RHCG Safety Corp. *and* Construction & General Building Laborers, Local 79, LIUNA. Cases 29–CA–161261 and 29–RC–157827

June 7, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 18, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union filed answering briefs, and the Respondent filed reply briefs.

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,[1] and conclusions, and to adopt the recommended Order as modified and set forth in full below.[2]

In this consolidated unfair labor practice and representation case the judge found that the Respondent violated the Act by unlawfully interrogating and discharging employee Claudio Anderson, and interfered with the representation election by providing a voter list that failed to substantially comply with the Board's voter-list requirements. We agree with these findings, as further discussed below.[3]

1. The interrogation

Under the totality of the circumstances test, we agree with the judge that Supervisor David Scherrer unlawfully interrogated Anderson when texting him on July 30, 2015, "U working for Redhook or u working in the union?" See, e.g., *Rossmore House*, 269 NLRB 1176, 1177–1178 & fn. 20 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 928 (5th Cir. 1993). Anderson testified that he never told Scherrer or any other supervisor that he had signed a union card, visited the union office, or supported the Union, and the Respondent concedes that Anderson was not an open union supporter at the time of the interrogation. See *Davies Medical Center*, 303 NLRB 195, 205 (1991) (employee questioned not an open supporter), enfd. 991 F.2d 803 (9th Cir. 1993) (unpublished). Further, Scherrer sent the text in direct response to Anderson's inquiry about whether he could return to work. By juxtaposing working for Redhook with working in the Union, Scherrer's text strongly suggested that the two were incompatible.[4] Cf. *Facchina Construction Co.*, 343 NLRB 886, 886 (2004) (questioning an applicant about his union sentiments or activity tends to be coercive because it suggests that employment is conditioned on the answer), enfd. 180 Fed.Appx. 178 (D.C. Cir. 2006) (unpublished); *Boydston Electric, Inc.*, 331 NLRB 1450, 1450 fn. 5 (2000) *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 559–560 (7th Cir. 1993) (given employee's recent return from layoff, it is doubtful that employee believed that he could take supervisor at his word when supervisor prefaced questioning the employee about union activity and his possible involvement in it, by stating that the employee could tell him that it was none of his business). Next, while Supervisor Scherrer was not one of the Respondent's highest ranking officials, he did have the power to put Anderson to work on his jobsites. Further, contrary to the Respondent's claims that Scherrer was merely inquiring whether Anderson was available for work, that was not what Scherrer asked.[5] Scherrer also did not have or

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

[2] We shall modify the judge's recommended Order in accordance with our decisions in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), *J. Picini Flooring*, 356 NLRB 11 (2010), and the Board's standard remedial language. In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate employee Claudio Anderson for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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). We shall substitute a new notice to conform to the Order as modified.

[3] There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by threatening employees with job loss and reduced wages if they selected the Union as their bargaining representative or to the judge's conclusion that he need not consider the Union's other election objections in light of his sustaining the voter list objection.

[4] We reject the Respondent's contention that a text message cannot be found to constitute an unlawful interrogation. The Board has found, with court approval, that an unlawful interrogation need not be face-to-face. See, e.g., *McGlaughlin v. NLRB*, 652 F.2d 673, 674 (6th Cir. 1981) (coercive interrogation occurred via a phone call); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1240–1242 (9th Cir 1980) (coercive interrogation occurred via a written job application form). The Respondent offers no reason why the Board should provide a safe harbor for coercive employer interrogations via text messages.

[5] In rejecting the Respondent's claim that Scherrer merely wanted to make sure that Anderson was available for work, we further note that the Respondent does not claim that it had a rule prohibiting outside

communicate to Anderson any legitimate purpose for asking if he was working in the Union. See, e.g., *Windemuller Electric, Inc.*, 306 NLRB 664, 673 (1992) (no legitimate reason for question and none conveyed to employee), enfd. 34 F.3d 384 (6th Cir. 1994). Nor did Scherrer provide Anderson with any assurances against reprisals. *NLRB v. Brookwood Furniture*, 701 F.2d 452, 462 (5th Cir. 1983) (no evidence that employer had a valid purpose for question and none conveyed, and no assurances against reprisals).

