local 143 had been notified that the Company was performing work in its jurisdiction and had required only that the Company follow its contract with Local 606. Prior to sending employees to Hershey in 2007, Operations Manager Murray called Local 143 and informed President Robert Rhoades of the manner in which overtime was computed in Local 606. President Rhoades agreed that

the employees coming to Hershey simply needed to call in, that the Company could follow its Local 606 contract.

Boone was unaware whether, prior to 2007, Local 494 in Milwaukee had been notified that the Company was performing work in its jurisdiction. In 2007, the Company did notify Local 494 in Milwaukee that the Company was going to be working in its jurisdiction, and Local 494 required that the Company sign its local agreement.

B. The Layoff of Michael D. Mathers

1. Facts

Michael Mathers was hired in December 2006. Thereafter he performed various duties including an RV show in Tampa, Florida. On July 22, he was sent, by himself, to set up a water conservation tradeshow at Saddle Brook Resort in Tampa, Florida, which is about a one hour drive from Orlando. The timesheet he turned in reflected that he worked 11 hours. Shortly after submitting his timesheet, Operations Manager Murray called Mathers to her office where she questioned him regarding the time charged, time that she considered excessive.

At the hearing, Mathers explained that two of the hours were driving from Orlando to Tampa and back to Orlando, that it took him about three or four hours to set up the electrical supply cables for the booths of the various vendors, and that he remained at the site in order to collect payments from the vendors who connected to the electricity supplied by the cables. On cross examination he admitted that he waited around for the vendors to arrive so that he could make some collections because Manager Fisher had told him to “get whatever payments” he could on the day that he did the set up.

Operations Manager Murray acknowledged questioning Mathers regarding his time sheet, stating that she “felt the hours were excessive,” and asking whether anything happened on that job that “would make him stay there for 11 hours.” She recalled that Mathers responded that he “just went to the job.” Murray asked whether he thought the hours were excessive, and that Mathers acknowledged, “[Y]eah, kind of.” She then asked how he would have handled the situation if he had been in Orlando, and Mathers stated that he would have called Fisher, presumably to determine how long he should wait to make whatever collections he could from the vendors. Murray testified she told Mathers that “the next time you go out on a job like this and you think the hours are excessive, please call in to the office and we will give you direction.”

Mathers agrees that Murray questioned him regarding the number of hours that were reflected on his timesheet. He told her that Fisher did not want him to go the next day and told him to “go set it up, get whatever payments you can on the show, and make sure everything is set up and running good and leave.” He explained that he “had to wait for the vendors to come in,” that he did so and “got a few collections, and everything was good, and then I left.” He testified that Murray claimed that he was “padding the time” and said “that's all I want to talk about this.” Mathers replied, “[A]ll right,” and that “the next time I speak to you, I want a union rep -- I want to be represented by a union member the next time I talk to you.” Murray answered, “[T]hat's the part I don't like about unions.” Mathers responded, “[W]ell, it's people like you, that's why unions are here.”

A pretrial affidavit signed by Mathers states that he told Murray that if he needed to talk to her again he would invoke his “*Weingarten* rights” (*NLRB v. Weingarten*, 420 U.S. 251 (1975)), and that he was “not gong to put myself in this position again without having a union

representative present." On cross examination he acknowledged that, although he had heard about *Weingarten*, he did not know the "whole definition" and did not use that word when speaking with Murray. Although Mathers' inclusion of the term *Weingarten* in his affidavit detracts from his credibility, his forthright acknowledgement that he did not use the term *Weingarten* when speaking with Murray enhances his credibility. Murray denied that Mathers made any statement regarding a union representative or that she stated anything regarding not liking unions. I credit Mathers, both upon his demeanor and the unimpressive demeanor of Murray coupled with her giving Mathers a false reason for his layoff.

In early August, Manager Mike Fisher asked any employees who desired to work two separate tradeshows, an RV tradeshow in Hershey, Pennsylvania, and a tool tradeshow in Milwaukee, Wisconsin, to express their interest in working at one or both of the tradeshows. Mathers, who has a sister in Hershey, volunteered for that tradeshow. Mathers, a relatively new employee, called Local 606 and spoke with President Harry Brown who explained that when employees go out of Local 606, they are required to notify the local union with jurisdiction over the location. Although Business Manager Brown recalls receiving a call from an Edlen employee regarding working in the jurisdiction of the Local 143, he did not recall who called him. Mathers called Local 143, the local union with jurisdiction in Hershey, and learned that their hourly rates were higher than the contractual rates of Local 606.

