**Nitro Construction Services *and* Robert Darren Brumfield.** Cases 09–CA–313196 and 09–CA–323836

May 28, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On October 30, 2024, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The Charging Party also filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

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

We affirm the judge's conclusion, for the reasons he states and those set forth below, that the Respondent violated Section 8(a)(3) and (1) of the Act when its superintendent, Jason Dillard, laid off Michael Bishop and Robert Darren Brumfield from its PureCycle construction project. To begin, we disregard the Respondent's bare exception to the judge's finding that Brumfield engaged in protected concerted activity by raising COVID-19 workplace health and safety concerns to Dillard. See Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations; *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). We also clarify that Bishop and Brumfield engaged in protected activity by seeking, through foreman Dwight Barker, to assert their rights under the collective-bargaining agreement regarding their pay for working partial days. See *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); see also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). In adopting the judge's finding that the Respondent had knowledge of the employees' protected activity, we note that Barker is a Section 2(11) supervisor, and his knowledge is imputed to Dillard, the decisionmaker. See, e.g., *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012), affd. 361 NLRB 1395 (2014). We note that although the Respondent contends that its foremen are not supervisors, it failed to except to the judge's finding that the foremen possess the authority to assign work, and supervisory status is established by the possession of at least one of the statutory indicia of supervisory authority. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Respondent additionally argues that, because its foremen do not possess firing authority,

[1] We reject the Respondent's arguments, raised for the first time on exception, that the Board members and administrative law judges are unconstitutionally insulated from removal, the Board's adjudication of private rights and legal relief violates the Seventh Amendment of the Constitution, and the structure of the NLRB violates the separation of powers. The Respondent did not raise these arguments in any form before the judge. Consequently, these arguments are untimely and therefore waived. See *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (finding argument waived where party failed to raise it to the judge), enfd. 922 F.2d 832 (3d Cir. 1990).

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent asserts in its exceptions that the consolidated complaint was never properly served on it. However, the Respondent withdrew its request for special permission to appeal Deputy Chief Administrative Law Judge Arthur J. Amchan's July 8, 2024 Order finding that the consolidated complaint was properly served via email. As the judge's Order is not before the Board, his ruling that service was properly effectuated stands.

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

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Vibe Consulting, LLC*, 374 NLRB No. 33 (2026). We shall substitute a new notice to conform to the Order as modified.

In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), the judge ordered the Respondent to compensate employees Brumfield and Bishop for any direct or foreseeable pecuniary harms incurred as a result of their unlawful layoff. As stated in *Performance Plumbing, LLC*, 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, slip op. at 3 fn. 3 (2026), Chairman Murphy and Member Mayer find no need at this time to express an opinion whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act. They would be open to reconsideration of that precedent in a future proceeding, but in the absence of a three-member majority to overrule it at this time, they agree to apply *Thryv*.

Finally, we adopt the judge's recommended remedy ordering the Respondent to post the attached notice at its facility in Nitro, West Virginia and at the PureCycle construction project if the Respondent still maintains a presence there, and if the PureCycle construction project is complete or if the Respondent has ceased operations at that location, to duplicate and mail notices to all current and former employees employed by the Respondent on the PureCycle project since the date of the unfair labor practice found herein. See *Burrink Commercial Services Inc.*, 369 NLRB No. 21, slip op. at 1–2 (2020) (citing *Zurn/N.E.P.C.O.*, 345 NLRB 12, 20 (2005), rev. denied 243 Fed.Appx. 898 (6th Cir. 2007); *Pan American Electric, Inc.*, 328 NLRB 54, 60 (1999)). No party has argued that the judge erred in that regard.

the foremen's statements about having nothing to do with the layoff decision are not indicative of its animus. This argument, however, was raised for the first time on exceptions to the Board and is thus untimely. See *Yorkaire, Inc.*, 297 NLRB at 401. We also agree with the judge, for the reasons he states, that the close timing between the protected activity and the layoffs is indicative of animus, and we further rely on Dillard's pretextual cost-savings rationale for the layoffs. We therefore adopt the judge's finding that the layoffs were motivated by the employees' protected activity and that the Respondent did not sustain its defense burden of demonstrating that the layoffs would have occurred even in the absence of their protected activity. In doing so, we note that an employer cannot sustain its defense burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), if the reasons it advances for the adverse action are found to be pretextual. See *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019).

We also affirm the judge's dismissal of the Section 8(a)(3), (4), and (1) allegations that the Respondent refused to hire Brumfield on two subsequent projects because of his protected activity and/or his filing of an unfair labor practice charge. Even assuming that the General Counsel met the initial burden under *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), we agree with the judge, for the reasons he states that the Respondent met its defense burden.[5]

## ORDER

The National Labor Relations Board orders that the Respondent, Nitro Construction Services, Nitro, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because they engage in protected concerted activities.

(b) Laying off employees because of their support for and activities on behalf of the Union.

(c) 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 Bishop and Robert Darren Brumfield 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 Michael Bishop and Robert Darren Brumfield whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of their unlawful layoffs, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Michael Bishop and Robert Darren Brumfield for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of Michael Bishop's and Robert Darren Brumfield's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Michael Bishop and Robert Darren Brumfield, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoff 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 Nitro, West Virginia, and at its jobsite at the PureCycle project if the Respondent still maintains a presence there, copies of the attached notice, marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in

[5] Given our findings above, we deny the Charging Party's December 3, 2024 motion to correct the transcript and December 13, 2024 motion to reopen the record. In rejecting the Charging Party's argument that he did not receive effective assistance of counsel, Member Prouty agrees with the judge that the General Counsel's handling of the case is unreviewable and the Charging Party has not demonstrated prejudice. He also notes that the Board "does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act[.]'" *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)).

[6] 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."

conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the construction project at the PureCycle jobsite is complete, or if the Respondent has ceased operations at that location, 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 on that project at any time since December 30, 2022. If 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 December 30, 2022.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 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. May 28, 2026

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James R. Murphy, Chairman

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David M. Prouty, Member

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Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay you off because you engage in protected concerted activities.

WE WILL NOT lay you off because of your support for and activities on behalf of the Union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Michael Bishop and Robert Darren Brumfield full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Bishop and Robert Darren Brumfield whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Bishop and Robert Darren Brumfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Michael Bishop's and Robert Darren Brumfield's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Michael Bishop and Robert Darren Brumfield, and WE WILL, within 3 days thereafter, notify them in

writing that this has been done and that the layoff will not be used against them in any way.