We reject the Respondent's contention that the judge should not have received into evidence the screenshot of the text constituting the interrogation (and certain other texts that Anderson and Supervisor Scherrer exchanged), because the General Counsel did not move into evidence screenshots of 10 additional text messages that Anderson and Scherrer exchanged between July 29 and August 4. The Respondent points to nothing in the Federal Rules of Evidence that required the judge to reject the screenshots of the text messages that Anderson did take simply because the General Counsel did not move into evidence screenshots of all the text messages that Anderson and Supervisor Scherrer exchanged. Nor, contrary to the Respondent, do the "missing" text messages make it impossible for the Board to determine the legality of the interrogation.

Rule 106 of the Federal Rules of Evidence provides, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." The Rule "is concerned with misleading impressions created by taking statements in documents or recordings out of context." *1 Weinstein's Federal Evidence* § 106.02[1] (2d ed. 2013). However, the admitted screenshot of the text constituting the unlawful interrogation is not incomplete. Accordingly, there is no "part" of the "statement" that the General Counsel failed to move into evidence.

Although the Rule also provides for the admission of related writings that in fairness ought to be considered, the General Counsel could not have moved screenshots of those other messages into evidence. None of the other messages that Scherrer and Anderson exchanged were on the phones that Anderson and Scherrer had at time of the unfair labor practice hearing; neither individual had screenshots of those messages; and the cell phone providers did not have copies of the actual content of those texts. See *United States v. Thompson*, 501 Fed.Appx. 347, 364 (6th Cir. 2012) (unpublished) (rejecting defendant's rule of completeness argument "because the government admitted 100% of what they were in possession of").

Moreover, Anderson's failure to take screenshots of all of the text messages he exchanged with Scherrer did not prevent the Respondent from questioning Scherrer about his communications with Anderson during the relevant time period, and about the circumstances surrounding those communications, when Scherrer testified at the unfair labor practice hearing. See *United States v. Harry*, 927 F.Supp. 2d 1185, 1192, 1227 (D.N.M. 2013) (although Rule 106 might have allowed defendant to introduce other individual's text messages to him had they not been lost, he is not without a remedy because he can testify about the missing texts), affd. 816 F.3d 1268 (10th Cir. 2016). In fact the Respondent asserts in its reply brief to the General Counsel's answering brief that "Scherrer explained the content of his communications with Anderson between July 29 and August 4, which he thought were face-to-face rather than text messages . . . ."

In any event, the "missing" text messages could not have rendered lawful the coercive nature of the interrogation given (a) the Respondent's explicit concession that Anderson was not an open union supporter at the time of the interrogation; (b) the Respondent's implicit concessions that Scherrer did not provide any assurances against reprisals or explain the purpose of the question; and (c) the fact that the cell phone provider records confirm that Scherrer did not send any additional text messages to Anderson the night of the interrogation. [6]

We recognize, as the Respondent notes, that the record does not indicate whether Anderson replied truthfully to Scherrer's question, because Anderson did not take screen shots of the messages he sent to Scherrer later that night after Scherrer's interrogation text. However, even if Anderson had freely admitted union involvement in response to Scherrer's interrogation, it would not have

employment, and Anderson specifically asked to return to work before Scherrer's text interrogation. Further, Scherrer's purported concern about Anderson's availability is at odds with the Respondent's claim elsewhere in its exceptions brief that Scherrer had no work for Anderson at that time.

[6] For example, given the Respondent's concession that Anderson was not an open union supporter at the time of the interrogation, it is clear that none of the missing text messages that were exchanged before the interrogation would have revealed Anderson's support for the Union. Moreover, there are no missing text messages from Scherrer on the night of the interrogation to put the interrogation into further context. Thus, although the Respondent's Exceptions Brief indicates that the record does not reflect the content of text messages sent at 11:04 and 11:06 p.m. on July 30, the cell phone records demonstrate that those text messages were sent by Anderson to Scherrer. We note in this regard that the judge inadvertently found that Scherrer texted Anderson "U got to tell me what's going on" on July 30 at 11:04 p.m. when in fact that text was sent on a different date.

rendered the interrogation lawful. See *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 928 (5th Cir. 1993) (If an interrogation is coercive in nature, it makes no difference that the employee is not actually coerced.). See also *A&A Ornamental Iron, Inc.*, 259 NLRB 1019, 1020–1021 (1982) (interrogation unlawful notwithstanding that individual truthfully responded, admitting union membership.)