Shortly thereafter, Mathers spoke with President Boone about hotel rooms in Hershey, explaining that he needed a single room because he had sleep apnea. Boone stated that that was no problem. Mathers noted that the rate of pay in Local 143 was $26.50 with overtime after eight hours and time and one half on Saturday, double time on Sunday. Boone replied that he "had no problem with the pay … [that] if he has to pay it, he has to pay." Boone admits the conversation regarding the room, but denied that the rates of the Pennsylvania local union were mentioned. I credit Mathers and find that he did mention the pay rate. Mathers did not inform Boone that he had called Local 143 or that the information regarding the pay rate had been given directly to him. At some point, Boone learned that Mathers had a sister in Hershey with whom he "wanted to spend some time." Boone testified that he "would not have had a problem with that."

Boone testified that he wanted employee Emmett Swinson to go to the Hershey tradeshow, arriving on September 5, but that Swinson's wife was experiencing medical problems, and he did not want to go. That situation changed shortly before Boone obtained airline tickets on August 27, to fly the employees to Harrisburg, the city nearest to Hershey, and he selected Swinson, who had agreed to go. Operations Manager Murray testified that Boone sent Swinson "in place of" Mathers.

Mathers recalled seeing his name upon what he thought was a list of the employees going to Hershey. Boone testified that any such list would have been who he was "looking to take or possibly be selected" and would have been thrown away. In view of the substitution of Swinson for Mathers, his presence upon the nonexistent document is immaterial. Mathers was told by employee Jason Driver that he was not included in the airline tickets. Mathers did not express disappointment regarding his failure to be selected to any management official.

On August 31, prior to the departure of the employees selected to go to Hershey, Mathers was laid off. The Company called the termination a layoff because Local 606 President Brown had informed the Company that the Union could grieve a discharge, but not a layoff.

Mathers credibly testified that, on the day of his layoff, he had been working at Universal Studios and was driving home when he received a call from supervisor Keith Hay who stated

that he hated "to be the bearer of bad news," but that Operations Manager Murray was going to lay him off. Mathers asked why, and Hay replied that he had "no idea." Mathers returned to the shop. As he entered, he saw Mike Fisher and Hay sitting in the office and asked why he was being laid off. They replied that they had no idea. As he went to the office of Murray, he encountered President Boone and asked him why he was being laid off. Boone replied that, "[W]e are going in a different direction, and you are one of the unlucky ones to be laid off." Boone did not deny the foregoing comment. Mathers then met Murray who asked him to accompany her to her office. Once in the office she stated that she hated that he had "to find out that you are getting laid off this way." Mathers asked why he was being laid off, and Murray replied, "[W]e are going in a different direction, and you are just one of the unlucky ones. We are going to lay off a few other people." She gave no names. No other employees were laid off.

Operations Manager Murray initially testified that she laid off Mathers "[b]ecause he was lazy, and he didn't do the job." She stated that she had seen him "stand around … with his hands folded, not working." In further testimony she explained that she observed him "standing in the same place in the shop" on the Company's security video cameras. She reported her observations to Manager Fisher and President Boone, and she claims that she asked Fisher to speak to Mathers. Boone testified that he himself had spoken to Mathers "from a joking standpoint," telling him to "get moving," that he was "standing around too much," and on one occasion stating that if he caught him "standing around again, we are going to have some problems." Fisher did not testify to any instances of laziness on the part of Mathers. He testified that he "never" spoke to Mathers about laziness. There is no discipline of any kind in the personnel file of Mathers.

Boone testified that, after Mathers was laid off, employee John Griffis questioned him regarding why Mathers was let go and that he told Griffis that "he was lazy, and I had told him numerous times to get to work." Boone testified that Griffis replied that he had to tell Mathers the same thing. Insofar as Mathers had already been laid off, the alleged comment by Griffis could have played no part in the decision of the Company. Contrary to the comment that Boone alleges that Griffis made, employee Griffis testified that Mathers' "work ethic was good," that he worked with Mathers and that Mathers "was a hard worker." I credit Griffis. Boone admitted that Mathers was a "very good electrician." I note, with concern for credibility, that Boone informed employee Griffis that Mathers was laid off because he was lazy but dissembled when speaking with Mathers, telling him that the Company was "going in a different direction."