NITRO CONSTRUCTION SERVICES

The Board's decision can be found at http://www.nlrb.gov/case/09-CA-313196 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington D.C. 20570 or by calling (202) 273-1940.

*Erik Brinker, Esq.,* for the General Counsel.
*R. Booth Goodwin, Benjamin Ware, Richard Owen,* and *David Dobson, Esqs*., for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts in this case that Nitro Construction Services (Respondent) violated the National Labor Relations Act (the Act) by: in December 2022, laying off Michael Bishop and Robert Darren Brumfield because they engaged in union and protected concerted activities; and, in March and August 2023, refusing to hire Brumfield for two work projects because he engaged in union and protected concerted activities, and because he filed an unfair labor practice charge in Case 09–CA–313196. As explained in more detail below, I have determined that Respondent violated the Act, but only by unlawfully laying off Bishop and Brumfield in December 2022.

STATEMENT OF THE CASE

This case was tried in person in Charleston, West Virginia, on September 4, 2024. Charging Party Robert Darren Brumfield filed the unfair labor practice charge in Case 09–CA–313196 on March 1, 2023, and filed the unfair labor practice charge in Case 09–CA–323836 on August 16, 2023.

On May 24, 2024, the General Counsel issued a consolidated complaint. In the consolidated complaint, the General Counsel alleged that Respondent violated Section 8(a)(3), (4), and (1) of the Act by: discharging employees Robert Darren Brumfield and Michael Bishop on about December 30, 2022, because they engaged in union and protected concerted activities and to discourage employees from engaging in those or other concerted activities; and refusing to hire Brumfield for employment on about March 31 and August 4, 2023, because he engaged in union and protected concerted activities, because he filed an unfair labor practice charge in Case 09–CA–313196, and to discourage employees from engaging in those or other concerted activities. Respondent filed a timely answer (and an amended answer) denying the alleged violations in the consolidated complaint.

PROCEDURAL ISSUES

On October 10, 2024, Charging Party Brumfield filed a motion for an extension of time to, among other things, request an additional 10 days to file a posttrial brief (posttrial briefs were due on October 9, 2024). In an October 11, 2024 order, I noted Brumfield's status as a pro se litigant and permitted Brumfield to file a posttrial brief on or before October 21, 2024. Brumfield subsequently filed his posttrial brief by the October 21 deadline.

Brumfield's posttrial brief raises two procedural issues. First, Brumfield contends that the General Counsel improperly failed to allege additional misconduct that Respondent engaged in (i.e., Brumfield contends that the complaint is too narrow). (Brumfield Posttrial Br. at 4–5, 8, 14–15.) That argument fails because, as the Board has explained, the General Counsel possesses unreviewable final authority to decide whether to issue unfair labor practice complaints. See *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 982 (1992) (citing *NLRB v. UFCW Local 23*, 484 U.S. 112, 122–123, 125–126 (1987)) (explaining that under Section 3(d) of the Act, the General Counsel has unreviewable final authority regarding investigating unfair labor practice charges and deciding whether to issue complaints). Relying on the Board's guidance, I find that the General Counsel's unreviewable authority to decide whether to issue an unfair labor practice complaint includes the authority to determine what it will allege in an unfair labor practice complaint.[1]

Second, Brumfield contends that the General Counsel improperly did not communicate adequately with Brumfield about the case and improperly told Brumfield that he was not permitted to be present during the trial except for when Brumfield testified as a witness. (Brumfield Posttrial Br. at 2–7.) As the charging party in the case, Brumfield did have the right to appear at and participate in the trial in this case subject to appropriate limitations set by the administrative law judge. See Board Rule 102.38; *Unga Painting Corp.*, 237 NLRB 1306, 1306–1308 (1978); see also *Greyhound Bus Lines*, 319 NLRB 554, 554 (1995) (setting forth a suggested witness sequestration order that calls for alleged discriminatees, including charging parties, to remain outside of the hearing room "when other witnesses on behalf of the General Counsel or the charging party are giving testimony as to events as to which the alleged discriminatees will be expected to testify"). Notwithstanding Brumfield's right to appear and participate in the trial, Brumfield's arguments fail. As an initial matter, Brumfield's objections concerning his communications with the General Counsel (regarding the case in general and regarding the extent of Brumfield's participation in

[1] Brumfield also contends that the evidentiary record is incomplete because the General Counsel failed to present (as evidence during trial) an April 12, 2024 "negotiation letter" that Brumfield sent to the General Counsel and Respondent to set forth "points of fact and law." (Brumfield Posttrial Br. at 8, 20–21.) The General Counsel's decision to not present the negotiation letter during trial is arguably not reviewable and, in any event, the negotiation letter is akin to a position statement from Brumfield that would be excluded as hearsay under these circumstances. Accordingly, I decline Brumfield's request to add the negotiation letter to the evidentiary record.

the trial) are arguably not reviewable, as they relate to the General Counsel's discretion to determine what it will allege in the complaint and the General Counsel's and Brumfield's strategic discussions and deliberations about the pros and cons of having Brumfield participate in the entire trial.[2] See *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB at 982. But even if I consider the merits of these issues, I do not find that Brumfield's limited participation in the trial (allegedly based on the General Counsel's instructions) or his limited communications with the General Counsel were prejudicial to Brumfield's due process rights. Indeed, as explained below, the General Counsel and Brumfield prevailed on the allegation that Respondent unlawfully laid off Brumfield and Bishop in violation of the Act. As for the refusal to hire allegations on which Respondent prevailed, I considered the relevant points that Brumfield stated that he would have raised during trial had he questioned project manager Mike Price about Respondent's decisions to not hire Brumfield for two projects in 2023, and did not find them to be persuasive.[3] See *Spector Freight System, Inc.*, 141 NLRB 1110, 1112–1115 (1963) (finding that although the trial examiner unreasonably limited the charging party's right to examine witnesses, no relief was warranted because the charging party did not show that the trial examiner's restrictions resulted in prejudice to the charging party's rights); see also Discussion and Analysis, infra, Sec. C(3), D(3).

