**M.J. Melo Painting Ltd. *and* Local Union 1430, International Brotherhood of Electrical Workers.**[1]
Cases 29–CA–278541, 29–CA–280834, 29–CA–286220, and 29–RC–279096

June 10, 2026

## DECISION, ORDER, AND DIRECTION

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On June 14, 2023, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The judge found that the Respondent, a residential and commercial painting company, committed multiple violations of the National Labor Relations Act during an organizing campaign among its employees by Local Union 1430, International Brotherhood of Electrical Workers (the Union). Among other violations, the Respondent threatened to reduce employees' hours and then followed through on its threat, reducing the hours of eight employees and ceasing assigning any work to five of them. For the reasons discussed by the judge, we affirm his conclusions that the Respondent violated Section 8(a)(3) and (1) by discharging the five employees to whom it ceased assigning work: Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Percy Martinez, and Andres Suarez.[4] Additionally, for the reasons discussed below, we affirm the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging four employees—Antonio Hanco, Joel Nunez Jimenez,[5] Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono—through its unlawful reduction in their work hours.[6] Finally, for the reasons discussed below, we reject the Respondent's argument that a non-Board settlement agreement between itself and the Union renders the challenges to the ballots of employees Hanco, Nunez, Mario Vasquez, and Yundes Arcila moot and requires the dismissal of the Union's representation petition in Case 29–RC–279096, and we consequently affirm the judge's decision to overrule those ballot challenges.[7]

[1] We have amended the caption to reflect the correct names of the Respondent and the Charging Party.

[2] The Respondent has implicitly 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.

[3] We shall amend the remedy and modify the judge's recommended order to conform to his unfair labor practice findings and to the Board's standard remedial language, and we shall add a direction, which the judge inadvertently failed to include in his decision. We shall substitute a new notice to conform to the Order as modified.

[4] The credited evidence recounted in the judge's decision establishes that the Respondent ceased assigning work to Astoquillca, Cedeno, Chica, Martinez, and Suarez, and the Respondent has not contested the judge's finding that it did so in retaliation for their union activities. The Respondent essentially argues that it could not have discharged those employees because it never expressly told any of them that they were being discharged. However, "[t]he Board has held that the fact of discharge does not depend on the use of formal words of firing." *North American Dismantling Corp.*, 331 NLRB 1557, 1557 (2000), enfd. in relevant part mem. 35 F. App'x 132 (6th Cir. 2002). Instead, "the determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer's statements or conduct would reasonably lead the employees to believe that they had been discharged." *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001) (internal quotations omitted). Although the Respondent never expressly told Astoquillca, Cedeno, Chica, Martinez, and Suarez that they had been discharged, those employees would have reasonably believed that they had been discharged based on the Respondent ceasing to assign work to them. See *Hudson Moving & Storage Co.*, 322 NLRB 1028, 1028–1029 (1997) (finding that an employer "ceased assigning work to 7 of its drivers and helpers who had signed union authorization cards, thereby effectively terminating them for their union activities" (internal footnotes omitted)); *F & F Construction Co.*, 235 NLRB 1440, 1440, 1446 (1978) (finding that an employer unlawfully discharged an employee "when it ceased assigning him work"), enfd. mem. 601 F.2d 595 (7th Cir. 1979).

[5] The judge inadvertently referred to this employee as "Jose Nunez Jimenez" throughout his decision. We have corrected the judge's error.

[6] In the absence of exceptions, we adopt the judge's conclusions that the Respondent violated Sec. 8(a)(1) by interrogating employees about their union activities, threatening employees with reprisals, including reduced hours of work and discharge, if they supported the Union, creating the impression of surveillance of its employees' union activities, making statements of futility about employees choosing the Union as their representative, and promising benefits to employees if they did not choose the Union as their representative, and violated Sec. 8(a)(3) and (1) by reducing the hours of work of employees Astoquillca, Cedeno, Chica, Hanco, Martinez, Nunez, Yundes Arcila, and Yundes Londono in retaliation for their union activities.

[7] On June 28, 2021, the Union filed a petition in Case 29–RC–279096 to represent the Respondent's painters. Pursuant to a stipulated election agreement, a mail-ballot election was conducted from August 4 to September 8, 2021. The tally of ballots showed seven votes cast for the Union and five votes cast against representation, with one void ballot and four challenged ballots, a number sufficient to affect the results of the election. In an unpublished Order granting the Union's request for review of the Acting Regional Director's Decision on Challenges and Objections and Direction of Second Election, the Board agreed with the

## I. CONSTRUCTIVE DISCHARGES

"A constructive discharge is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it." *Zeigler North Riverside, LLC d/b/a Zeigler Ford of North Riverside*, 370 NLRB No. 41, slip op. at 3 (2020) (internal quotations omitted). To establish a constructive discharge pursuant to the Board's traditional constructive discharge theory, the General Counsel must prove the following two elements: "First, the burdens imposed on the employee must cause, and be intended to cause, a change in [the employee's] working conditions so difficult or unpleasant as to force [the employee] to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).[8] The General Counsel can satisfy the intent requirement of the first element of the traditional constructive discharge standard by showing that the "the employer 'reasonably should have foreseen' that its actions would cause an employee to quit." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 470 (2007) (quoting *American Licorice Co.*, 299 NLRB 145, 148 (1990)). The Board applies *Wright Line*[9] to determine if the second element of the traditional constructive discharge standard has been met. See *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018) (citing *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995)).

The judge did not cite or apply the Board's traditional constructive discharge standard. Instead, he simply concluded that the Respondent constructively discharged Hanco, Nunez, Yundes Arcila, and Yundes Londono in violation of Section 8(a)(3) and (1) by reducing their hours of work, which he found "creat[ed] an untenable financial situation for employees who were forced to choose between hoping they might get their regular hours or seeking other employment."

The Respondent excepts, arguing that the reductions in hours were not onerous enough to force Hanco, Nunez, Yundes Arcila, and Yundes Londono to quit. However, as discussed above, the Respondent has failed to except to the judge's findings that under *Wright Line*, the Respondent violated Section 8(a)(3) and (1) by reducing the hours of work of Hanco, Nunez, Yundes Arcila, and Yundes Londono in retaliation for their union activities, and we have adopted the judge's findings of those violations in the absence of exceptions. Therefore, the General Counsel has necessarily satisfied the second element of the Board's traditional constructive discharge standard with regard to the constructive discharge allegations concerning Hanco, Nunez, Yundes Arcila, and Yundes Londono—i.e., she has established that the Respondent reduced those employees' hours of work because of their union activities.[10]

As a result, the only question before the Board on exceptions is whether the General Counsel has satisfied the first element of the Board's traditional constructive discharge standard. For the reasons discussed below, we find that the General Counsel has shown that the burdens imposed on Hanco, Nunez, Yundes Arcila, and Yundes Londono as a result of the reductions to their hours of work caused, and were intended to cause, a change in those employees' working conditions so difficult or unpleasant as to force them to resign.[11]

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Acting Regional Director that "the improper commingling and counting of two ballots contained in unsigned yellow envelopes, along with the failure to count a misplaced ballot that was timely received before the count, would require setting aside the election should those three ballots prove determinative." *MJ Melo Painting, Ltd.*, Case 29–RC–279096, 2022 WL 159186, at *1 (NLRB Jan. 7, 2022). However, the Board remanded Case 29–RC–279096 to the Regional Director to resolve the challenges to the ballots of Hanco, Nunez, Vasquez, and Yundes Arcila because "the two improperly commingled ballots and the misplaced ballot may *not* be determinative, depending on the outcome of the four challenged ballots[,] . . . [and u]nder such circumstances, it would not be necessary to set aside the election." Ibid. (emphasis in original). On remand, the Regional Director consolidated the ballot challenges with the unfair labor practice allegations in Cases 29–CA–278541, 29–CA–280834, and 29–CA–286220, and scheduled them for hearing before the judge.

[8] A constructive discharge may also be shown under a "Hobson's Choice" theory. See *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001) ("Under the Hobson's Choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of [their] Sec[.] 7 rights and the employee quits rather than comply with the condition."). The General Counsel has not pursued a violation under the Hobson's Choice theory on exceptions, and, in any event, the facts of this case do not support finding a violation under that theory.

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[10] In arguing that the employees were not constructively discharged, the Respondent contends that it reduced their hours for a nondiscriminatory reason, i.e., because it had less work to assign during the relevant time period. The Respondent has waived that argument by failing to except to the judge's previously referenced findings that it unlawfully reduced the hours of work of Hanco, Nunez, Yundes Arcila, and Yundes Londono in retaliation for their union activities. See Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."); see also id. at Sec. 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.").

[11] In analyzing the constructive discharge allegations concerning Hanco, Nunez, Yundes Arcila, and Yundes Londono under the first element of the Board's traditional constructive discharge standard, we have relied upon, and will reference below, those employees' credited testimony regarding their hours of work and the hours of work for those employees reflected in the Respondent's WorkMax records, which the parties entered into evidence as Jt. Exh. 7. WorkMax is an application that

*A. Antonio Hanco*

Hanco first worked for the Respondent from October 2019 to June 29, 2021.[12] Hanco testified that prior to June 10, he normally worked at least 40 hours per week but sometimes worked 48 hours or more. He testified further that from June 10 to 14, the Respondent did not assign him any work, and thereafter it assigned him work only 3 or 4 days a week. The Respondent's WorkMax records show that Hanco worked 48.56 hours per pay period on average from March 24 to June 9[13] but only 26.72 hours per pay period on average (and never more than 4 days in a pay period) from June 10 to 29.[14] According to Hanco, he stopped working for the Respondent after June 29 because the reduction in his hours of work made it difficult for him to pay rent and other bills.