Murray admitted that she did not state to Mathers that he was being laid off because he was lazy. She recalls telling him that he was being laid off because there was a lack of work and that "we didn't need that many people in our warehouse working, and, therefore, I was laying him off." She denied stating that the Company was "going in a different direction." On cross examination, Murray amended her initial testimony that Mathers was laid off because he was lazy and didn't work by asserting an additional reason, "[W]e were having a slowdown." Counsel for the General Counsel questioned Murray about the additional stated reason for the discharge, asking what work the Company did not have on September 1 that it had on August 1, Murray answered, "In the warehouse, it's always the same work, but there's usually less of it, and we don't really have to have people in the warehouse to do it at any specific time." No documentary evidence was presented in support of a lack of work. Mathers was aware of various upcoming tradeshows.

I credit the testimony of Mathers that he was told that he was being laid off because the

Company was "going in a different direction" and that he was one of the "unlucky ones." Boone did not deny making that comment to Mathers. I do not credit Murray's denial that she made the same statement to Mathers as Boone had made.

Prior to the layoff of Mathers, the only employees who had been separated from the Company were employees who had been hired for short term specific jobs and one employee who was "stealing time," i.e. falsifying his time sheet. Although Murray had, in July, questioned Mathers about the amount of time he spent at Saddle Brook, there was no contention that he had falsified his time sheet and not spent the time reported. The contention was that the time he spent was excessive.

Boone was not involved in the layoff of Mathers. He testified that Murray had "wanted to let him [Mathers] go … in the last month prior" to laying him off on August 31 and that date was chosen because "she wanted to do it on the end of the week," which suggests that Boone was aware of what was to occur several days before the layoff actually occurred. That knowledge explains why an airline ticket was obtained for employee Greg Guenther, who had no experience at RV tradeshows, rather than Mathers.

2. Analysis and Concluding Findings

The complaint alleges, and the General Counsel argues, that Mathers was denied the Hershey assignment because of his union activities and laid off because of his union activities.

The Respondent argues that Mathers' testimony was not credible and that, absent his conversation with Murray, there is no evidence that the Respondent was aware of Mathers having engaged in any union activity. The Respondent further argues that that there is no evidence of animus and that the layoff of Mathers because of his laziness and lack of work constituted legitimate reasons for his separation.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Mathers' invocation of his *Weingarten* rights by stating that "the next time I speak to you, I want a union rep -- I want to be represented by a union member the next time I talk to you," constituted union activity. *Circuit-Wise, Inc.*, 308 NLRB 1091, 1109 (1992). The finding in *Circuit-Wise, Inc.*, is consistent with *IBM, Inc.*, 341 NLRB 1288, 1294 (2004), in which the Board limited the right to representation in an investigatory interview to employees represented by a union. Thus, Mathers' statement relating to union representation at any future conversation constituted union activity. An employer's cooperative relationship with its employees' collective bargaining representative does not preclude finding that an employer bears animus towards employees who assert their representational rights relating to grievance filing, and, by analogy, their rights to representation at investigatory interviews. See *New Orleans Cold Storage Co.*, 326 NLRB 1471 at fn. 1 (1998), enfd. 201 F.3d 592 (5th Cir. 2000). Murray's response, "[T]hat's the part I don't like about unions," did not constitute a threat in violation of Section 8(a)(1), but it clearly reflected antipathy towards employees who chose to exercise their right to representation.

I note that, although not stating the source of his knowledge, Mathers' mention of the pay rates of Local 143 to Boone establishes that the Respondent was aware that he knew his contractual rights. Insistence upon compliance with contractual rights constitutes protected union activity. See *Tel Data Corp.*, 315 NLRB 364, 378 (1994). Even though Boone's response indicated a willingness to pay whatever was necessary, the encounter confirmed that employee Mathers would, as he had with Operations Manager Murray, exercise both his representational and contractual rights.