Respondent also raised a procedural issue, arguing during trial and in its posttrial brief that the trial violated Respondent's due process rights because Respondent did not have the opportunity to conduct pretrial discovery regarding the General Counsel's evidence against the company. (Tr. 9–10; R. Posttrial Br. at 14 fn. 7.) As I indicated to Respondent before and during trial, it is well established that the Board's rules do not permit pretrial discovery, and I am bound to follow the Board's rules on this issue. See *Communication Workers of America, AFL–CIO, Local 51*, 371 NLRB No. 15, slip op. at 4 (2021); *Offshore Mariners United*, 338 NLRB 745, 746–747 (2002); *Beta Steel Corp.*, 326 NLRB 1267, 1267 fn. 3 (1998), enfd. 210 F.3d 374 (7th Cir. 2000); Board Rule 102.118(a).

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the posttrial and reply briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

## FINDINGS OF FACT[5]

### I. JURISDICTION

Respondent, a West Virginia corporation with an office and place of business in Nitro, West Virginia, provides electrical and mechanical construction and related services to various customers throughout the United States. In the 12–month period ending on May 1, 2024, Respondent performed services valued in excess of $50,000 in states other than the State of West Virginia. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the International Brotherhood of Electrical Workers, Local 317 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

In 2022, Respondent was providing services as a subcontractor (to general contractor Denham-Blythe) at the PureCycle Technologies (PureCycle) project located in Ironton, Ohio. Respondent's employees in the bargaining unit who worked at the PureCycle project were covered by a collective-bargaining agreement between the Union and the West Virginia-Ohio Valley Chapter, National Electrical Contractors Association. (Jt. Exh. 1; GC Exh. 1(e) (par. 5), (x) (par. 5); Tr. 199–200.)

#### *B. November 30, 2022: Brumfield Starts Working for Respondent at the PureCycle Project*

In about late November 2022, Respondent advised the Union that it (Respondent) needed 10 electricians[6] to work at the PureCycle project for a period of 6–8 weeks. Following the referral procedures set forth in the collective-bargaining agreement, the Union referred six applicants to Respondent, one of whom was Brumfield.[7] Respondent hired the applicants and Brumfield

[2] It is not uncommon for a charging party to only appear as a witness during trial. The General Counsel and charging party may decide to limit the charging party's participation in that fashion for any number of reasons, including but not limited to setting up an argument that the charging party's testimony is more credible because the charging party did not hear any other witness testify during the trial.

[3] For example, Brumfield contended that he would have questioned Price about the validity of using subjective criteria to make hiring decisions and about whether Price consulted with the foreman at the Mountaineer project about Brumfield. (See Brumfield Posttrial Br. at 17, 19–20.) The other parties explored those issues during trial and I considered them in making my decision in this case. (See Findings of Fact (FOF), sec. II(J)–(K), infra; Discussion and Analysis, sec. D(3), infra.)

[4] The transcript and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: the cover page for the transcript should list Respondent's name as "Nitro Construction Services"; and Jt. Exhs. 1 and 5 each include pages at the end of the document that are duplicates of previous pages in the document.

[5] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

[6] During trial, the parties and witnesses interchangeably used the terms "electrician," "journeyman," "wireman," and "journeyman wireman" to refer to employees who worked for Respondent on the projects in question. For ease of reference, I will use the term "electrician" in this decision.

[7] Under the collective-bargaining agreement, the Union keeps a register of job applicants that are divided into four groups. Applicants in group one, which is reserved for members of the local union, have the highest priority. Applicants in group two, which includes applicants who have 4 or more years of experience and have passed an examination "given by a duly constituted Inside Construction Local Union of the IBEW," have the next highest priority. When making referrals, the Union begins with applicants in group one, and then proceeds in order to groups two, three, and four, until meeting the requested number of applicants. Brumfield and three other applicants (J.G., G.M., and C.S.) were group two referrals for the PureCycle project with start dates on

started work for Respondent at the PureCycle project on November 30, 2022. (GC Exh. 2 (p. 1); Jt. Exhs. 2 (p. 2), 3 (pp. 2–3); Tr. 71, 73, 153–154, 188–189, 208, 213.)

In his first week or two on the PureCycle project, Brumfield spoke with quality assurance and superintendent Shawn Brawley, who asked for Brumfield's thoughts on how the job was going. Brumfield responded that the project was highly disorganized, stating (as an example) that Respondent sometimes had electricians perform work without the correct information, which led to having to tear the work out and redo it. Brumfield added that there seemed to be animosity between members of two local unions (local 466, and the Union (local 317)),[8] and that employees often were out of basic supplies. (Tr. 76–79, 133–134.)

### *C. December 5, 2022: Bishop Starts Working for Respondent at the PureCycle Project*

In early December 2022, to complete the remaining number of electrician referrals that Respondent requested in late November, the Union referred four additional applicants to Respondent for the PureCycle project for 6–8 weeks.[9] Michael Bishop was one of those four applicants. Respondent hired the additional four applicants and Bishop began working for Respondent at the PureCycle project on December 5, 2022. (GC Exh. 2 (p. 1); Jt. Exhs. 2 (p. 2), 3 (p. 1); Tr. 17, 70, 154–155, 175–176, 188–189, 208; see also Tr. 56–57 (Bishop expected that he would work at PureCycle at least until the end of February).)

By mid-December 2022, Bishop began working with Brumfield more often on assignments at the PureCycle project as "tool partners" who were familiar with each other. Shortly after that development, Bishop stopped by the office trailer to complete some paperwork and an administrator asked Bishop how he liked working with Brumfield. Bishop thought that the question was odd but answered that Brumfield is "a particular type of person"[10] but was great because he (Brumfield) produced quality work and craftsmanship. Bishop subsequently told Brumfield that people were asking about Brumfield in the office. (Tr. 21–22, 24–25, 49–50, 67–69, 79–83, 121, 134; see also Tr. 26 (noting that superintendent Jason Dillard was in the office but was not the one in this instance who asked Bishop about Brumfield), 218–219 (explaining that in addition to Dillard, superintendent Brawley and field engineer Andy White worked in the office trailer).)

### *D. December 21, 2022: Respondent Sends Bishop Home due to Suspected Illness*

On December 21, 2022, Bishop reported to work in the morning and had a cough drop in his mouth because his throat was dry. General foreman Stoney Burke noticed that Bishop had a cough drop and said that he thought Bishop was sick. Bishop replied that he was a little congested but was fine. (Tr. 26–27.)

After the morning meeting, Bishop and Brumfield took out their tools and prepared to start their assignments for the day.[11] Foreman Dwight Barker, however, spoke to Bishop and stated that Respondent wanted him (Bishop) to go home because he was sick. Bishop complied, but stated that he planned to visit the doctor and would return to work the next day if the doctor did not find anything wrong. (Tr. 27, 52, 83–86, 100, 135; see also Tr. 28, 52–53 (noting that when Bishop went to the doctor, the doctor thought that Bishop had a respiratory infection and recommended that Bishop not work for at least 3 days to rest).)