2. The discharge

Applying *Wright Line*,[7] we find that the Respondent unlawfully discharged Anderson. As an initial matter, we agree with the judge that Anderson could reasonably conclude that the Respondent had discharged him, even though no one explicitly told him that he was discharged. *See Poly-America, Inc. v. NLRB*, 260 F.3d 465, 477 (5th Cir. 2001) (the Board may find employees have been discharged even when there is no evidence that the word "fired" has been used). Scherrer repeatedly rebuffed Anderson's efforts to return to work, and, when Anderson asked Nick Rodriguez why he (Anderson) could not return to work, Rodriguez told him that Garofalo (a vice president of operations) had said that Anderson (and some other guys) could not work for the Respondent anymore. Cf. *Champ Corp.*, 291 NLRB 803, 804 (1988) (employees could reasonably conclude that they had been discharged where union conveyed to them their employer's clear and unambiguous position that they would never be rehired or reinstated under any circumstances), enfd. in pertinent part 933 F.2d 688, 693–694 (9th Cir. 1990).

Although the Respondent faults Anderson for failing to follow Scherrer's instructions that he contact Supervisor Pavon for work, the judge credited Anderson's testimony that Scherrer instructed him to contact Rodriguez, not Pavon. The judge thereby implicitly discredited Scherrer's contrary testimony. We find no basis for reversing the judge's credibility determinations. We note in this regard that Scherrer's testimony about instructing Anderson to contact Pavon was equivocal, and Scherrer's memory was shown to be imperfect because he could not specifically recall texting Anderson even though records from his cell phone provider show that he did.

We also reject the Respondent's additional contention that the judge erred in implicitly finding Rodriguez to be its agent, and therefore erred in attributing Rodriguez' statement (to Anderson) to the Respondent. See *Metco Products v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989) (An individual has apparent authority to bind the principal "if a third person could reasonably interpret acts or omissions of the principal as indicating that the agent has authority to act on behalf of the principal.") The record shows that Rodriguez drove a company vehicle, and that the Respondent used Rodriguez to relay information to both Spanish speaking and non-Spanish speaking employees, to translate for it, and to communicate separation notices to employees. See *Facchina Construction Co.*, 343 NLRB at 886–887 (foreman found to be agent where management regularly communicated with its employees through its foremen), enfd. 180 Fed.Appx. 178 (D.C. Cir. 2006) (unpublished); *Poly-America, Inc. v. NLRB*, 260 F.3d at 481 (relying in part on junior foreman's serving as a conduit for communications between the Spanish-speaking work force and the English-speaking management). Moreover, Rodriguez made the statement in question to Anderson after Supervisor Scherrer specifically instructed Anderson to speak with Rodriguez about his request to return to work. See *Davies Medical Center*, 303 NLRB 195, 206 (1991) (finding individual's remarks to an employee attributable to respondent where uncontroverted supervisor specifically instructed employee to contact that individual), enfd. in pertinent part 991 F.2d 803 (9th Cir. 1993). In these circumstances, we find no merit to the Respondent's contention that Anderson would not reasonably conclude that Rodriguez was speaking for the Respondent.

Having concluded that the Respondent did in fact discharge Anderson, we now turn to the legality of the discharge. We find, in agreement with the judge, that the Respondent discharged Anderson because it believed he was becoming involved with the Union. There is no dispute that Anderson engaged in union activity; he signed a union card in June,[8] and in mid to late July he visited the union offices (in the presence of other respondent employees). Further, Supervisor Scherrer's unlawful interrogation of Anderson —"U working for Redhook or u working in the union?"—constitutes evidence that the Respondent suspected Anderson of union involvement and harbored antiunion animus. See, e.g., *NLRB v. Industrial Erectors, Inc*., 712 F.2d 1131, 1137 (7th Cir. 1983). The timing of the discharge in connection with the unlawful interrogation (and Anderson's union activity) buttresses a finding of unlawful motivation. See *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 461 (2001) (timing of discharge supports finding of unlawful motive because it occurred day after unlawful interrogation); *S&M Grocers, Inc.*, 236 NLRB 1594, 1595 (1978) (discharge unlawful where it followed shortly after interroga-