An inference of discriminatory motivation with regard to an adverse employment action may be established without direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Factors that the Board has relied upon in finding discriminatory motivation include suspicious timing (*Electronic Data Systems Corp.*, 305 NLRB 219 (1991), shifting reasons given in defense and false reasons given in defense (*Adco Electric* 307 NLRB 1113, 1128 (1992) and *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988)).

Boone's was aware that Murray had wanted to get rid of Mathers for about a month which coincides with the meeting she had with Mathers shortly after July 22 when Mathers stated his desire for union representation at any future discussion. The failure of Murray to state to Mathers the reason that she claims he was discharged, laziness, is persuasive evidence that alleged laziness was not the real reason. I have not credited the testimony of Murray that she told Mathers that he was being laid off due to lack of work. That stated reason, lack of work, constituted a shift in position from her initial testimony. Manager Mike Fisher, who oversaw the electrical work performed by the employees, did not testify to any slowdown. Murray's new assertion, lack of work, was not substantiated by any documentary evidence. See *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004).

The only reason given to Mathers for his layoff was that the Respondent was "going in a different direction" and that he was "one of the unlucky ones." Mathers testified that Boone made that statement to him as he was going to speak with Murray, and Boone did not deny making that statement. Although Murray denied making that statement, I have not credited her denial. No other employee was laid off. The reason given to Mathers was false. The reasons stated at hearing, initially laziness on the part of Mathers and, thereafter, laziness and lack of work were false. "Affirmative proof … that the reason given [for a termination] was false warrants the inference that some other reason was being concealed." *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (1st Cir. 1966). As in *South Point Barge Co.*, 195 NLRB 925, 930 (1972), I find that the false reasons advanced by the Respondent were "advanced to screen such true reason." The Respondent was not going in a different direction and no other employees were being laid off.

I find that the General Counsel has established that union activity was a substantial and motivating factor for Respondent's action. *Manno Electric*, 321 NLRB 278 (1996).

The Respondent has not established that Mathers would have been laid off in the absence of his union activity. Mathers received no discipline during his entire tenure of employment at the Company. Boone knew that Mathers had a sister in Hershey and "wanted to spend some time" with her, and that he, Boone, "would not have had a problem with that." Boone's willingness to have sent Mathers to Hershey knowing that he wanted to visit his sister, an agenda with which he had no problem, detracts from his claim that he had any issue with regard to alleged laziness on the part of Mathers. Manager Fisher never spoke to Mathers about laziness. Boone admitted that Mathers was a "very good electrician." Employee John Griffis confirmed that Mathers' "work ethic was good," and that Mathers "was a hard worker."

Murray told Mathers that he was laid off because Respondent was "going in a different direction," a false reason. Even if I credited Murray's testimony that she told Mathers that he was laid off because of lack of work, that reason was false. The contention at the hearing that Mathers was laid off for laziness is unsupported by credible evidence and false. When the reason given for a respondent's action is either false, or does not exist, the respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

I find that, "because of the false reason advanced for the termination … there was another motive that the Respondent wished to conceal." *Pan American Electric*, 321 NLRB 473, 476 (1996). I find that the Respondent laid off Mathers because of his union activities, his announced intention to exercise his representational rights by having a union representative present at any future conversation with Operations Manager Murray and concern that he would, in the future, exercise his contractual rights regarding wage rates. Although the Respondent called the termination a layoff, it was a discharge. By discharging Mathers because of his union activities, the Respondent violated Section 8(a)(3) of the Act.

The denial of the trip to Hershey is relevant only if Mathers would have earned more in Hershey than if he remained in Orlando. It would appear that, when Boone obtained the airline tickets, he was aware that Murray was going to discharge Mathers on August 31. Boone preferred to send employees who had experience working RV tradeshows, and employee Greg Guenther had never worked an RV tradeshow. I find that, if Mathers had not been discharged, Boone would have sent Swinson and Mathers with the other employees going to Hershey instead of Swinson and Guenther. Insofar as Mathers was no longer employed in September, the denial of that job assignment is subsumed in my finding of unlawful discharge and I shall, therefore, recommend that the allegation of denial of a job assignment be dismissed.