### *E. December 27, 2022: Brumfield Confronts Dillard about Being At Work*

On December 27, 2022, both Brumfield and Bishop reported to work (the 27th was Bishop's first day back at work after his respiratory infection). When employees gathered in the office trailer before the morning safety meeting, Brumfield learned that superintendent Dillard had recently had COVID–19. Brumfield approached Dillard and told him that he (Dillard) should not be at work because Dillard should still be quarantined. Dillard disagreed, taking the position that he was cleared to return to work because 5 days had passed. Brumfield, however, continued to object, pointing out that Respondent sent Bishop home the previous week because Bishop had a cough drop in his mouth. The exchange ended and Brumfield and Bishop left the trailer after the meeting to start working on their assignment. (Tr. 28, 30–33, 86–91, 147, 191–193, 216; see also Tr. 30 (noting that Bishop was present at the meeting and heard some of the discussion between Brumfield and Dillard).)

### *F. December 28, 2022: Bishop Raises Concern about His Paycheck*

On December 28, 2022, Bishop received his paystub for the previous week and observed that Respondent paid him for only 2 hours for December 21 (the day that Respondent sent Bishop home from work). Believing that he should have been paid for 4 hours of "show-up pay" for that day under section 3.08 of the collective-bargaining agreement because he was sent home after starting work, Bishop told Shop Steward Jason Smith and

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November 30, 2022. (Jt. Exhs. 1 (Sec. 4.05, 4.13), 2 (p. 2); GC Exh. 2 (p. 1); Tr. 74–75, 176 (referring to group two as "book 2").)

[8] During trial, Respondent acknowledged that there was, in fact, animosity between members of the two local unions at the PureCycle project. The animosity started a few months before Brumfield and Michael Bishop began working at the project, and neither Brumfield nor Bishop were involved in the animosity. (Tr. 197–199, 212–213, 222–223.)

[9] Of the four referrals, two applicants were in group one (J.H. and J.A.), and two were in group two (Bishop and M.K.) as defined in the collective-bargaining agreement regarding referral priority. Applicant M.K. never reported to work at the PureCycle project. (Tr. 176. 187; GC Exh. 2 (p. 1); see also Jt. Exh. 1 (sec. 4.05, 4.13).)

[10] Bishop explained that in saying Brumfield was "a particular kind of person," he meant that Brumfield was intellectual and straight to the point and that, as a result, some people liked Brumfield and some did not. (Tr. 51.)

[11] Dillard testified that he was certain that Bishop did not take out his tools to start work on December 21. (Tr. 221–222) While I question whether Dillard, given his various responsibilities as superintendent, would have kept track of (or had reason to keep track of) Bishop's activities as the workday began on December 21, this factual dispute is not material since Dillard later agreed that Bishop started work on December 21 by attending the morning meeting and therefore was entitled to be paid for 4 hours. (See Findings of Fact (FOF), sec. II(H), infra.)

foreman Barker that his paycheck was 2 hours short.[12] Bishop also told Brumfield about the issue with his paycheck and Brumfield agreed that Bishop should talk to the steward and Respondent. (Tr. 29–30, 33–35, 69, 91–93, 202–203; Jt. Exh. 1 (sec. 3.08).)

Later in the day, Smith told Bishop that Respondent would not be correcting Bishop's paycheck because the foreman did not think that Bishop took out his tools to begin working on December 21. Bishop subsequently confronted foreman Barker to assert that he (Bishop) did indeed start work on December 21. Brumfield, who was present at the time, confirmed that Bishop started work. Barker indicated that he would take Bishop at his word on the point, saying (to the steward), "Well, if he says he did [start work], he must have, he did." (Tr. 35–37, 52–54, 69, 137; see also Tr. 96–97 (noting that Bishop told Brumfield that he was going to talk to the steward again about his paycheck, and that Brumfield agreed that Bishop should do so).)

### *G. December 29, 2022: Respondent Announces that Bishop and Brumfield Will Be Laid Off*

In the morning on December 29, 2022, superintendent Dillard emailed Union assistant business manager Greg Spears about an upcoming layoff. The email exchange stated as follows:

> Dillard: Greg, [j]ust letting you know that I will be having a 2 man layoff tomorrow at the end of shift. The reason is a reduction of force. Thank you
>
> Spears: Thanks for letting me know. What are their names?
>
> Dillard: Robert Brumfield and Michael Bishop

(Jt. Exh. 4; Tr. 155–156, 158–159, 182, 185; see also Tr. 174–175 (Spears agreed that Respondent provided sufficient advance notice about the layoff), 182, 209 (indicating that Dillard made the decision to lay off Bishop and Brumfield).)[13]

That afternoon, Bishop and Brumfield followed up with shop steward Smith about Bishop's paycheck, prompting Smith to state that Bishop and Brumfield were getting laid off. Bishop and Brumfield asked how many other people were getting laid off, and Smith replied that only Bishop and Brumfield were being laid off. When Bishop and Brumfield asked if the layoff related to their production or work quality, Smith replied that there was nothing wrong with either of those areas. Bishop and Brumfield then asked why they were being laid off when the foreman had previously mentioned that Respondent was putting in a request for 6 to 10 more workers. Smith did not have an explanation for the layoff. (Tr. 38–39, 61–62, 99–102, 124, 137, 146.)

### *H. December 30, 2022: Respondent Lays Off Bishop and Brumfield*

On December 30, 2022, Respondent laid off Bishop and Brumfield from the PureCycle project. Foreman Barker apologized about the layoff, said he did not know why Bishop and Brumfield were being laid off, and said he had nothing to do with the layoff. Similarly, general foreman Burke stated that he had nothing to do with the decision to lay off Bishop and Brumfield and added that Brumfield (but not Bishop) was welcome to come back to the PureCycle project if he (Brumfield) could get a referral. It is undisputed that Bishop's and Brumfield's job performance did not factor into the layoff decision. (Tr. 40, 45–47, 102–104, 117–118, 140, 158–159, 189–190.)