At the end of August, Supervisor Serrano reached out to Hanco to see if he would return to work for the Respondent. Hanco said that he would do so only if the Respondent guaranteed him full-time hours plus overtime, which Serrano agreed to do. Hanco testified that the Respondent initially assigned him more than 40 hours per week when he returned to work but stopped doing so after the election results were revealed. The WorkMax records confirm that the Respondent assigned Hanco more than 40 hours of work during his first two full pay periods back working for the Respondent but only 40 hours of work during his last three pay periods.[15] According to Hanco, he stopped working for the Respondent at the end of September because only 40 hours of work per week was not sufficient to support his family and cover his expenses.[16]

The complaint, as amended at the hearing, alleged that the Respondent discharged or constructively discharged Hanco on or about June 22 and again on approximately September 30. While the judge found that the Respondent constructively discharged Hanco in violation of Section 8(a)(3) and (1) by reducing his hours in retaliation for his union activity, the judge did not specify whether the Respondent did so both at the end of June and again around the end of September. For the reasons discussed below, we clarify that the Respondent constructively discharged Hanco both at the end of June and around the end of September.

As a general matter, "[t]he Board has held that a significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity, will establish constructive discharge." *Alpine Log Homes*, 335 NLRB 885, 885 (2001). The WorkMax records discussed above show that Hanco's average hours of work per pay period, and consequently his income, decreased by approximately 45 percent after June 9. Hanco had no idea how long this reduction to his hours of work would continue. The Board has previously found that less significant reductions in hours of work resulted in constructive discharges. See, e.g., *PPP Insulation Co.*, 320 NLRB 953, 953, 954 (1996) (finding a constructive discharge where an employer reduced an employee's weekly hours from 40 to 32 (i.e., a 20 percent reduction)); *Kime Plus, Inc.*, 295 NLRB 127, 127, 146 (1989) (finding a constructive discharge where an employee's "new schedule of 28.75 [was] 6.25 hours (about 17.86 percent) short of [her] old schedule of 35 paid hours per week"). Unsurprisingly, Hanco credibly testified that the reduction in hours that he experienced after June 9 made it difficult for him to pay his rent and other bills.[17] The Respondent clearly should have foreseen that a 45 percent reduction in work hours would have prompted Hanco to seek work elsewhere. Accordingly, the General Counsel has shown that the reduction to Hanco's hours of work in June in retaliation for his union activity caused, and was intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign, and we therefore find that the Respondent unlawfully constructively discharged Hanco at the end of June.

As to Hanco's decision to stop working for the Respondent around the end of September, Hanco credibly testified that he could not support his family and cover his expenses if he was not receiving more than 40 hours of

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the Respondent began using in March 2021 to track employees' hours of work. The Respondent's payroll records cover a longer period of time, but the record evidence firmly establishes that those records do not accurately reflect the actual number of hours that employees worked each pay period. Therefore, we have not relied upon the payroll records and will not reference them below.

[12] Hereafter, dates are in 2021 unless otherwise noted.

[13] The WorkMax records show that Hanco did not perform any work for the Respondent for a 2-week period from May 17 to 31. Hanco testified that he had to take time off work in May because his arm was hurting as a result of doing plaster work for the Respondent. In calculating the average number of hours per pay period that Hanco worked prior to June 10, we have not factored in the pay periods that included the time that Hanco had to take off work as a result of this arm injury—i.e., the May 12 to 18, May 19 to 25, and May 26 to June 1 pay periods.

[14] The Respondent's pay periods run from Wednesday to Tuesday.

[15] During the hearing, the Respondent's attorney questioned Hanco about the number of hours that he worked each week in September, and the Respondent has cited that testimony in its argument in support of its exceptions. However, the hours referenced by the Respondent's attorney during that line of questioning are not consistent with the WorkMax records or the payroll records for Hanco, and we are not able to determine the source of those figures. We therefore do not rely on that testimony.

[16] The WorkMax records show that Hanco last worked for the Respondent on October 5.

[17] The judge found the testimony of Hanco, Nunez, Yundes Arcila, and Yundes Londono "about the need to support their families on the income they were previously accustomed to earning to be both truthful and sufficient justification for leaving employment with Respondent."

work per pay period, and the Respondent stopped assigning him more than 40 hours during the final three pay periods that he worked for the Respondent. The Board has previously found constructive discharges in similar circumstances. See, e.g., *Polymer Prints*, 281 NLRB 431, 431 fn. 1, 436–437 (1986) (finding that an employer constructively discharged an employee by ceasing to assign him overtime where the employee informed the employer that "he could not discharge his family responsibilities if [the employer] continued to withhold overtime from him"); *Peerless Distributing Co.*, 144 NLRB 1510, 1511–1512, 1518 (1963) (finding that an employer constructively discharged an employee by reducing his hours and income "from approximately 62 hours and $165 a week to 49 hours and $115 a week" where the employee testified that he could not afford to continue his job in those circumstances). Further, because Hanco told Serrano in late August that he would return to work for the Respondent only if he was assigned full-time hours plus overtime, the Respondent reasonably should have foreseen that ceasing to assign Hanco more than 40 hours per pay period would cause him to quit. See *La Favorita, Inc.*, 306 NLRB 203, 205 (1992) (finding that an employee's "resignation was a reasonably foreseeable consequence of the employer's conduct" of reducing the employee's hours where the employee "had clearly indicated that he desired to work more hours"), enfd. mem. 977 F.2d 595 (10th Cir. 1992). Accordingly, the General Counsel has shown that by ceasing to assign more than 40 hours per pay period to Hanco in September in retaliation for his union activity, the Respondent caused, and intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign, and we therefore find that the Respondent unlawfully constructively discharged Hanco around the end of September.

### *B. Joel Nunez Jimenez*

Nunez worked for the Respondent from January 27 to July 1. He testified that prior to early June, he always worked at least 40 hours per week for the Respondent and could work up to 60 hours per week. He testified further that after he had a conversation about the Union with Supervisor Serrano in early June, the Respondent stopped assigning him overtime and assigned him only 2 or 3 days of work during some weeks. The WorkMax records show that Nunez worked 46.29 hours per pay period on average from March 24 to June 8 but only 36.33 hours per pay period on average from June 9 to 29. Nunez last worked for the Respondent on July 1.[18] On that day, Nunez sent a text message to Serrano requesting a new work assignment. The next morning, Serrano responded that he would let Nunez know if the Respondent had work for him for the next day or July 6. On July 5, Serrano told Nunez that the Respondent would not have work for him until July 12. On July 6 and 11, Nunez asked Serrano where he would be working on July 12. Serrano did not respond to Nunez' July 6 message and said that he could not talk in response to Nunez' July 11 message. Nunez followed up on July 11 by asking Serrano to please tell him if there was work or not. On July 12, Serrano asked Nunez to work for the Respondent the next day, but Nunez responded that he was painting a house, which would take about 3 days to finish, and that he would let Serrano know when he was available. On July 22, Serrano asked Nunez if he was available to work, and Nunez responded the next day that he would be working on a job with a friend for a couple of weeks. Neither Nunez nor Serrano followed up thereafter. Nunez testified that he found a new job because the Respondent reduced his hours and then stopped assigning him work, and because he had bills and a family that depends on him.

The record evidence summarized above shows that the Respondent reduced Nunez' hours by approximately 22 percent in June and then did not assign him any work for almost the first 2 weeks of July. As discussed with regard to Hanco in Section I.A, above, the Board has found that similar, and even less significant, reductions in hours resulted in constructive discharges. Further, as of July 11, Nunez would not have known if the Respondent was going to assign him work again given that he had asked three times where he would be working on July 12 but had not received an answer from Serrano. Nunez credibly testified that he found a new job because he had bills and a family that depends on him. In these circumstances, the Respondent clearly should have foreseen that Nunez would have had no choice but to seek work elsewhere.

For the reasons discussed above, we find that the General Counsel has established that by reducing Nunez' hours in June and failing to assign him any work for almost the first 2 weeks of July in retaliation for his union activity, the Respondent caused, and intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Nunez.

### *C. Jorge Arnwivis Yundes Arcila*

Yundes Arcila worked for the Respondent from May 2019 to October 12. He testified that prior to June, he

[18] According to the WorkMax records, Nunez last worked for the Respondent on June 28, but Nunez' text messages with Serrano indicate that he finished a job for the Respondent on July 1.

worked as many as 60 to 80 hours per week, and never less than 40 hours per week, but that the Respondent began reducing his hours around late May or early June. He testified further that he did not receive more than 40 hours per week from July to September. The WorkMax records show that Yundes Arcila worked 48.77 hours per pay period on average from March 24 to May 25, 48.82 hours per pay period on average from May 26 to June 29, and 36.94 hours per pay period on average from June 30 to October 12.[19] Additionally, from June 30 to October 12, Yundes Arcila worked 40 hours or less during 12 of 15 pay periods.