C. The Discharge of Jason Driver

1. Facts

Jason Driver began working for the Company on January 3, 2005. He was sent out-of-state several times, including the tradeshow in Hershey. He was also selected to go to the Milwaukee tool tradeshow. Prior to leaving for Milwaukee, both Driver and employee John Griffis contacted Local 606 regarding any requirements that the Milwaukee local might have. They learned that Local 494 required employees to have an OSHA 10 card, a document confirming that they had completed a 10 hour safety training course.

The Company, hearing rumors of employee concerns, contacted Bob Coppersmith, the NECA representative in Florida who, by e-mail dated September 28, confirmed that the employees needed the OSHA 10 card and that the Company should send by facsimile copy (fax) the names and social security numbers of the employees who would be working in Milwaukee. The e-mail also noted that the Company would have to pay a 3 per cent assessment to Local 494. Nothing was mentioned regarding the rate of pay.

Upon arrival at the job site, Driver and Griffis went to Local 484, presented their OSHA 10 cards and were sent to take a drug test. Murray, in Orlando, spoke by telephone with a representative of Local 494, who advised that the rates in Milwaukee were "higher up here and you must pay them." Murray stated that the rates did not present a problem, that the Company would pay "whatever it is that we have to pay." She explained that the Orlando payroll had already been made and that she was "not going to go back and change the payroll at this point," but would " make a check for the… extra money that we owe them." The representative with whom she spoke stated that that would be "fine." Shortly thereafter, Local 494 sent its wage rates by fax to the Company. The rates were significantly higher than the Local 606 rates in that the base rate in Orlando was $22.40 per hour and the base rate in Milwaukee was $30.08 per hour. Murray did not state when the Company was going to prepare the checks for the extra money.

There are multiple pages of testimony concerning what occurred in Milwaukee. A

brief summary is sufficient insofar as the events relevant to this decision occurred on October 11 and thereafter. After Driver and Griffis had checked in at Local 494 and returned to the tradeshow, Boone asked what had occurred and Driver told him. Shortly thereafter Business Agent Tim Hanson came to the job site and threatened to remove Fisher and Swinson, who had not checked in with Local 494. Boone intervened, signed the Local 494 contract, and agreed to accept two referrals from Local 494. Fisher assigned Driver to oversee his "union brothers," neither of whom was cooperative, requesting four foot rather then two foot stepladders and otherwise complicating the set up for the tradeshow. At some point, Driver simply opted out, sitting in a chair for at least an hour or more, the length of time varying with the testimony of the witness.

At lunch on October 11, Driver received a telephone call from a friend, a former employee of the Company, who informed him that he and Griffis were going to be terminated when they returned to Orlando. If Griffis was concerned, he did not express it. Driver, to use the vernacular, "lost it." He called Local 494 and informed Business Agent Hanson that he was quitting and complained that he had not been paid the proper wage. Hanson replied that he would take care of it, that he would give "Murray 48 hours to pay you; if not, we're going to go through a grievance process." Driver said, "[O]kay." He then called the airline and changed his return date to October 12, paying the necessary fee.

Business Agent Hanson called Murray and told her, "Jason, you didn't pay him right" and that he wanted verification. Murray explained that payroll was handled by a company called PayChex, and Hanson requested that she send him a receipt from PayChex. He followed up that call of October 11 on October 16 confirming that Driver had been correctly paid. Murray denied receiving a call from Hanson in which he identified Driver. I do not credit that testimony.

Following a conversation on a speaker telephone with supervisors Keith Hay and Scott Martin and Operations Manager Murray in which Driver repeated that he was quitting, Driver went to Boone's office at the tradeshow and informed him that he was going to be fired and had "had enough." Boone commented that Driver had called the Union, Local 494 "about the wage difference." Driver acknowledged that he had done so, and Boone stated, "[T]hat wasn't a good decision there." The conversation deteriorated with various statements being made, including a retracted threat by Boone not to pay for Driver's room. The conversation ended with Boone telling Driver to go back to his room and make his decision, that, "I really don't want you to quit."

Driver admits that, in addition to the stress of the Milwaukee situation, he was experiencing personal problems. He returned to his room about 5 p.m., called his wife, and decided that it was in his "best interest to stay with this Company." At about 7 p.m. he informed Boone that he had decided to "stay with the Company." Boone replied that he was glad that Driver "made that decision," and told him that he would come by the hotel and give him a ride to the airport in the morning. He did so. As Driver departed, Boone stated, "See you to [at] work on Monday."