Regarding the issue with Bishop's paycheck from the previous week, Dillard agreed that Bishop should have been paid for 4 hours for December 21 because, at a minimum, Bishop started work by attending the morning meeting. To address the 2-hour difference in pay, Dillard proposed letting Bishop go home early (at noon instead of 3 p.m.) on December 30, but receive pay for

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[12] Sec. 3.08 of the collective-bargaining agreement states as follows, in pertinent part:

> When [employees] are directed to report to the job and do not start work due to lack of material, weather conditions, or other causes beyond their control, they shall receive two (2) hours pay unless the employee is notified before close of regular prior work day to report. In the event of inclement weather, the decision to work or not to work will be made at the site by the Employer or the Employer's representative on the job.
>
> If the employee is put to work, [they] shall receive a minimum of four (4) hours pay.

(Jt. Exh. 1 (sec. 3.08).)

[13] Dillard testified that he decided to lay off Bishop and Brumfield in the morning on December 28, before he heard about the issue regarding Bishop's paycheck. Specifically, Dillard stated that on about December 26 or 27, he spoke with the general contractor's project manager Jordan Lewis about cutting costs at the PureCycle project because there was an area that Respondent could not work in until some overhead work and piping were completed, and thus the scope of work had changed. In response to Lewis' instruction to reduce staffing as a way to cut costs, Dillard decided that the two-person layoff was warranted. (Tr. 182–183, 187, 200–202, 209–210, 213–217; see also Tr. 187–188 (Dillard testimony that the scope of work returned to normal by January 8, 2023, which enabled Respondent to bring in more electricians), 210–211 (Dillard testimony that the December 27, 2022 discussion with Brumfield about being at work after having COVID–19 did not bother him and was not relevant to his decision to lay off Bishop and Brumfield).)

I do not credit Dillard's explanation for the layoffs. First, there is no corroboration in the evidentiary record for Dillard's explanation regarding the layoffs. Indeed, there is no documentation of any communications between Dillard, Lewis, or anyone else about a change in the scope of work, cutting costs, or layoffs, and Respondent did not call Lewis as a witness during trial. (Tr. 184–185, 214–215.) Second, Respondent's behavior shortly after the December 30 layoff undermines the proposition that a layoff was necessary, as by January 8, 2023, Respondent (through Dillard) was asking the Union to refer additional candidates to work at the PureCycle project as electricians. (See Findings of Fact (FOF), sec. II(I), infra.) And third, Dillard did not credibly explain why he selected Brumfield for the layoff. According to Dillard, employees who were hired from group two of the Union's referral list get laid off before group one employees, and he selected Bishop and Brumfield for the layoff because they were group two employees that were hired in last. (Tr. 186, 216; see also Jt. Exh. 1 (sec. 4.20(a) (describing the order of layoffs due to a lack of work, with employees in group one being the last to be laid off).) While that explanation arguably covers why Bishop was selected for the layoff (since Bishop was the most recent group two hire on December 5), it does not explain why Brumfield was chosen for the layoff, since Brumfield was one of four individuals hired from group two on November 30, and none of the other group two individuals hired alongside Brumfield was laid off. (See FOF, sec. II(B)–(C), supra.)

the entire day. Bishop agreed to that solution. (Tr. 54–55, 127, 202–206.)

### *I. January–March 2023: Additional Developments Regarding the PureCycle Project*

On about January 8, 2023, Dillard advised the Union that Respondent needed six electricians to work at the PureCycle project for a "short call" (a period of 14 days or less). Following the referral procedures set forth in the collective-bargaining agreement, the Union referred six applicants to Respondent. Brumfield was not one of the referrals because his name was too far down the list. (GC Exh. 2 (p. 4); Tr. 160–162, 172–174, 187–188; see also Tr. 172 (noting that after being laid off from the PureCycle project, Brumfield contacted the Union to put his name on the out-of-work list).)

On about January 23, 2023, Dillard advised the Union that Respondent needed four electricians to work at the PureCycle project for a period of 6 weeks. The Union referred four applicants to Respondent. Brumfield again was not one of the referrals because his name was too far down the list. (GC Exh. 2 (p. 1); Tr. 159–160, 172–174, 188.)

Also in January 2023, the Union filed a grievance on Brumfield's behalf to (among other things) contest Respondent's decision to lay off Brumfield from the PureCycle project.[14] Superintendent Dillard submitted Respondent's reply to the grievance, and on January 25, 2023, the Local Labor Management Cooperation Committee denied the grievance, finding that Brumfield "received a reduction in force layoff with eligibility for rehire." (Jt. Exhs. 6–8; Tr. 104–108, 142–143, 211–212; see also Jt. Exh. 5 (Brumfield letter asking the Union to file a grievance).)

Brumfield filed an unfair labor practice charge on March 1, 2023, in Case 09–CA–313196, to allege that Respondent violated the Act when it laid off Bishop and Brumfield from the PureCycle project. (GC Exh. 1(a); Tr. 116.)

### *J. March 31, 2023: Respondent Declines to Hire Brumfield for the Mountaineer Project*

In the afternoon on March 31, 2023, Brumfield emailed union assistant business manager Spears to request that he (Brumfield) be placed on the out-of-work list because he (Brumfield) was finishing up at another project. As it turned out, Spears was in the process of responding to a request from Respondent for five electricians to work at the Mountaineer powerhouse project, and included Brumfield as one of the five applicants that the Union would refer for hire for that project, with a start date of April 3, 2023. Spears notified Brumfield about the Mountaineer project referral but a few minutes later heard from Respondent's project manager Mike Price that Respondent would not hire Brumfield for the Mountaineer project (Price was fine with hiring the other four applicants that the Union referred). Accordingly, Spears notified Brumfield that he would not be hired at the Mountaineer project and referred a different applicant to Respondent. (GC Exhs. 2 (p. 3), 3; Tr. 110–113, 117, 162–168, 171, 231–236, 241–242; see also Tr. 227–228 (explaining that periodically the Mountaineer powerhouse brought in staff to assist with routine maintenance outages), 176–178, 233 (explaining that under the applicable contract for the Mountaineer project, Respondent had the right to reject any applicant, including rejecting an applicant based on a preference for workers that Respondent knew); Jt. Exhs. 2 (p. 1), 9.)

During trial, Price explained that he declined to hire Brumfield because the general foreman at the Mountaineer project (Tyson) was new in the position and he (Price) wanted to only hire electricians that he or Tyson knew. Price did not know Brumfield, but did know the other four applicants that Spears initially referred because Price had worked with them before.[15] (Tr. 231, 234–235, 241–242, 245–246; see also Tr. 226, 229–230 (explaining that Price was general foreman at the Mountaineer powerhouse until 2022, when Price became a project manager and Tyson became the general foreman at Mountaineer).)