Yundes Arcila last worked for the Respondent on October 12. That evening, Supervisor Serrano told Yundes Arcila that his job for the next day had been cancelled and that there would not be work for him for the rest of that week. However, on October 15, Serrano asked Yundes Arcila to work the next day, but Yundes Arcila responded that he was too far away. On October 16, Yundes Arcila sent Serrano a text message requesting a 1-month vacation. Serrano responded that the Respondent had work and needed Yundes Arcila.[20] Yundes Arcila never told the Respondent that he wanted to return to work. He testified that he stopped working for the Respondent because he could not survive—and, in particular, pay his rent—if he was not working more than 40 hours per week.

Even assuming that, consistent with the WorkMax records, the Respondent did not reduce Yundes Arcila's hours in June, the WorkMax records show that the Respondent reduced Yundes Arcila's hours by approximately 25 percent from July to October. As discussed with regard to Hanco in Section I.A, above, the Board has previously found that similar, and even less significant, reductions in hours of work resulted in constructive discharges. Moreover, Yundes Arcila credibly testified that he could not survive if he was not working more than 40 hours per week, and the WorkMax records show that he worked 40 hours or less during 12 of the final 15 pay periods in which he worked. The Respondent reasonably should have foreseen that such a significant reduction to Yundes Arcila's hours of work and its failure to assign him more than 40 hours of work per week would cause him to quit, particularly since its owner Melo testified that Yundes Arcila said that he could not survive without working more than 40 hours per week. See *Polymer Prints*, 281 NLRB at 436–437 (finding that an employer constructively discharged an employee by ceasing to assign him overtime where the employee told the employer that "he could not discharge his family responsibilities if [the employer] continued to withhold overtime from him").

For the reasons discussed above, we find that the General Counsel has established that by reducing Yundes Arcila's hours of work in retaliation for his union activity, the Respondent caused, and intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Yundes Arcila.

### *D. Jorge Yundes Londono*

Yundes Londono worked for the Respondent from September 2020 to September 26. He testified that until late May, he worked around 50 hours per week and always a minimum of 40 hours per week. He testified further that around the end of May or beginning of June, the Respondent began reducing his hours, and he was working only 3 or 4 days per week. After being shown his WorkMax records, Yundes Londono testified that the reduction in hours may not have started until July. According to the WorkMax records, Yundes Londono worked 42.81 hours per pay period on average from March 24 to May 25, only 1 day for 10.17 hours during the May 26 to June 1 pay period, 47.17 hours per pay period on average from June 2 to 29, 17.92 hours per pay period on average from June 30 to August 10, and 39.17 hours per pay period on average from August 12 to September 21.[21]

Yundes Londono last worked for the Respondent on September 21. On that day, Supervisor Serrano told Yundes Londono that the Respondent did not have a lot of work and that he would be in touch. Serrano did not attempt to assign Yundes Londono work again until September 26. Yundes Londono responded that he could not work that week. On October 3, Yundes Londono asked Serrano if there was any work for the following week, and Serrano responded that there was not a lot of work and that he had to rotate workers. On October 5, Serrano asked Yundes Londono to work the next day, but Yundes Londono responded that he was not available. On October 7, Serrano asked Yundes Londono to work the next afternoon and followed up the next day to note that Yundes Londono had not responded. Yundes Londono did not respond until he sent the following text message to Serrano on October 16:

[19] This calculation factors in 16 hours of sick time that Yundes Arcila used from June 30 to October 12.

[20] Yundes Arcila testified that subsequently he had a telephone conversation with Serrano, but he did not describe the substance of that conversation.

[21] This calculation includes 32 hours of sick time that Yundes Londono used from August 12 to September 21.

> Good afternoon, Jose. That week you called me to work, at the beginning of the week you told me that there was NO work the entire week. Then you text me to go [work] and I already had plans. Please, be honest, if you say no, it's no, and [if you say] yes, it's yes, but you cannot be playing with my time. This week, I waited all day for a call, and you didn't tell me anything. As of today, October 16, don't count on me. Thank you.

(Alterations in translation.)

The record evidence summarized above shows that after having previously reduced Yundes Londono's hours of work by nearly 60 percent from July to mid-August, the Respondent once again significantly reduced Yundes Londono's hours of work at the end of September and beginning of October.[22] As discussed with regard to Hanco in Section I.A, above, the Board has previously found that far less significant reductions in hours resulted in constructive discharges. The Respondent also introduced additional uncertainty by telling Yundes Londono that it did not have work for him but then, a few days later, asking him to work the next day. This uncertainty that the Respondent created regarding if or when Yundes Londono would be assigned work would have made continuing to work for the Respondent even more untenable for Yundes Londono.

Although Yundes Londono did not testify regarding how the reduction in hours and uncertainty in scheduling specifically affected him, the Board has held that "[e]vidence concerning the actual impact of the reduction [in income] on the employee's livelihood is not required." *Consec Security*, 325 NLRB 453, 453 fn. 4 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999). In these circumstances, we infer that the two separate significant reductions in work hours and the uncertainty in scheduling would have affected Yundes Londono's ability to earn a living to such an extent that he was forced to seek alternative employment. See id. at 453 & fn. 4 (drawing "a reasonable inference that a reduction of income in the magnitude of 25 percent would impair an employee's ability to earn a living to such an extent that the employee would be forced to seek alternative employment"). Finally, the Respondent reasonably should have foreseen that its actions would cause Yundes Londono to quit, particularly in light of Yundes Londono's October 16 text message expressing exasperation with the uncertainty in scheduling. See *Davis Electric Wallingford*, 318 NLRB at 377 (finding a constructive discharge where, in declining a work assignment, an employee told his supervisor that "'he had a family to worry about, financial responsibilities and couldn't afford to be bounced back and forth like a yo-yo on a psychological roller coaster the company was putting him through'").

For the reasons discussed above, we find that the General Counsel has established that by reducing Yundes Londono's hours of work on two occasions and creating uncertainty regarding his scheduling in retaliation for his union activity, the Respondent caused, and intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Yundes Londono.

## II. CHALLENGED BALLOTS

The judge overruled the challenges to the ballots of Hanco, Nunez, Vasquez, and Yundes Arcila. The Respondent does not except to the judge's decision to overrule those challenges on the merits. Instead, the Respondent argues that pursuant to a non-Board settlement agreement between itself and the Union (hereinafter the representation settlement agreement), the Board should find that the ballot challenges are now moot and "should hereby order that all claims by the Union to organize, and any related claims, be withdrawn and dismissed with prejudice." The representation settlement agreement was not entered into evidence and is therefore not a part of the record in this proceeding. See *Ambrose Auto & Autotrans Katayenko*, 361 NLRB 931, 931 fn. 2 (2014). The Respondent has simply attached the representation settlement agreement to its exceptions as "Respondent Exhibit 1." The Board's standard practice is to decline to consider documents attached to exceptions or briefs if those documents are not a part of the record, as "the Board considers only record evidence and arguments pertaining to that record evidence." *Modern Drop Forge Co.*, 326 NLRB 1335, 1335 fn. 1 (1998); see also *ABM Parking Services*, 360 NLRB 1191, 1191 fn. 2 (2014) (specifying that the Board did not consider a nonrecord exhibit attached to the employer's cross-exceptions); *KIMA–TV*, 324 NLRB 1148, 1148 fn. 1 (1997) (adopting the judge's refusal to consider nonrecord exhibits attached to the employer's posthearing brief); *Harran Transportation Co.*, 319 NLRB 461, 461 fn. 1 (1995) (specifying that the Board did not consider documents attached to the employer's exceptions that were not in the record). Thus, we decline to consider the

[22] Specifically, the Respondent failed to assign Yundes Londono any work on 3 days during the September 22 to 28 pay period and on 2 days during the September 29 to October 5 pay period. Yundes Londono told Serrano that he could not work from September 27 to October 1. Thus, the Respondent failed to assign Yundes Londono any work on half of the days during those two pay periods, but he ultimately did not work at all during those pay periods.

representation settlement agreement in rendering our decision today.

As a result, we reject the Respondent's argument that the ballot challenges are moot because that argument is based solely on the representation settlement agreement. For the same reason, we deny the Respondent's apparent request for the Board to dismiss the Union's petition in Case 29–RC–279096. We also deny the Respondent's request to dismiss the petition for the additional reason that it is not an issue properly raised on exceptions. Pursuant to Section 102.46(a) of the Board's Rules and Regulations, a party may "file with the Board . . . exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections)." The Respondent did not raise the representation settlement agreement before the judge but instead raised it for the first time in its exceptions. Therefore, the Respondent's request to dismiss the petition based on the representation settlement agreement does not relate in any way to the judge's decision or rulings or any other part of the record or proceedings in this case.[23]

Because the Respondent does not contest the judge's decision to overrule the challenges to the ballots of Hanco, Nunez, Vasquez, and Yundes Arcila on any other grounds, we affirm that decision and shall direct the Regional Director to open and count those challenged ballots and take appropriate action consistent with the Board's unpublished Order granting the Union's request for review of the Acting Regional Director's Decision on Challenges and Objections and Direction of Second Election. See *MJ Melo Painting, Ltd.*, Case 29–RC–279096, 2022 WL 159186 (NLRB Jan. 7, 2022).