Boone did not deny that he stated to Driver that he had not made a good decision by protesting his pay to Local 494. He denied that he told Driver to return to the hotel to make a decision, claiming that he only told him to "think about the decisions that he has made." He claims that he told Driver to "come see me in the office" on Monday. He denied that Driver stated that he would "stay with the Company."

Boone's testimony that he told Driver to see him "in the office," is contradicted not only

by Driver, but also by the testimony of employee John Griffis who credibly testified that Boone stated to him that neither he nor Driver were "going to get laid off, that everything was worked out, … [t]hat Jason was going to fly back a day early, and … would be back to work when we got back to Orlando, but we didn't need to worry about our jobs." Griffis testified that Boone told him that "Jason [Driver] had quit, but they had worked things out, and that he was going to be back to work when we got back to Orlando." Boone was not at the office for three days after the employees returned from Milwaukee. If Boone had told Driver to see him on Monday, he would have left instructions regarding Driver and directed someone to speak with him if only to change the day they were to meet "in the office". No such instructions were given.

Consistent with his conversation with Boone, Driver reported to work on Monday, October 13. Manager Fisher asked Driver what he was doing there, that he had quit. Driver replied that he did not "know what you've heard, but you need to talk to Jamie [Boone] about that one." Supervisors Keith Hay and Scott Martin had placed Driver on the work schedule and he worked on Monday, Tuesday, and Wednesday. On Thursday, October 18, Driver was setting up a tradeshow at a Doubletree hotel. Supervisor Keith Hay showed up on the job and told him that Boone and Mike Fisher had been in the front office talking about the job in Milwaukee, and "it wasn't good, that I … needed to go back to the shop and defend myself and tell my side of the story."

Supervisor Hay testified that rumors were flying "that there was going to be somebody fired" and he told Driver, at the Doubletree, "to go to the shop and talk to Louise Murray."

Driver went to Murray's office and stated that it was "very uncomfortable," that he was hearing that he "might not work here much longer" and "wanted to know what was going on." Murray asked Driver to explain what happened in Milwaukee and he did so, stating that he got stressed out, that he was put in charge of the two electricians from the Milwaukee local, and that had received the call that he was "going to be fired" as soon as he got back. Murray denied that she would "say anything like that." Murray stated that Driver had "filed a grievance against me through the hall." Driver acknowledged that he did talk to Business Agent Hanson about his pay, but did not file a grievance. Murray stated that she was "thinking about … if I should keep you or if I'm going to get rid of you," that "in my mind you filed a grievance with me." Driver protested that he did not. Murray repeated, "in my mind you did. " Murray noted that Driver had said that he was going to quit and that "if she didn't get rid of me and anybody else found out that I had done all these things and … I wasn't dealt with, then the next person who did it thought that they could just get away with it. So, she was just going to have to let me go." Driver stated that, if that was her decision, then "just let's do that." Murray said that, although she was not prepared to do that today, that Driver needed to go home and get his uniforms and she would have his layoff slip and last check when he returned. When he returned, Driver saw that the layoff slip stated, "quit." He protested that if she had given him the slip on October 11 it would have been correct but that he and Boone had discussed the situation and "I had a job, you know, for as long as I wanted it, everything was taken care of." Driver noted that he did not plan on drawing unemployment, but he had not quit. Murray added the word "layoff" to the layoff slip.

Murray admitted that she was aware that Driver had been working, "not where I would see him, but he was there somewhere." Nevertheless, she did not call him in. On Thursday, when Driver came to her office, Murray recalls that he asked what was going to happen to him, that he was "very uncomfortable" because nobody would speak to him. She asked Driver to relate what happened in Milwaukee, and Driver explained that he had received the telephone

call stating that he was going to be fired when he returned, that he got mad and quit. Murray questioned why he would take the word of someone who did not work for the Respondent, and Driver replied that the report was given to him by his best friend and he believed him. Murray asked what Driver thought she should do and claims that Driver answered that he knew what she had to do and that she had "to let me go because it wouldn't be fair to all the other guys if you kept me on here." Murray stated that Driver had not "been re-employed, so I am going to accept your resignation." Murray acknowledges that, after returning his equipment, Driver protested the "quit" on his termination slip and Murray agreed to add the word "layoff." She recalled that, in that portion of the conversation, Driver noted that he did not plan on drawing unemployment, that he "had a job to go to the day I came back."