### *K. August 4, 2023: Respondent Declines to Hire Brumfield for the Nucor Project*

On August 4, 2023, Union assistant business manager Spears notified Brumfield that he (Brumfield) was one of two applicants being referred to Respondent to work at the Nucor steel mill project for 2 weeks. A few minutes later, Respondent's project manager Price told Spears that Respondent would not hire Brumfield for the Nucor project. Spears then notified Brumfield that he would not be hired and referred a different applicant to Respondent that Price knew. (GC Exhs. 2 (p. 5), 4; Tr. 113–115, 117, 169–171, 236–238, 242–243; see also Jt. Exhs. 2 (p. 3), 9; Tr. 176–178, 238, 246 (explaining that under the applicable contract for the Nucor project, Respondent had the right to reject any applicant, including rejecting an applicant based on a preference for workers that Respondent knew).)

During trial, Price testified that he did not hire Brumfield for the Nucor project because he did not know Brumfield. Specifically, Price explained that Nucor was a new customer for Respondent and Price only wanted to hire electricians that he knew and trusted to ensure that Respondent would make a good impression on the project. (Tr. 237–238, 243, 246.)

## DISCUSSION AND ANALYSIS

### *A. Credibility Findings*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a

[14] Bishop attempted to initiate a grievance regarding his layoff but the Union apparently did not receive the email that Bishop sent to request that a grievance be filed. (Tr. 44, 62–63.)

[15] Brumfield noted that he heard about the Mountaineer project from Mike Brewer, who would be serving as a foreman on the project and encouraged Brumfield to apply. (Tr. 110–111.) While project manager Price indicated that that on "few and far between" occasions he would ask colleagues if they knew an applicant (instead of relying solely on his own knowledge), there is no evidence that Price consulted with Brewer about whether to hire Brumfield. (Tr. 243.)

party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

### *B. Were General Foreman Burke and Foreman Barker Statutory Supervisors?*

As a preliminary matter relating to the 8(a)(3) and (1) allegations in this case, the parties dispute whether general foreman Stoney Burke and foreman Dwight Barker were statutory supervisors under the Act. Individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act (i.e., the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. Conclusory evidence does not satisfy that burden. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888–889 (2014); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006).[16]

The evidentiary record establishes that both Burke and Barker were statutory supervisors for Respondent. Both the general foreman (Burke) and the foreman (Barker) have the authority to assign work and issue directions to electricians. There is also secondary indicia of Burke's and Barker's supervisory status, as Respondent compensates them at a higher rate than electricians, and the collective-bargaining agreement specifies that employers must have a general foreman and a foreman on the job based on established ratios of supervisors to electricians.[17] I also find that both Burke and Barker used independent judgment when exercising their authority and held their authority in Respondent's interest, as Respondent relied on them to manage the workforce on a daily basis and there is no evidence of any policies or instructions that dictated how Burke and Barker made decisions when assigning work or issuing directions. (See Jt. Exh. 1 (secs. 3.04, 3.07); Tr. 20, 27, 125, 156–157, 181–182).) Accordingly, I find that the General Counsel met its burden of proving that Burke and Barker were statutory supervisors in the relevant time period (2022).[18]

### *C. Did Respondent Violate the Act When it Laid Off Bishop and Brumfield?*

#### 1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Michael Bishop and Robert Darren Brumfield on December 30, 2022, because they asserted Bishop's right to receive show-up pay under the collective-bargaining agreement, and to discourage employees from engaging in those or other concerted activities.

#### 2. Applicable legal standard

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that the employee's union or other protected activity was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus against union or other protected activity on the part of the employer. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6 (2023), enfd. 2024 WL 2764160 (6th Cir. 2024). Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of discriminatory motivation may include, among other factors: the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. Id., slip op. at 6–7; *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

If the General Counsel makes the required initial showing, then the burden of persuasion shifts to the employer to establish, as an affirmative defense, that it would have taken the same

[16] The Board has recognized that certain "secondary indicia" may support a finding of supervisory status if the evidentiary record shows that the alleged supervisor possesses at least one of the primary indicia of supervisory status set forth in Sec. 2(11) of the Act. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Secondary indicia of supervisory status include, but are not limited to, the individual's: designation as a supervisor; attendance at supervisory meetings; responsibility for a shift or phase of the employer's operation; authority to grant time off to other employees; responsibility for inspecting the work of others; responsibility for reporting rule infractions; receipt of privileges exclusive to members of management; and compensation at a rate higher than the employees supervised. The ratio of supervisors to employees is also a secondary indicator of supervisory status. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977).

[17] Specifically, the collective-bargaining agreement requires a foreman for each 10 electricians on the job, and requires a general foreman when more than 22 electricians are employed on the job. (Jt. Exh. 1, sec. 3.07.)

[18] Respondent did not admit to the supervisory/agent status of Burke and Barker in its answer or via stipulation, but did not provide a substantive argument about their status beyond asserting that any testimony during trial about Burke's and Barker's statements was hearsay. (See R. Posttrial Br. at 14 fn. 7.) Since I have found that Burke and Barker are statutory supervisors, the General Counsel properly offered testimony about their statements as admissions that are not covered by the rule against hearsay. (See Federal Rule of Evidence 801(d)(2).)

action even in the absence of the employee's union or protected activity. In order to meet that burden in circumstances where the employer maintains that the employee engaged in misconduct, the employer need not prove that the disciplined employee committed the misconduct alleged. Instead, the employer only needs to show that it had a reasonable belief that the employee committed the alleged offense and that it acted on that belief when it took the disciplinary action against the employee. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 7; *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002); see also *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (noting that the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union animus where the surrounding facts tend to reinforce that inference). A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.

3. Analysis

The evidentiary record shows that at the PureCycle project on December 21, 2022, Respondent sent Michael Bishop home because Respondent thought he was sick and should not work. When employees came to work on December 27, Robert Brumfield learned that superintendent Jason Dillard had recently had COVID–19. In the presence of other employees who were in the office trailer, Brumfield confronted Dillard about whether Dillard should be working, noting that Respondent previously sent Bishop home based on a suspicion that Bishop was sick. The following day (December 28), Bishop received his paycheck and objected to the foreman that the paycheck was incorrect because Bishop started work on December 21 and should have been paid for 4 hours under the collective-bargaining agreement (instead of being paid for 2 hours as reflected on the paycheck). Brumfield backed up Bishop in the December 28 discussion with the foreman about Bishop's paycheck. In the morning on December 29, Dillard notified the Union that Bishop and Brumfield (and only those two employees) would be laid off. Dillard followed through with laying off Bishop and Brumfield on December 30, and, with Bishop's agreement, addressed the paycheck issue by letting Bishop leave the worksite early while being paid for the full day. On about January 8 and 23, 2023, Respondent asked the Union to refer a total of ten additional electricians to work at the PureCycle project. (Findings of Fact (FOF), Sec. II(D)–(I).)