## AMENDED REMEDY

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

Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Percy Martinez, and Andres Suarez and by constructively discharging employees Antonio Hanco, Joel Nunez Jimenez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono, we shall order the Respondent to offer those employees full reinstatement to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.[24] We shall also order the Respondent to make those employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discharges or constructive discharges. 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). In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024),[25] the Respondent shall also compensate those employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges or constructive discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these 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. Additionally, we shall order the Respondent to remove from its files any reference to the unlawful discharges of Astoquillca, Cedeno, Chica, Martinez, and Suarez and the constructive discharges of

[23] We note that the Respondent is not foreclosed from properly raising the representation settlement agreement to the Regional Director following our remand of Case 29–RC–279096.

[24] The Respondent argues that Hanco, Martinez, Suarez, Yundes Arcila, and Yundes Londono—who were parties to a non-Board settlement agreement resolving a lawsuit against the Respondent for failure to pay legally required overtime premiums (the overtime settlement agreement), which the Respondent has attached to its exceptions as "Respondent Exhibit 2"—have waived their respective rights to reinstatement because the representation settlement agreement states in its recitals that the parties to the overtime settlement agreement "agreed to disclaim interest in seeking Union representation and are no longer seeking to organize and negotiate their terms and conditions of employment with MJ Melo." As discussed above, the representation settlement agreement is not a part of the record in this case, and we therefore will not consider it. Even if we were to consider the representation settlement agreement, Hanco, Martinez, Suarez, Yundes Arcila, and Yundes Londono were not parties to the representation settlement agreement. Moreover, even if they had been parties to the representation settlement agreement, the recital cited by the Respondent does not waive their respective rights to reinstatement in this case. To the contrary, it represents a prospective waiver of their Sec. 7 rights, which the Board would find to be unlawful and unenforceable. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175–176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

In rejecting the Respondent's arguments based on the representation settlement agreement, Member Mayer relies solely on the fact that it is not part of the record in this case and the fact that Hanco, Martinez, Suarez, Yundes Arcila, and Yundes Londono were not parties to it.

[25] As stated in *Performance Plumbing, LLC*, 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer 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*.

Hanco, Nunez, Yundes Arcila, and Yundes Londono, and notify the employees in writing that this has been done and that the discharges and constructive discharges will not be used against them in any way.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing the hours of work of Astoquillca, Cedeno, Chica, Hanco, Martinez, Nunez, Yundes Arcila, and Yundes Londono, we shall order the Respondent to make those employees whole for any loss of earnings or other benefits suffered as a result of the unlawful reductions to their hours of work. Backpay shall be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. per curiam 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with our decision in *Thryv*, supra, the Respondent shall also compensate those employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful reductions to their hours of work. Compensation for these 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.

Further, we shall order the Respondent to compensate all backpay recipients for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 29, 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 year(s). See *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition to the backpay allocation report, we shall order the Respondent to file with the Regional Director for Region 29 copies of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards. See *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).[26]

Finally, given that all nine of the employee witnesses spoke Spanish and testified through an interpreter at the hearing and that the Respondent's owner, Melo, testified that Supervisor Serrano—who, unlike Melo, is fluent in Spanish—primarily communicates with employees because most of the Respondent's employees are Spanish speakers, we shall order the Respondent to post notices in both English and Spanish at its Brooklyn, New York facility. See *HSA Cleaning Inc.*, 373 NLRB No. 46, slip op. at 1 fn. 4 (2024) (ordering an employer to post notices in both English and Spanish where two employee witnesses testified through an interpreter, and the record demonstrated that the employer frequently communicated with employees in Spanish); *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 371 NLRB No. 126, slip op. at 1 fn. 2 (2022) (ordering an employer to post notices in both English and Spanish where it "communicated with employees through a translator and some of the unlawfully discharged employees sp[oke] only Spanish"); *International Shipping Agency, Inc.*, 369 NLRB No. 79, slip op. at 8 (2020) (ordering an employer to post notices in both English and Spanish where many of the witnesses spoke Spanish and testified through an interpreter). We shall also order the Respondent to mail copies of the notice in both English and Spanish to all current employees and former employees employed by the Respondent at any time since June 7, 2021. "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act." *Bill's Electric, Inc.*, 350 NLRB 292, 297 (2007) (internal quotations omitted). The Respondent's unit employees report directly to third party worksites each day and receive work assignments from Serrano by text message or phone call. There is no indication in the record that they ever report to the Respondent's office. In these circumstances, we find that a notice-mailing remedy is necessary to ensure that the Respondent's employees will be adequately informed of the unfair labor practices committed by the Respondent and their rights under the Act. See, e.g., *Amerigal Construction Co.*, 372 NLRB No. 104, slip op. at 3 (2023) (ordering notice mailing where the employer's employees were "construction workers who work[ed] primarily at locations away from the [employer's] facility"); *Bevilacqua Asphalt Corp.*, 369 NLRB No. 96, slip op. at 2 (2020) (ordering notice mailing where the employer's truckdrivers did not regularly visit the employer's offices); *Abramson, LLC*, 345 NLRB 171, 171 fn. 3 (2005) (ordering notice mailing where employees worked on individual construction jobsites across two states).[27]

[26] The Respondent argues that we must limit the backpay awards for Hanco, Martinez, Suarez, Yundes Arcila, and Yundes Londono pursuant to the overtime settlement agreement. However, like the representation settlement agreement, the overtime settlement agreement was not entered into evidence and is thus not a part of the record in this case. Therefore, we will not consider the overtime settlement agreement. In any event, even if the overtime settlement agreement were properly before us, what effect, if any, that settlement should have on the backpay owed to those employees should be determined in compliance. See *Clark Distribution Systems*, 336 NLRB 747, 751 fn. 11 (2001).

[27] Although no party has requested a bilingual notice posting or a notice mailing on exceptions, we note that "the Board has 'broad discretionary' authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act" and that "remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions." *Indian Hills Care Center*, 321

ORDER

The National Labor Relations Board orders that the Respondent, M.J. Melo Painting Ltd., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees by asking them whether they signed union authorization cards, support Local Union 1430, International Brotherhood of Electrical Workers (the Union), or plan to vote in favor of the Union.

(b) Threatening employees with reduced work hours if they support the Union.

(c) Threatening employees, implicitly or explicitly, with discharge if they support the Union.

(d) Creating the impression of surveillance by telling employees that it knows which employees are supporting the Union and signed union authorization cards.

(e) Making statements of futility by telling employees nothing good will come from bringing in the Union.

(f) Promising employees increased benefits and improved terms and conditions of employment if they refrain from union organizational activity by telling them that they will receive more work assignments if they vote against the Union.

(g) Retaliating against employees by reducing their hours of work because they support the Union.

(h) Discharging employees in retaliation for supporting the Union.

(i) Constructively discharging employees in retaliation for supporting the Union.

(j) 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 Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Andres Suarez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono 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 Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Andres Suarez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono 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 discharges or constructive discharges, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Make Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono whole for any loss of earnings and other benefits and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful reductions to their hours of work, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, 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 year(s) for each employee.

(e) File with the Regional Director for Region 29, 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 each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Percy Martinez, and Andres Suarez and the unlawful constructive discharges of Antonio Hanco, Joel Nunez Jimenez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and constructive discharges will not be used against them in any way.

(h) 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.

(i) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix" in both English and Spanish.[28]

NLRB 144, 144 fn. 3 (1996) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1970)).

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

Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix" in both English and Spanish to all current employees and former employees employed by the Respondent at any time since June 7, 2021, at their last known home addresses.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 29 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 Case 29–RC–279096 is severed from Cases 29–CA–278541, 29–CA–280834, and 29–CA–286220 and remanded to the Regional Director for Region 29 for action consistent with the Direction below.

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 29 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the challenged ballots of Antonio Hanco, Joel Nunez Jimenez, Mario Vasquez, and Jorge Arnwivis Yundes Arcila and issue a revised tally of ballots. If the revised tally of ballots shows that the two improperly commingled ballots and the one misplaced ballot are not determinative, the Regional Director shall issue the appropriate certification. Alternatively, if the revised tally of ballots shows that the two improperly commingled ballots and the one misplaced ballot are determinative, the Regional Director shall set aside the election and conduct a second election at such time as she deems appropriate.

Dated, Washington, D.C. June 10, 2026

_____

James R. Murphy, Chairman

_____

David M. Prouty, Member

_____

Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

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

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

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you by asking you whether you signed a union authorization card, support Local Union 1430, International Brotherhood of Electrical Workers (the Union), or plan to vote in favor of the Union.

WE WILL NOT threaten you with reduced work hours if you support the Union.

WE WILL NOT threaten you, implicitly or explicitly, with discharge if you support the Union.

WE WILL NOT create the impression of surveillance by telling you that we know which employees are supporting the Union and signed union authorization cards.

WE WILL NOT promise you increased benefits and improved terms and conditions of employment if you refrain from union organizational activity by telling you that you will receive more work assignments if you vote against the Union.

WE WILL NOT retaliate against you by reducing your hours of work because you support the Union.

WE WILL NOT discharge you in retaliation for supporting the Union.

WE WILL NOT constructively discharge you in retaliation for supporting 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 Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Andres Suarez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono 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 Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Andres Suarez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges or constructive discharges, 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 discharges or constructive discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Antonio Hanco, Percy Martinez, Joel Nunez Jimenez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono whole for any loss of earnings and other benefits suffered as a result of the unlawful reductions to their hours of work, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful reductions to their hours of work, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, 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 year(s) for each employee.