Driver denied that he told Murray that he knew what she had to do which was to "let me go" or that he stated that it "wouldn't be fair" to the other employees if she "kept me on here." He also denied that he stated that he had a job to go to, explaining that he had to have a layoff slip before he could sign the out of work book at Local 606, otherwise he would be "double booking."

Murray initially acknowledged that Driver told her that Boone had rehired him, and that she responded that she "didn't know anything about Jamie [Boone] rehiring him. As far as I was concerned, he had not been rehired." She testified that the foregoing exchange occurred when she asked him "what he was doing there." Murray then altered that testimony, stating, "I don't know that he said that Jamie [Boone] rehired him. I think he said Jamie told him to come in on Monday morning and talk to him. … He [Driver] didn't tell me he rehired him. He was going to come in and talk to him [Boone]." I credit Driver that his rehiring by Boone was stated when he observed that Murray had placed "quit" on the layoff slip.

Murray knew that Driver had been working since Monday but had not sought to speak with him. Her contradictory testimony, initially acknowledging that Driver told her that Boone had rehired him but then asserting that Driver did not tell her that he had been rehired, is not credible. Murray claims that she told Driver that he had not "been re-employed, so I am going to accept your resignation." If, as claimed by Murray, Driver stated that it would be unfair for him to continue to be employed, there would have been no reason to claim that he had not been re-employed. Driver had been working all week. I credit Driver regarding the conversation with Murray in which he was terminated.

I find that Driver, who Boone had permitted to continue working, did not acquiesce in his termination. Insofar as he had dealt directly with President Boone, there was no reason for him to have had a concern for perceived fairness relative to his fellow employees. It is obvious that he did not have another job to come back to because he worked for the Company from Monday until he was terminated on Thursday.

Any claim that Driver voluntarily agreed to his termination is belied by his contemporaneous protest, on October 18, in a written statement to Local 606 in which Driver reported that Murray stated that "she was going to have to let me go." No grievance was filed. As already noted, the Respondent, following the advice of Business Agent Brown, does not discharge employees because it appears that Local 606 does not grieve layoffs.

2. Analysis and Concluding Findings

The complaint alleges, and the General Counsel argues, that Driver was discharged because of his union activity.

The Respondent argues that Driver's testimony was not credible and that there is no evidence that Driver engaged in any union activity other than that engaged in by employee Griffis who was not discharged. Contrary to that argument, I have credited the testimony of Business Agent Hanson that he called Murray and identified "Jason," i.e. Driver, as having complained about his pay and of Driver that Murray stated to him that he had "filed a grievance against me through the hall." Griffis filed no grievance. The Respondent further argues that Driver, on October 18, tendered his resignation to Murray and that the Respondent accepted his resignation. I have not credited the testimony of Murray. Driver did not resign.

Consistent with the analytical framework of *Wright Line*, supra, I find that Driver engaged in union activity, seeking his contractual rate of pay, and that the Respondent was aware of that activity as established by the call from Business Agent Hanson to Operations Manager Murray on October 11. I find that the Respondent bore animus towards that activity as established by Murray's statement to Driver that he had filed a grievance against her and, when Driver denied that a grievance had actually been filed, by her informing him that "in my mind you filed a grievance with me." The termination of Driver was an adverse action affecting his employment. The General Counsel established a prima facie case.

The Respondent has not established that Driver would have been discharged in the absence of his perceived grievance filing activity. The Respondent, by Boone, from a personal standpoint, forgave Driver for his conduct in Milwaukee. From a legal standpoint the Respondent condoned his behavior. The doctrine of condonation "prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." *United Parcel Service*, 301 NLRB 1142. 1143 (1991). See also *South Point Barge Co.*, supra at 929, in which the employer condoned the quitting of an employee by rehiring him.