Based on the evidentiary record, I find that the General Counsel made an initial showing that Bishop's and Brumfield's union and protected concerted activities were a motivating factor in Respondent's decision to lay them off from the PureCycle project. The General Counsel established that both Bishop and Brumfield engaged in union and/or protected concerted activity when: Brumfield, on behalf of Bishop and other employees, confronted Dillard on December 27 about whether Dillard should be working; and Bishop, with Brumfield's backing, relied on the collective-bargaining agreement on December 28 to object to not receiving 4 hours of pay for starting work on December 21. Respondent was aware of those activities, as Brumfield spoke to superintendent Dillard directly about whether Dillard should have been at work, and both Bishop and Brumfield spoke to foreman Barker directly about Bishop's paycheck. I also infer that Barker relayed the concerns about Bishop's paycheck to Dillard because Dillard was the one who had the authority to correct Bishop's paycheck. The General Counsel also demonstrated that Respondent acted with animus by showing that the timing of the layoff decision was suspicious, as Dillard decided to lay off Bishop and Brumfield within 1–2 days of their union and protected concerted activities, and 9 days later asked the Union to refer additional electricians to work at the PureCycle project. Animus is further established by the fact that both general foreman Burke and foreman Barker quickly distanced themselves from Dillard's decision to lay off Bishop and Brumfield, with each of them emphasizing that they had nothing to do with the layoff decision. (See FOF, Sec. II(H)–(I).)

As its affirmative defense, Respondent maintains that it would have laid off Bishop and Brumfield even in the absence of their union and protected concerted activities because on December 26 or 27, the general contractor at the PureCycle project instructed Dillard to reduce the workforce as a way to cut costs. (R. Posttrial Br. at 11–15.) As stated in the Findings of Fact, however, I do not credit Dillard's testimony that he received such a directive, as there is no corroborating documentation or testimony about a need to reduce the workforce (let alone by only two people who happened to be Bishop and Brumfield), Dillard did not articulate a credible explanation for why he selected Brumfield for the layoff when Brumfield was hired alongside three other employees who were similarly situated and were not laid off, and only 9 days after laying off Bishop and Brumfield, Dillard notified the Union that Respondent needed additional electricians at the PureCycle project.[19] (FOF, Sec. II(G)

[19] Respondent objected to the General Counsel's presentation of evidence about Brumfield's December 27 confrontation with Dillard about whether Dillard should be working after recently having COVID–19, as the complaint does not allege that the December 27 confrontation was a form of protected activity that factored into Brumfield's layoff. (See R. Posttrial Br. at 14–15.) Respondent's objection fails for two reasons. First, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Starbucks Corp.*, 373 NLRB No. 105, slip op. at 2 fn. 7 (2024); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). That standard is satisfied here, given that the December 27 confrontation relates to whether Brumfield's and Bishop's layoff was lawful and thus is closely connected to the subject matter of the complaint; and the parties fully litigated the December 27 confrontation since the General Counsel presented testimony about the

(explaining that Brumfield was one of four individuals in group two that Respondent hired on November 30, 2022).)

Since the General Counsel made an initial showing of discrimination and Respondent's affirmative defense was not successful, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it laid off Bishop and Brumfield on December 30, 2022, because of their union and protected concerted activities and to discourage other employees from engaging in those activities. See, e.g., *New York Paving, Inc.*, 371 NLRB No. 139, slip op. at 3–6 (2022) (employer violated the Act by laying off bargaining unit employees in retaliation for the union's filing of a contractual grievance), enfd. 2023 WL 7544999 (D.C. Cir. 2023); *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 4–5 (2021) (same, where employer laid off two employees because they supported the union).

### *D. Did Respondent Violate the Act When it Refused to Hire Brumfield in 2023?*

#### 1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Robert Darren Brumfield at the Mountaineer Power Plant on about March 31, 2023, and by refusing to hire Brumfield at the Nucor project on about August 4, 2023, because Brumfield engaged in union and protected concerted activities (including asserting Bishop's right to receive show-up pay at the PureCycle project), and to discourage employees from engaging in those or other concerted activities.

The General Counsel also alleges that Respondent violated Section 8(a)(4) and (1) of the Act by refusing to hire Robert Darren Brumfield at the Mountaineer Power Plant on about March 31, 2023, and by refusing to hire Brumfield at the Nucor project on about August 4, 2023, because Brumfield filed an unfair labor practice charge in Case 09–CA–313196.

#### 1. Applicable legal standard

To establish a discriminatory refusal to hire, the General Counsel must show (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered to such requirements, or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicant. Once those elements are established, the burden shifts to the employer to show that it would not have hired the applicant even in the absence of their union activity or affiliation. See *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002); see also *Aerotek, Inc.*, 365 NLRB 8, 8–9 (2016) (applying *FES*), enfd. in pertinent part 883 F.3d 725 (8th Cir. 2018); *Harmony Corp.*, 349 NLRB 781, 782–784 (2007) (same).

Under Section 8(a)(4) of the Act, an employer may not discriminate against an employee for participating in the Board's processes, including filing charges, testifying, or being subpoenaed to testify at a Board proceeding. The Board applies the same legal framework for 8(a)(3) allegations (i.e., the *FES* standard in a refusal to hire case) to determine whether an adverse employment action was for reasons that are prohibited by Section 8(a)(4). *S. Freedman & Sons, Inc.*, 364 NLRB 1203, 1205–1206 (2016), enfd. 713 Fed. Appx. 152 (4th Cir. 2017).

#### 2. Analysis

The evidentiary record shows that in 2023, Respondent had concrete plans to hire electricians for both the Mountaineer project (on March 31) and the Nucor project (on August 4). The Union referred Brumfield as an applicant for each of those projects, but Respondent, through project manager Price, summarily declined Brumfield as an applicant for each project because Price did not know Brumfield. (FOF, Sec. II(J)–(K).)