WE WILL file with the Regional Director for Region 29, 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 each backpay recipient's corresponding W-2 form(s) 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 discharges of Leonardo Astoquillca, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Percy Martinez, and Andres Suarez and the unlawful constructive discharges of Antonio Hanco, Joel Nunez Jimenez, Jorge Arnwivis Yundes Arcila, and Jorge Yundes Londono, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and constructive discharges will not be used against them in any way.

M.J. MELO PAINTING LTD.

The Board's decision can be found at https://www.nlrb.gov/case/29-CA-278541 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

*Lynda Tooker, Esq.* and *Rachel Zweighaft, Esq.,* for the General Counsel.
*Christopher R. Travis, Esq.,* counsel for the Respondent.
*Jordan El-Hag, Esq.,* counsel for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The initial charge in this matter was filed on June 14, 2021, followed by additional charges and amended charges filed between August 4, 2021, and November 15, 2021. The initial consolidated complaint was issued on October 21, 2021.

A Representation Petition was filed on June 28, 2021, and a Stipulated Election Agreement was entered into by the parties on August 4, 2021, for a mail ballot election to determine whether Respondent's employees wished to be represented by Local Union 1439, International Brotherhood of Electrical Workers (herein the Union). Mail ballots were due September 1, 2021. On September 8, 2021, ballots were counted resulting in challenged ballots being determinative of the outcome. On September 15, 2021, Respondent filed postelection objections.

On October 8, 2021, the Acting Regional Director issued a decision on challenges and objections, ordering a second election. On October 27, 2021, the Union filed a Request for Review with the Board. A second consolidated complaint was issued on December 27, 2021.[1] By Order dated January 7, 2022, the Board remanded the Petition to the Acting Regional Director for a determination on the challenged ballots pending from the initial

[1] The General Counsel further amended the complaint at the start of the hearing to allege additional violations of Sec. 8(a)(3) and (1).

election.

Thereafter, a Decision on Remand, Order consolidating cases and notice of hearing issued on January 20, 2022, joining the issue of challenged ballots with the pending unfair labor practice allegations for hearing before an administrative law judge.

In substance the complaint alleged that Respondent: (1) threatened, coerced and intimidated employees in violation of Section 8(a)(1) of the Act; (2) reduced employees' hours of work in retaliation for their union activity in violation of Section 8(a)(3) and (1) of the Act; and (3) discharged and/or constructively discharged employees in retaliation for their Union activity in violation of Section 8(a)(3) and (1) of the Act. In addition, with regard to the R-Case herein, a determination must be made as to the eligibility of three individuals who voted in the election and the status of a fourth individual's ballot.

Beginning March 1, 2022, and ending March 10, 2022, pursuant to the Board's decision in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), I conducted a trial via Zoom Government, during which all parties were afforded the opportunity y to present their evidence.[2] On June 16, 2022, the General Counsel and Respondent each filed timely briefs.[3]

Upon consideration of the stipulated/ record and the Briefs filed, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Based on Respondent's amended answer admitting jurisdictional facts alleged in the Second consolidated complaint, including that it is a domestic corporation with an office and place of business in Brooklyn, New York, which provides services valued in excess of $50,000 annually directly to customers located outside the state of New York, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), & (7) of the Act. I further find that the Union has been a labor organization within the meaning of Section 2(5) of the Act. In addition, Respondent admits and I find that Respondent's Owner Nicholas Melo and Respondent's Field Supervisor Jose Serrano are both supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is engaged in the business of providing painting services to residential and commercial customers. It was founded and is majority owned by Nicholas Melo, who previously worked as a union painter for a different union for many years. In May 2021, Respondent employed approximately 20-25 employees, including painters and other skilled laborers.

On or about May 25, 2021, Painter Andres Suarez contacted Angelica Webber, a business agent for the Union about the possibility of Respondent's employees joining the Union. With that information, Suarez began speaking with his coworkers about the benefits of joining the Union, taking on the lead role in an organizing drive to bring the Union in. The employees communicated about the Union via a WhatsApp group among themselves and Webber, which also enabled them to meet by video. They met regarding the Union at least three times in late May and early June 2021, and a sufficient number of employees signed union authorization cards for the Union to file a petition with the Region on June 28, 2021.

Prior to the filing of the petition, and within just 2 weeks of the first communication with the Union, by June 7, 2021, Suarez ceased receiving work assignments, never to work for Respondent again. No one from Respondent ever explained to Suarez why he no longer received work assignments, but other employees were told by Jose Serrano that the reason Suarez was no longer there was because of his activity on behalf of the Union. This was just one of many anti-Union statements that the employees attributed to Serrano.

#### *A. Serrano's Alleged 8(a)(1) Statements*

Multiple employee witnesses testified consistently about statements Serrano made to one or more of them on repeated occasions during the period of May through July 2021. A common theme emerged of Serrano approaching employees one or two at a time to speak with them about the Union. Serrano began making comments about the Union prior to the Union's June 28, 2021 petition being filed, and continued those comments thereafter. Respondent did not offer testimony to refute the specific statements attributed to him, but Serrano did offer a general denial, testifying that while he was aware of the union campaign and heard employees talking about it, he had been told by Melo not to engage with employees on the subject.

Employee Jose Nunez Jimenez testified that Serrano talked to him about the Union at a worksite at the Empire State Building in June 2021. Serrano told Jimenez that Respondent had a list of employees who were trying to join the Union. He also told Jimenez that he had fired four employees, including Suarez, and that the employees on the list would no longer be working for the company either. Serrano asked Jimenez if he would be on the list and told Jimenez that the Union could not resolve anything. He said maybe they could get $1000 or $2000, but without the Union, the employees could get much more, and that if Jimenez helped defeat the Union, Serrano could guarantee him work at the company.

Employee Jhonny Cedeno testified that he had a conversation with Serrano at a worksite at Hudson and 34th St. in early June 2021 in which Serrano told Cedeno Respondent had a list of employees supporting the Union that it was going to try to get rid of and encourage to go work somewhere else, namely the alleged discriminatees in this case. Serrano also told Cedeno the Union was not good for employees, but rather, if the Union won it would only help the lawyers.

Cedeno had another conversation with Serrano at that same worksite in mid-June 2021 in which Serrano told him the Union would not be good for the workers and that the Union's attorney and business agent, along with Suarez, were trying to brainwash the employees. In that same conversation, Serrano told Cedeno Suarez was fired, and Respondent was going to make sure Suarez

[2] Anderson Vereyken, a Board attorney, served as Courtroom Deputy to assist with the Zoom technology during the trial, and is recused from otherwise participating in the case.

[3] The Charging Party, though represented by counsel during the hearing, did not submit a posthearing brief.

could not get other work elsewhere. He told Cedeno that if he voted against the Union, Serrano would make sure he had work, but that if he voted for the Union, he could not guarantee that Cedeno would get work. Finally, Serrano asked Cedeno to report anything he heard about the Union to him.

Cedeno also had a conversation with Serrano by telephone at the end of July 2021 in which Serrano asked Cedeno to tell him any communications he had with or information he had about Union representative Webber. He also asked Cedeno how he planned to vote in the upcoming Union election. And Serrano followed up on his earlier statements, telling Cedeno that if the Union won the election, he could not guarantee that Cedeno would still have work.

Employee Diego Alejandro Chica Aguirre testified that he was with Serrano at a worksite in Brooklyn when Serrano asked him if he had signed anything to get into the Union. Serrano also told Aguirre that if he had signed anything to get into the Union, he would no longer have work, and that Respondent would also fire other employees if they supported the Union. Serrano further told Aguirre that Respondent knew it was Suarez who started organizing for the Union, and that Suarez was not going to be working anymore. Finally, after Aguirre reported to Serrano that his tools had been stolen in June 2021, Serrano told him in July 2021 that he would help him find his tools if Aguirre voted against the Union.

Employee Leonardo Astoquillca testified that he was at a worksite in Manattan in June or July 2011 when Serrano called him over to speak with him. He told Astoquillca to think about his family, because if the Union came in the company would close and he would have no work. Astoquillca also testified that he called Serrano sometime later in July to ask for his paycheck, and in that call, Serrano told Astoquillca that if he backed up the Union he would be out of work and be fired.

Employee Jorge Yundes Londono Jr. and his father, employee Jorge Yundes Arcila Sr. both testified that they were with Serrano at a worksite in Connecticut when Serrano told them that Respondent knew what was going on with the Union, including Suarez' involvement and the fact that 4 to 6 employees had signed union authorization cards. Again, Serrano told the employees that Suarez was fired for trying to bring the Union in to the company, though he also let them know his belief that the Union would never get into the company because Respondent had very good lawyers, and that any employees who did sign cards would have their hours reduced.

Soon thereafter, Serrano spoke with Arcila Sr. again in Connecticut, this time without Londono Jr. present. Serrano reiterated that the Union would not get in because Respondent had good lawyers and told Arcila Sr. that Suarez would never work for Respondent again. Serrano then said that because of the Union, Respondent was reviewing the hours worked by employees and would be getting rid of the overtime employees had been accustomed to working. And Serrano stated that if the Union wins the election, there will be problems, including that "they will close the company." (Tr. 705). By contrast, Serrano told him that if the employees voted against the Union, there would be plenty of work.