Driver informed Boone that he had decided that it was in his "best interest to stay with this Company." Boone replied that he was glad that Driver "made that decision," and told him that he would give him a ride to the airport in the morning. As Driver departed, Boone stated, "See you to [at] work on Monday." Employee John Griffis confirmed that, although Driver quit, Boone told him that "they had worked things out, and that he was going to be back to work when we got back to Orlando."

On October 11, Boone told Driver the he had not made a good decision when he protested to Local 494 regarding his pay. That comment proved to be prophetic. When terminating Driver, Murray referred to his filing a grievance and, when he protested that no grievance had been filed, stated that "in my mind" he had done so. Her statement that Driver had "done all these things" and that, if he "wasn't dealt with, then the next person who did it thought that they could just get away with it," ignores the fact that Boone either rehired Driver or overlooked his statement that he was quitting. In either circumstance, the Respondent condoned his behavior. The "things" to which Murray referred, Driver's conduct in Milwaukee, including his protest regarding his pay, were condoned. Thus, there was no reason for termination other than Murray's belief that Driver had filed a grievance against her, protected conduct that had also been condoned.

As already pointed out, notwithstanding an overall cooperative relationship with the union that represents its employees, an employer may harbor animus related to grievance filing activity. *New Orleans Cold Storage Co.*, supra, 1471 at fn. 1. Although Murray's statement to Driver regarding his filing of a grievance against her does affirmatively state her motivation for the action that she took and establishes animus towards grievance filing activity, it did not

threaten discharge. I shall recommend that the allegation of a threat of discharge for filing grievances be dismissed.

The credited evidence establishes that Boone accepted Driver's retraction of his "quit." The Respondent had him represent the Respondent by assigning him to work outside the shop on October 15, 16, 17, and 18. The termination, although called a layoff, was a discharge. The only basis for the discharge other than Driver's conduct on the job in Milwaukee and his quitting in Milwaukee, conduct that the Respondent had condoned, was that Murray perceived that Driver had filed a grievance against her. The absence of involvement by Boone in the discharge of Driver on October 18 is inexplicable.

The Respondent has not established that it would have discharged Driver in the absence of his perceived grievance filing activity. Although Driver had not actually filed a grievance, Murray, in her mind, believed that he had done so. A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777 (1974). Discharging employees because they file grievances violates the Act. *New Orleans Cold Storage Co.*, supra. I find that the Respondent, by discharging Driver for engaging in union grievance filing activity, violated Section 8(a)(3) of the Act.

Conclusions of Law

By laying off/discharging Michael D. Mathers and Jason Driver because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and 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 discriminatorily laid off/discharged Michael D. Mathers and Jason Driver, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from August 31, 2007, in the case of Mathers and from October 18, 2007 in the case of Driver, to date of 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).

The General Counsel, in his brief, seeks compound interest upon any backpay due. The Board has recently reaffirmed its determination not to deviate from its current practice of awarding simple interest. *Glen Rock Ham*, 352 NLRB No. 69, slip op. 1 fn. (2008). Consistent with that decision, I deny the request for compound interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] 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.

ORDER

The Respondent, Edlen Electrical Exhibition Services, Inc., of Orlando, Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of International Brotherhood of Electrical Workers and any of its constituent local unions or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Michael D. Mathers and Jason Driver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Michael D. Mathers and Jason Driver for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter, notify Michael D. Mathers and Jason Driver in writing that this has been done and that the layoffs will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities in Orlando, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, 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

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

to all current employees and former employees employed by the Respondent at any time since August 31, 2007.

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

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

Dated, Washington, D.C., August 8, 2008.

_____
George Carson II
Administrative Law Judge

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 had 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 discharge, lay off, or otherwise discriminate against any of you because of your membership in or activities on behalf of International Brotherhood of Electrical Workers and any of its constituent local unions or any other labor organization.

WE WILL, within 14 days from the date of the Board's Order, offer Michael D. Mathers and Jason Driver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharges/layoffs of Michael D. Mathers and Jason Driver and within 3 days thereafter notify them in writing that this has been done and that the discharges/layoffs will not be used against them in any way.

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

EDLEN ELECTRICAL EXHIBITION SERVICES, INC., OF ORLANDO

(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.

201 E. Kennedy Blvd., South Trust Plaza, Suite 530,
Tampa, FL 33602–5824, (813) 228–2641,
Hours: 8 a.m. to 4:30 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2455