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[8] The judge mistakenly found that Anderson signed his union card when he visited the union offices in mid to late July, and that the Union commenced its organizing efforts in August 2015.

tion); *Matson Terminals, Inc., v. NLRB*, 114 F.3d 300, 303 (D.C. Cir. 1997) (the proximity between union activity and employer's action by itself is substantial circumstantial evidence of unlawful motivation).

The Respondent's inconsistent employment practices further support a finding of unlawful motivation. The Respondent regularly returned employees to work after employees took time off for vacations and other reasons, including even the need to serve jail time. And in its Exceptions Brief, the Respondent contends that it tries to limit employee turnover. Yet, when Anderson no longer needed the approved leave he had just obtained and sought to return to work, the Respondent never put him back to work despite Scherrer's admission that he had never disciplined Anderson and the undisputed fact that the Respondent proceeded to hire numerous employees in both the concrete and demolition divisions, including more than 20 concrete division employees in August and about 11 employees in the demolition division between July 26 and August 30, 2015.

Accordingly, we find, in agreement with the judge, that the Respondent discharged Anderson because it believed he was becoming involved with the Union. As the Respondent offers no legitimate reason for discharging Anderson, the Respondent has plainly failed to show that it would have discharged Anderson even absent his union activity.

Our dissenting colleague argues that Anderson voluntarily quit his job, which precludes a finding that he was discharged. However, this argument does not square with Anderson's testimony, corroborated by Supervisor Scherrer, that Anderson asked for, and was granted, time off, and that Anderson contacted Scherrer for work when he no longer needed the leave that he had just recently obtained. Put simply, Anderson's decision to take an approved leave in no way establishes that he intended to permanently sever his employment relationship with the Respondent, notwithstanding that there was no guarantee of a position upon his return (just as there is no guarantee of continued employment for any at-will employee).

Our dissenting colleague also argues that there was no work for Anderson at that time, because he finds that the Respondent had replaced Anderson at the Tillotson jobsite. However, the dissent ignores that the Respondent had not hired Anderson to work only at the Tillotson jobsite.[9] Further, neither Scherrer nor Garofalo testified that there was no work for Anderson at any other Respondent job sites. To the contrary, the Respondent implicitly concedes that there was work for Anderson at its other jobsites, because it points to Anderson's failure to contact Pavon (or other supervisors) for work as the reason why Anderson no longer works for it. See, e.g., Respondent's Exceptions Brief page 45 ("As a result of Anderson's own inaction, he stopped working for Respondent.")[10]

3. The voter-list objection

The Board's December 15, 2014 final rule updated the *Excelsior* list requirement[11] to better advance the two objectives articulated by the Board in *Excelsior*: (1) ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the *nonemployer* party arguments concerning representation; and (2) facilitating the public interest in the expeditious resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters based solely on lack of knowledge as to the voter's identity. 79 Fed.Reg. 74308, 74335–74341, 74345 (Dec. 15, 2014). In addition to codifying the *Excelsior* requirement that an employer furnish a list of the names and home addresses of eligible voters, the final rule also requires the employer to furnish, among other things, "available home and personal cellular (''cell'') telephone numbers of all eligible voters." 29 C.F.R. §§ 102.62(d), 102.67(l). The rule also reduces the period of time to produce the list from 7 calendar days to 2 business days after the approval of an election agreement or issuance of a direction of an election, but grants regional directors discretion to approve agreements providing for more time or to allow additional time in directed election cases. Id. See 79 Fed.Reg. 74353–74358, 74428. The rule further provides that the employer's failure to file or serve the list shall be grounds for setting aside the election whenever proper and timely objections are filed. 29 C.F.R. §§ 102.62(d), 102.67(l).