Serrano spoke with Arcila Sr. alone one more time, this time in Manhattan, when Serrano told him he knew about the employees' WhatsApp group, and that he knew which employees had signed Union authorization cards. He reiterated that he would continue to reduce those employees' work hours. Although he did not reveal to Arcila Sr. how he knew which employees signed cards, Arcila Sr. testified that Serrano had asked him on multiple occasions whether he supported the Union.

Employee Percy Martinez testified that Serrano spoke to him and Astoquillca at a Lexington Ave. worksite after the petition was filed, told them the Union was bad for them, and asked how they were planning to vote. On a later date, at the Worth St. worksite, Martinez described Serrano as arguing and telling him that if he continued supporting the Union, he was going to "go to shit" and he was going to "go to hell." Serrano also told Martinez that if the employees continue backing the Union, the company would change its name and "everybody's going to go to hell."

### *B. Respondent's Changes to Work Assignments and Employee Separations*

There is no dispute that employee work hours were reduced in the summer of 2021, or that the alleged discriminatees ceased working for respondent thereafter. The General Counsel maintains these reductions were in retaliation for the employees' Union activity. Respondent maintains that these reductions were justified by business needs, specifically due to a reduction in available work.

I find certain facts applicable to all the alleged discriminatees based on statements which Serrano made to multiple employees. Specifically, Serrano made it clear that Respondent was aware of the organizing drive, including prior to the filing of the Union petition. Serrano also made it clear that Respondent knew Suarez had been a leading promoter of the Union, and Serrano told multiple employees that Respondent kept a list of other employees who were supporting the Union. Serrano also made explicit statements of union animus, up to and including that Respondent would change its name and stop giving work to employees if they voted yes for the Union.

#### 1. Andres Suarez

Suarez began working for Respondent in July 2019 and continued until his termination in June 2021. In the months leading up to his termination, he worked full-time plus 10–12 hours of overtime almost every week, paid by Respondent for his regular hours and paid by a separate entity for the overtime hours. He wore the same uniform and performed the same work during his regular and overtime hours and received his assignments from Serrano.

Suarez testified that in 2020, during the height of the pandemic, Respondent had used a rotation system for work assignments among new employees, but that did not apply to the more senior workers. He worked consistently before his union activity up until June 7, 2021, when he suddenly ceased getting work assignments, never to be assigned work again.

Although Suarez texted Serrano to ask what was going on and also called him, neither attempt was responded to. Other employees were reporting to him what Serrano was telling them about the Union and his status as an employee, and so he assumed his employment with Respondent had ended.

### 2. Antonio Hanco

Hanco began working for Respondent in October 2019, and prior to June 2021, consistently worked at least a 40-hour week, plus 8 hours of overtime for the majority of weeks. Like Suarez, he had been an early union supporter, and was named by Serrano as one of the employees Respondent knew to be involved in the organizing campaign.

In early June 2021, Respondent sent Hanco and some other employees home from a worksite, telling them Serrano would be in touch about returning to work. However, days passed and Hanco did not hear from Serrano. When Hanco reached out to Serrano to find out whether there was work, Serrano told him that there was work, but that it had to be rotated around among the employees. Hanco was not offered work until June 15, 2021, but was given no assignments from June 9 to 14.

Thereafter, Hanco's hours were significantly reduced for the remainder of June, receiving only three or 4 days of work per week, rather than the 5 days plus overtime that he consistently received previously. As a result, Hanco stopped working for Respondent in the month of July and most of August, working elsewhere before returning to work for Respondent at the end of August at Serrano's request.

Serrano had reached out to Hanco during his absence from work, telling him that Respondent had a lot of work, and asking him to return. Hanco asked Serrano whether he could count on receiving full-time work plus overtime if he returned, and Serrano told Hanco that he could count on that.

Based on that assurance, Hanco started working for Respondent again toward the end of August 2021, and initially received overtime for the first few weeks. However, by mid-September, almost immediately after the ballot count from the Union election, Hanco's hours were reduced again to just 40 hours per week, with no overtime. When this happened, Hanco decided he could no longer continue working without the promised overtime, and stopped working for Respondent as of September 30, 2021.

### 3. Jose Nunez Jimenez

Jimenez was employed by Respondent beginning in January 2021, and was also accustomed to working full-time 40 hours plus about 10 hours of overtime per week. This continued through May of 2021. In June 2021, however, almost immediately after Suarez was fired and Hanco stopped getting work, Jimenez had his hours reduced as well. He no longer was receiving full-time work for the remainder of June.

When Jimenez confronted Serrano about the reduction in his hours, Serrano told him there was not enough work. Jimenez continued reaching out to Serrano seeking work throughout the first 2 weeks of July 2021, initially to no avail. By the time Serrano finally did offer a work assignment to Jimenez on July 12, 2021, Jimenez had found other work and declined the offer. Jimenez advised that he would contact Serrano when that job was over so he could return to work for Respondent.

Although Jimenez intended to return to work for Respondent when his other job was completed, Jimenez never did return to work. Instead, while working at his other job, he heard about what was going on with his former coworkers, and decided that it would be futile to return to work for Respondent.

### 4. Jhonny Cedeno

Cedeno worked as a painter for Respondent beginning December 2020, and typically worked 40 hours a week plus overtime, as much as 16–20 hours per week. At first, he was paid in cash, but later began to be paid by checks, one for his regular hours and a separate one for his overtime hours. His hours suddenly started getting reduced after the 1st week in July 2021 when he only received 30 hours, then 16 hours, then 8 hours.

Cedeno spoke with Serrano about the reduction in hours, and Serrano told him the reduction was because of the Union, and that Respondent was holding back work. Serrano let Cedeno know at that time that when the union campaign was over, he would go back to working his regular hours.

On July 28, 2021, Cedeno texted Serrano to let him know that he was not able to work that day because his arm was hurting. He told Serrano that he would call him when he was feeling better. On July 30, 2021, Cedeno called Serrano and they spoke for over 30 minutes. Cedeno was given 1 day of work following this call, but was never offered any additional shifts after that 1 day in August 2021.

### 5. Diego Alejandro Chica Aguirre

Aguirre began working for Respondent in February 2021, though he too sometimes received checks from other entities while working for Respondent. When he started working, he typically worked full-time plus 10-20 overtime hours per week before his hours were reduced in June after the Union campaign began.

The last day Aguirre worked for Respondent was July 28, 2021. Aguirre did not receive an offer for another potential job assignment until Serrano texted Aguirre on August 30, 2021. Even then, when Aguirre tried at least three times to call Serrano to find out the details of the potential assignment, Serrano did not answer the calls, respond to messages or text a followup. Instead, Aguirre ceased receiving assignments altogether.

### 6. Leonardo Astoquillca

Astoquillca was a relatively new employee, who began working in May 2021. He worked full-time 40 hours for 3 weeks, but then had his hours reduced to 3 days per week, coinciding with the Union organizing drive and Serrano's repeated statements to him about losing work if he supported the Union.

In July 2021, Astoquillca heard Serrano say that "the Peruvian is supporting the Union" referring to Astoquillca, and the last time he received work assignments from Respondent was in July. He received no more assignments after the end of July. While acknowledging that by that point, he would have been unlikely to accept more work because he had been so turned off by Serrano, he never told Serrano that, and the lack of additional assignments came from Respondent, not Astoquillca.

### 7. Jorge Yundes Londono Jr.

Londono Jr. began working for Respondent in September 2020. From the start of his employment through about May 2021, he typically worked full-time plus 10 overtime hours. However, from the end of May 2021 through July 2021, Londono Jr. had his hours reduced to only three or four 8 hour days per week. When he asked Serrano why his hours were reduced, Serrano told him that Respondent had to rotate people so

everyone would have work because Respondent was not opening work due to what was happening with the Union.

In the months that followed, Serrano repeatedly told Londono Jr. at the start of the week that there was no work, but then would text Londono on Wednesday or Thursday asking if he was able to work. However, Londono Jr. typically had made other arrangements for the week based on what Serrano told him at the start of the week. This happened multiple times until Londono Jr. decided he could no longer tolerate it. On October 16, 2021, he texted Serrano to tell him he would work if Serrano said there was work, and not work if Serrano said there was no work, but that he could no longer work under the circumstances that Serrano created by repeatedly giving the mixed messages he had been giving to Londono Jr.

8. Jorge Yundes Arcila Sr.

Arcila Sr., who is the father of Jorge Yundes Londono Jr., began working for Respondent in May of 2019. Prior to the Union organizing drive, he was accustomed to working 60, 70 or even 80 hours in a week, and never remembered working fewer than 40 hours in a week. He was typically paid with 2 checks, one for 40 hours, which included deductions for taxes, and one for the overtime, which did not.

Despite his relative seniority, his hours were also reduced when the Union campaign began, with Serrano explaining to him that he had to try out the new people, so the older workers had to stay home. Serrano had also told Arcila Sr. that there would be plenty of work if the Union loses the election. But, although Arcila Sr. did get consistent work assignments, he continued to receive significantly reduced overtime hours from what he had been accustomed to. In the Fall of 2021 he requested a 20-day vacation, and thereafter, Serrano never reached out to offer work, and Arcila Sr. never reached out to request work.