Having considered the evidentiary record and the parties' arguments, I find that the General Counsel failed to meet its burden of proving that Respondent violated Section 8(a)(3) and/or (4) Act when it declined to hire Brumfield in 2023. First, the General Counsel did not make an initial showing of discrimination. While there is no dispute that Respondent was hiring and that Brumfield had the required training and experience for the positions at the Mountaineer and Nucor projects, the General Counsel did not demonstrate that Respondent acted with animus when it refused to hire Brumfield. As a preliminary matter, I do not find that Respondent's animus in laying off Brumfield from the PureCycle project carried over to Price's hiring decisions in 2023.[20] The General Counsel did not show that Price knew anything about the events at PureCycle, as there is no evidence that Price was aware of Brumfield's union and protected concerted activities at PureCycle, nor is there evidence that Price communicated with superintendent Dillard (who made the decision to lay off Brumfield) in any fashion. I have also considered the General Counsel's argument that Respondent provided shifting reasons for not hiring Brumfield,[21] but that argument fails because it is not supported in the evidentiary record. During trial, the General Counsel asserted (in a question to Price during cross examination) that Respondent said in a position statement that it did not hire Brumfield due to the poor quality of Brumfield's work. The General Counsel, however, did not offer a copy of the position statement into the evidentiary record and did not secure an admission from Respondent (either from Respondent's counsel or Price) about any content of the position statement that

December 27 confrontation in its case in chief, Respondent presented contrary evidence in its defensive case, and all parties addressed the December 27 confrontation in their posttrial briefs.

Second, even if I were to disregard the December 27 confrontation, the General Counsel would still prevail because it demonstrated that Respondent unlawfully laid off Bishop and Brumfield because they engaged in union and protected concerted activity by complaining about Bishop's paycheck on December 28.

[20] The General Counsel did not argue this theory in its posttrial brief.

[21] The General Counsel did not argue that any other circumstantial evidence supports a finding of animus, save for objecting that Brumfield was the only applicant that Respondent rejected within minutes of the Union's referrals. (GC Posttrial Br. at 15.) That fact, however, does not establish animus, because: the speed of Respondent's hiring decision is not probative in and of itself; and there is no evidence that Price deviated from his usual hiring practices when he declined to hire Brumfield.

related to Respondent's hiring decisions.[22] (See. Tr. 245–246.) Accordingly, there is no evidence to support the General Counsel's argument on this point.

Second, even if I found that the General Counsel made an initial showing of discrimination, Respondent showed that it would not have hired Brumfield even in the absence of his union and protected concerted activities. Specifically, project manager Price explained that he did not hire Brumfield because Price did not know Brumfield and wanted to hire familiar employees for the Mountaineer and Nucor projects.[23] The General Counsel did not present any evidence to rebut that explanation (such as examples of Price following different hiring practices in other circumstances, or evidence that Price's decisions were tainted with animus), and thus Respondent's defense stands.

Since the General Counsel did not meet its burden of proving that Respondent violated the Act when it refused to hire Brumfield for the Mountaineer and Nucor projects in 2023, I recommend that the complaint allegations regarding Respondent's hiring decisions be dismissed.

## CONCLUSIONS OF LAW

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

2. By, on December 30, 2022, laying off Michael Bishop and Robert Darren Brumfield because they engaged in union and protected concerted activities (and to discourage other employees from engaging in those activities), Respondent violated Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices stated in Conclusion of Law 2, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

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

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its unlawful layoffs of Michael Bishop and Robert Darren Brumfield, I shall require Respondent to offer to reinstate them to their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed absent the discrimination against them. Respondent must also make Bishop and Brumfield whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), enf. denied in part on other grounds 102 F.4th 727 (5th Cir. 2024), Respondent shall also compensate Bishop and Brumfield for any direct or foreseeable pecuniary harms incurred as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Respondent shall also be required to remove from its files any references to Bishop's and Brumfield's unlawful layoffs, and to notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

In addition, I shall require Respondent to compensate Bishop and Brumfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent shall also be required to file with the Regional Director for Region 9 a copy of Bishop's and Brumfield's corresponding W–2 form(s) reflecting the backpay awards.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

## ORDER

Respondent, Nitro Construction Services, Nitro, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees for engaging in union and protected concerted activities.

(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 of the Board's order, offer Michael Bishop

[22] The General Counsel did question superintendent Dillard about the position statement, but Dillard was not involved in the decisions to not hire Brumfield in 2023. Further, the only admission that that the General Counsel secured from Dillard about the position statement related to the PureCycle project and the fact that Respondent notified the Union (before Bishop and Brumfield were hired) that some employees that the Union referred to the PureCycle project did not perform their jobs in a satisfactory manner. (Tr. 190–191.) That admission is not relevant to Respondent's hiring decisions in 2023.

[23] I recognize that Price's practice of not hiring applicants he does not know (including Brumfield) is subjective and thus lends itself to potential discrimination or other abuse. The use of subjective criteria, however, is not unlawful per se; the General Counsel still must meet its burden of proving unlawful discrimination and it did not meet that burden here. See *Morrison Knudsen Co.*, 291 NLRB 250, 250 (1988) (noting that while the union's subjective referral practices "may lend themselves to abuse [such as] allowing a union to disguise favoritism or patronage in referrals[,] they are not however sufficient in themselves to prove such abuse").

[24] 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.

and Robert Darren Brumfield full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Bishop and Brumfield whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days of the Board's Order, remove from its files any references to Respondent's unlawful layoffs of Bishop and Brumfield and, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Compensate Bishop and Brumfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) File with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Bishop's and Brumfield's W–2 form(s) reflecting the backpay awards.

(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 Nitro, West Virginia, and at its facility at the PureCycle project if Respondent continues to provide services at that location, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at that facility at any time since December 30, 2022. Similarly, if Respondent no longer provides services at the PureCycle project (as a subcontractor or otherwise), Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees that Respondent employed at the PureCycle project at any time since December 30, 2022.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 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. October 30, 2024

## 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 lay off employees for engaging in union and/or protected concerted activities.

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

WE WILL, within 14 days of the Board's order, offer Michael Bishop and Robert Darren Brumfield full reinstatement to their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Michael Bishop and Robert Darren Brumfield whole for any loss of earnings and other benefits resulting from

[25] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

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."

the unlawful layoffs less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the unlawful layoffs of Michael Bishop and Robert Darren Brumfield, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

WE WILL compensate Michael Bishop and Robert Darren Brumfield for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Michael Bishop's and Robert Darren Brumfield's W–2 form(s) reflecting the backpay awards.

NITRO CONSTRUCTION SERVICES

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 09-CA-313196 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.