9. Percy Martinez

Martinez began working for Respondent in February 2021. When he started, he typically worked full-time plus 15 hours of overtime. However, about a month after he got involved with the Union, his hours were reduced, sometimes to 2 days in a week, then 4 days, then 2 days, then 3 days. This continued through September into October 2021 when during the first 2 weeks of the month he only worked 2 days a week, 16 hours.

On October 18, 2021, Martinez called out sick for the day, a Monday, using Respondent's system for calling out. He was paid for the day. However, thereafter, he never was called for any future assignments. Respondent claims that it fired Martinez for filing to come to work on October 18, but there is no evidence it ever communicated that decision to Martinez, and Martinez did not communicate with Serrano asking for additional assignments because that had not been the prior practice.

10. Respondent's Position

With regard to the reductions in hours for its employees beginning in June 2021, Respondent maintains the position that the reason for the reduction was due to a reduction in available work. At the same time, it is undisputed that Respondent hired multiple new employees at precisely the same time it was reducing the hours of its existing employees. While Respondent offers various justifications for terminating certain of the individuals, I find all of Respondent's purported reasons to be pretext.

*C. Credibility Assessment*

Many of the above factual findings are based on uncontradicted testimony, authenticated documentary evidence and testimony against interest by Melo and Serrano, which amounted to admissions. To the extent that Melo and Serrano gave arguably exculpatory testimony for their actions, I reject their testimony. I found both to be unreliable witnesses.

Melo's testimony was often evasive and/or defensive. He was unable to recall important details in his testimony, including on significant matters. When he did testify to specifics, his testimony was frequently unreliable, and even directly contradicted by Respondent's own documentary evidence. For example, Melo testified that employee Jimenez did not work for Respondent, but rather, worked for a different entity, only to have that testimony upended by Respondent's own time records showing Jimenez to be an employee.

I found Serrano to be similarly not credible. He appeared hesitant and defensive while testifying. In addition, his testimony that employee hours were reduced because of business needs was not only contradicted by the contradictory statements he made to multiple employees, but was specifically belied by Respondent's having hired new employees at precisely the time Serrano claimed there was not enough work.

By contrast, I found each of the discriminatees, all of whom testified at trial, to be very credible witnesses. In particular, when describing Serrano's statements about the Union, every witness remembered clearly what was said, and where they were and who was present when they heard it. Notably, Serrano said different things to different employees, but when more than one employee was present for statements by Serrano, the employees consistently corroborated each other's testimony. I also found their testimony regarding the method of receiving assignments, and how they were paid to be very straightforward and consistent.

Finally, for the employees alleged to have been constructively discharged – Hanco, Jimenez, Londono Jr. and Arcila Sr. - I found their testimony about the need to support their families on the income they were previously accustomed to earning to be both truthful and sufficient justification for leaving employment with Respondent.

III. CHALLENGED BALLOTS

On June 28, 2021, the Union filed a petition for an election, and on July 21, 2021, the parties signed a Stipulated Election Agreement to conduct an election by mail ballot beginning on August 4, 2021, with ballots due in the Board's Brooklyn Regional Office by September 1, 2021. The count of ballots took place on September 8, 2021. The Tally of Ballots resulted in 7 ballots cast for the Union, 5 cast against the Union, and 4 challenged ballots, a number sufficient to affect the results of the election. Those challenged ballots remain unresolved, and are before me. Objections to the election, also still pending, are not before me.

The challenged ballots involve four employees whose ballots timely arrived by mail: one for "Jorge Yundes" and then one each for Antonio Hanco, Jose Nunez Jimenez and Mario

Vasquez.

*The ballot of "Jorge Yundes"*

The mail ballot election procedure used in this case uses "Eligibility Key Numbers" to identify the specific ballots mailed to voters and ensure that no voter can vote more than once in the election. The voter eligibility list herein contained the names "Yundes Jr., Jorge A," which was assigned Eligibility Key Number 13, and "Yundes, Jorge," which was assigned Eligibility Key Number 14. While both of those ballots were returned to the Region, neither was counted.[4]

Jorge Yundes Arcila Sr. testified that he voted by mail using the ballot that he received in the mail at his home in New Rochelle, New York. He voted only once and confirmed that it is his signature on the Identification Stub for the ballot with Eligibility Key Number 14, the challenged ballot at issue. (U. Exh. 2.)

His son, Jorge Yundes Londono Jr., also testified that he voted by mail using the ballot that he received at 31 Birch St., New Rochelle, New York, where he was living with his father and other family. He also voted only once, and confirmed that it is his signature on the Identification Stub for the ballot with Eligibility Key Number 13, the uncounted ballot that is not at issue here. (U. Exh. 1.)

There is no evidence to refute Arcila Sr.'s testimony that the challenged ballot for "Jorge Yundes" is the valid ballot bearing his signature that he, an eligible voter in this election, timely cast and returned to the Region. Accordingly, I overrule the challenge and direct that the ballot of "Jorge Yundes," which we now know to be the ballot of Jorge Yundes Arcila Sr., be opened and counted.

*The ballot of Mario Vasquez*

Employee Vasquez' ballot was challenged because his name did not appear on the voter eligibility list, and there was some dispute as to whether he was employed within the election's required payroll period ending July 20, 2021. The payroll records presented at trial indicate that Vasquez was indeed employed during the applicable payroll period, and that he was eligible to vote in the election. Accordingly, I overrule the challenge and direct that the ballot of Mario Vasquez be opened and counted.

*The ballots of Antonio Hanco and Jose Nunez Jimenez*

The eligibility of these two ballots rests on the outcome of the unfair labor practice charges herein, and in particular, the employment status of these 2 alleged discriminatees at the time of the election. If the employees were not working because they were unlawfully constructively discharged, as maintained by the General Counsel, then they were eligible voters, and their ballots should be counted. If they were not employed, but were not unlawfully separated, then they would not have been eligible, and there votes would not be counted.

For the reasons discussed below, I find that both employees were unlawfully constructively discharged, and therefore were eligible to vote in the election. Accordingly, I overrule both challenges and direct that the ballots of Antonio Hanco and Jose Nunez Jimenez be opened and counted.

Analysis

This case involves an organizing drive that culminated in a Board election that is still pending an outcome. The facts of this case demonstrate a clear case of Respondent learning of the organizing drive and immediately responding with a series of unlawful statements made by its supervisor Jose Serrano to employees, followed by a targeted effort to retaliate against employees believed to be supporting the Union by reducing their work hours, and suspending, discharging and constructively discharging them, in a classic attempt to nip the Union's efforts in the bud.

*A. Respondent Violated Section 8(a)(1) of the Act by Unlawfully Threatening, Interrogating, Creating the Impression of Surveillance, Making Statements of Futility to Employees, and Making Promises of Benefits to Employees.*

Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaininig or other mutual aid or protection, or to refrain from those activities.

In deciding whether an employer's statement or conduct violates Section 8(a)(1), the Board applies the objective standard of whether it would reasonably tend to interfere with the free exercise of an employee's statutory rights, and does not consider the motivation or actual effect. *Midwest Terminals of Toledo*, 365 NLRB 1645, 1665 (2017), enfd. 783 Fed. Appx. 1 (D.C. Cir. 2019).

Here, the evidence is overwhelming that Jose Serrano, an admitted statutory supervisor for Respondent, made a barrage of statements to employees on multiple occasions, in numerous locations over the course of weeks immediately upon learning of the employees' nascent union organizing drive. These statements constituted hallmark 8(a)(1) violations, including interrogating employees, threatening employees, creating the impression of surveillance, making statements of futility, and promising benefits to employees.

*Interrogation*

Serrano interrogated employee Jimenez when asking if he belonged on Respondent's list of employees supporting the Union. When Serrano asked employee Cedeno to tell him any communications he had with Union Representative Webber, and asked Cedeno how he planned to vote in the election, that was also interrogation. Serrano interrogated employee Aguirre by asking him if he had signed anything to get into the Union. And he interrogated employees Martinez and Astoquillca how they were planning to vote in the election. He also asked Arcila Sr. on multiple occasions whether he was supporting the Union.

*Threats*

Serrano also made unlawful threats, including when he told

[4] The ballot assigned Eligibility Key # 13 was not presented at the count as it had been misplaced due to an election irregularity that is the subject of a pending Objection. Neither that Objection, nor the eligibility of that ballot to be counted are before me.

Jimenez and others that Suarez was fired for being with the Union and that the other employees Respondent knew were with the Union would not be working either. He also threatened employee Cedeno that employees on Respondent's list of employees supporting the Union would be gotten rid of, and threatened Cedeno that if the Union won the election, Serrano could not guarantee him work.

The threats continued with Serrano telling employee Aguirre that if Aguirre signed anything in support of the Union he would no longer have work, and that Respondent would fire other employees if they supported the Union. Serrano threatened employee Astoquillca that if the Union came in the company would close and there would be no work, a threat he also made to Arcila Sr. by telling him they would close the company if the Union wins the election. Serrano later told Astoquillca that if he supported the Union he would be out of work and be fired. He also told Londono Jr. and Arcila Sr. that employees who signed cards would have their hours reduced.

*Creating the Impression of Surveillance*

Serrano created the impression of surveillance when he told Jimenez and Cedeno that Respondent had a list of employees who were trying to join the Union. Serrano also created the impression of surveillance when he asked Cedeno to report anything he heard about the Union to him, and when he told Aguirre that he knew Suarez had started the organizing drive.

Serrano continued creating the impression of surveillance when he told Londono Jr. and Arcila Sr. that Respondent knew what was going on with the Union, including about Suarez' involvement and the fact that other employees had signed cards. He further created the impression of surveillance when he told Arcila Sr. that he knew about the employees Whatsapp group, and that he actually knew which employees had signed cards.

*Statements of Futility*

In addition, Serrano made statements of futility to employee Jimenez when he told him the Union could not resolve anything, and when he told Cedeno that if the Union won it would only benefit the lawyers. Serrano also made a statement of futility to Londono Jr. and Arcila Sr. by telling them the Union would never get into the company because Respondent's lawyers were too good. The threats to change the name of the company and close the company were also statements of futility.

*Promises of Benefits*

Finally, Serrano made promises of benefits to Jimenez when he told him that without the Union, employees would be able to get much more than they could with the Union. He promised benefits to Cedeno by telling him he could guarantee him work if Cedeno voted against the Union. He promised benefits to Aguirre when he told him he would help him find his tools if Aguirre voted against the Union. And he promised benefits to Arcila Sr. by telling him that if the Union lost the election, there would be plenty of work.

By engaging in this unlawful campaign to threaten, intimidate and coerce employees in the exercise of their Section 7 rights in an attempt to nip their organizing drive in the bud, I find that Respondent has violated Section 8(a)(1) of the Act by interrogating employees, threatening employees, creating the impression of surveillance, making statements of futility, and promising benefits to employees as alleged by the General Counsel.

*B. Respondent Violated Section 8(a)(3) and (1) of the Act by Discharging Employees, Constructively Discharging Employees, Suspending Employees and Reducing Employees' Hours of Work in Retaliation for their Union Activity.*

In light of the extraordinary series of 8(a)(1) violations I have found took place in this matter, the contemporaneous reductions in employee hours and subsequent separations that took place are conspicuously similar to the multiple threats by Serrano to do exactly what Respondent is alleged to have done in violation of 8(a)(3). The parties are in agreement that a *Wright Line* analysis governs the determination of whether the conduct alleged violates Section 8(a)(3) of the Act.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. While subsequent cases have restated and/or refined the test, the thrust of the analysis in determining the lawfulness of adverse actions remains the same.

First, the General Counsel must make an initial *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083 (1980), 10 enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB 997, 997 (2015).

Establishing unlawful motivation requires proof that: "(1) the employee[s] engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes that showing, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.,* 346 NLRB 494, 496 (2006). An employer "cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.,* 311 NLRB 1118, 1119 (1993).

Here, the General Counsel has clearly met its burden. Each one of the 9 individual discriminatees engaged in protected activity, as evidenced by their own testimony and the corroborating testimony of other employees. In addition, Respondent had knowledge of the employees' activity, as admitted by Serrano in his multiple unlawful statements to that effect. And, Respondent's animus toward the employees' protected activity was likewise made plain by Serrano's multiple unlawful threats made to employees for supporting the Union.

The nexus between the employees' protected activity and the adverse actions could hardly be clearer. Its campaign of interrogation, threats and related 8(a)(1) violations began immediately upon the commencement of the employees' union campaign, and almost as quickly, Respondent began doing exactly what they threatened and promised. As such, I find that the General

Counsel proved the three elements of unlawful motivation.

Having met its initial *Wright Line* burden, the analysis turns to Respondent's claimed justification for its actions, and whether its conduct was honestly motivated by legitimate, non-discriminatory reasons, and that it would have taken the same action regardless of the employees' protected activity. I find that Respondent has failed to meet its burden.

The assertion by the Respondent that its reduction of hours was due to the lack of available work is belied by the fact that Respondent hired new employees, assigning them significant hours, at the same time it was telling existing employees who supported the Union that there was not enough work available. Moreover, the claim that there was not enough work available was further undermined by Serrano's own words, telling multiple employees that there would be work if it were not for their union activity, and that work would return if they stopped supporting the Union.

I therefore reject Respondent's claim that employee hours were reduced because of reduced work availability. Rather, I conclude that Respondent unlawfully reduced the hours of work of employees Antonio Hanco, Jose Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono Jr., Jorge Yundes Arcila Sr., and Percy Martinez in retaliation for their union activity in violation of Section 8(a)(3) and (1) of the Act.

Based on the unlawful reduction in hours, and subsequent cessation of assigning work altogether, I also find that Respondent unlawfully discharged employees Andres Suarez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, and Percy Martinez in retaliation for their union activity in violation of Section 8(a)(3) and (1) of the Act.

Similarly, based on Respondent's unlawful reduction in hours, creating an untenable financial situation for employees who were forced to choose between hoping they might get their regular hours or seeking other employment, I further find that Respondent unlawfully constructively discharged employees Antonio Hanco, Jose Nunez Jimenez, Jorge Yundes Londono Jr., and Jorge Yundes Arcila Sr. in retaliation for their union activity in violation of Section 8(a)(3) and (1) of the Act.

## CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

a. Interrogating employees about their union activity;

b.

c. Threatening employees with reprisals, including reduced hours of work and discharge, if they supported the Union;

d. Creating the impression of surveillance among its employees;

e. Making statements of futility about the employees choosing a union; and

f. Promising benefits to employees for not choosing the Union.

4. Respondent violated Section 8(a)(3) and (1) of the Act by:

a. Reducing the hours of work of employees Antonio Hanco, Jose Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono Jr., Jorge Yundes Arcila Sr. and Percy Martinez in retaliation for their union activity.

b. Discharging employees Andres Suarez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, and Percy Martinez in retaliation for their union activity.

c. Constructively discharging employees Antonio Hanco, Jose Nunez Jimenez, Jorge Yundes Londono Jr., and Jorge Yundes Arcila Sr. in retaliation for their union activity.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The challenges to the ballots of Jorge Yundes, Antonio Hanco, Jose Nunez Jimenez and Mario Vasquez should be overruled and the ballots opened and counted.

## REMEDY

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

Respondent, having discriminatorily discharged employees Andres Suarez, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez, and constructively discharged employee Antonio Hanco, must offer them reinstatement and make them 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).

In addition, in accordance with the Board's decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), Respondent shall compensate the aforementioned discriminatees for any direct or foreseeable pecuniary harms incurred as a result of the unlawful adverse actions against them, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these 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 file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lumpum backpay awards covering periods longer than one year, *Latino Express, Inc*., 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] 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, MJ Melo Painting LTD., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Interrogating employees, by asking them whether they signed Union authorization cards, supported the Union, or planned to vote in favor of the Union.

(b) Threatening employees with reduced work hours if they supported the Union.

(c) Threatening employees, implicitly or explicitly, with termination if they supported the Union.

(d) Creating the Impression of Surveillance, by telling employees that it knows which employees are supporting the Union and who signed Union authorization cards.

(e) Making statements of futility by telling employees nothing good would come from bringing in the Union.

(f) Promising employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity, by telling them that they would receive more work assignments if they voted against the Union.

(g) Retaliating against employees, by reducing employee work hours because they supported the Union.

(h) Suspending employees in retaliation for supporting the Union.

(i) Discharging employees in retaliation for supporting the Union.

(j) Constructively discharging employees in retaliation for supporting the Union.

(k) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under 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 the Board's Order, offer Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) make Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez whole for any loss of earnings and benefits resulting from their discharges, less any interim earnings, plus interest, and for reasonable search-for-work and interim employment expenses, plus interest.

(c) reimburse Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez for any consequential harm they incurred as a result of their unlawful discharges.

(d) make Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez whole for any loss of earnings and benefits resulting from the reduction in their hours while employed by Respondent, plus interest.

(e) within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez and within 3 days thereafter, notify them in writing that this has been done.

(f) file with the Regional Director for Region 29, within 21 days from 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, copies of the corresponding W-2 forms of Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez reflecting their backpay awards.

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

Dated, Washington, D.C. June 14, 2023

## APPENDIX

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

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT threaten employees with reprisal for engaging in union activity.

WE WILL NOT create the impression that we are surveilling employees' union activities.

WE WILL NOT make statements that it would be futile to bring in a union.

WE WILL NOT promise employees increased benefits and improved terms and conditions of employment in response to union activity.

WE WILL NOT reduce employees shifts or hours of work in retaliation for their union activity.

WE WILL NOT suspend employees in retaliation for their union activity.

WE WILL NOT discharge or constructively discharge employees in retaliation for their union activity.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under

Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez whole for any loss of earnings and benefits resulting from their discharges, less any interim earnings, plus interest, and for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL reimburse Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez for any consequential harm they incurred as a result of their unlawful discharges.

WE WILL make Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez whole for any loss of earnings and benefits resulting from the reduction in their hours while employed by Respondent, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez and within 3 days thereafter, notify them in writing that this has been done.

WE WILL file with the Regional Director for Region 29, within 21 days from 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, copies of the corresponding W-2 forms of Andres Suarez, Antonio Hanco, Joel Nunez Jimenez, Jhonny Cedeno, Diego Alejandro Chica Aguirre, Leonardo Astoquillca, Jorge Yundes Londono, Jorge Yundes Arcila, and Percy Martinez reflecting their backpay awards.

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The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-278541 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.