Here, we agree with the judge that the election should be set aside for three reasons, each of which constitutes an independent basis for setting aside the election. First, approximately 90 percent of the addresses on the list were inaccurate.[12] Second, the list omitted the names of

[9] The record shows that Anderson had worked for the Respondent at multiple jobsites and that the Respondent regularly moved employees from jobsite to jobsite in response to the ebb and flow of work.

[10] We need not address our colleague's related *FES* arguments because the Respondent has not argued that *FES*—rather than *Wright Line*—should apply. See *UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8, slip op. at 2 (2016) (argument first raised by dissent is "not properly before the Board for consideration."). Accord: *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 1 fn. 4 (2015), enfd. ___Fed. Appx.___, 2016 WL 7508168 (D.C. Cir. 2016); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000).

[11] *Excelsior Underwear*, *Inc.*, 156 NLRB 1236 (1966).

[12] See *Mod Interiors, Inc.*, 324 NLRB 164, 164–165 (1997) (40 percent address inaccuracy rate warrants setting aside the election); *Ameri-*

at least 15 eligible voters.[13] Ten omissions were of employees eligible to vote under the *Steiny/Daniel*[14] formula that the parties agreed to utilize in the stipulated election agreement,[15] and 5 other omissions were of employees the parties agreed were eligible.[16] Third, the Respondent did not provide phone numbers for any of its employees on the list.

We find unpersuasive the Respondent's unsupported contention that the voter list's shortcomings did not impede the Union's ability to communicate with the eligible voters.[17] It is obvious that the Union's ability to communicate with eligible voters was impaired by the Respondent's failure to include numerous eligible voters on the list, as well as its failures to provide correct addresses for 90 percent of the listed employees or phone numbers for any of the listed employees. In any event, as the Board explained in rejecting the identical argument in the context of an *Excelsior* list objection, "to look beyond the issue of substantial compliance with the rule and into the additional issue of whether employees were actually informed about election issues would 'spawn an administrative monstrosity.'" *Mod Interiors, Inc.*, 324 NLRB at 164 (citation omitted).

We find equally unpersuasive the Respondent's argument that we should not set aside the election in light of the alleged large voter turnout.[18] The primary purpose of the voter-list requirement is to ensure the fair and free choice of bargaining representatives by maximizing the likelihood that all eligible voters will be exposed to the nonemployer party arguments concerning representation. 79 Fed. Reg. 74335–74345. See also NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969) (Excelsior's "disclosure requirement furthers this objective [of ensuring "the fair and free choice of bargaining representatives"] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses."). That a significant percentage of eligible employees purportedly voted hardly demonstrates that they were aware of the Union's arguments in favor of representation.

Nor are we persuaded by the Respondent's contention that we should refrain from setting aside the election because any shortcomings or inaccuracies in the list were "inadvertent" or "unintentional." Just as was true with respect to the *Excelsior* list, it is important that the information on the voter list be complete and accurate because of the important public policies that the list advances. The voter-list rule, like the predecessor *Excelsior* list rule, "is not intended to test employer good faith" (see *Mod Interiors, Inc.*, 324 NLRB at 164); nor is employer bad faith a precondition to finding substantial noncompliance with the list requirements. See *Woodman's Food Markets, Inc.*, 332 NLRB 503, 504 fn. 9, 505 fn. 12 (2000).

We find no merit to the Respondent's claim, embraced by our dissenting colleague, that it had no obligation to include the phone numbers for its employees on the voter list, because it did not maintain its employees' phone numbers in its computer database. The regulatory text of the rule contains no such limitation. See 29 C.F.R. §§102.62(d), 102.67(l). Rather, it requires an employer to include "available" home and personal cell telephone numbers, and the unit employees' phone numbers plainly were available to the Respondent, as the judge's decision makes clear.[19] Given the important public interests ad-

can Biomed Ambulette, Inc., 325 NLRB 911, 911, 914 (1998) (56 percent address inaccuracy rate warrants setting aside election).

[13] Here, the percentage of omissions (approximately 15%) exceeds that in some pre-*Woodman's* cases where elections were set aside based on omissions (*Automatic Fire Systems*, 357 NLRB 2340, 2341 (2012) (collecting cases)), the number of omissions could have affected the outcome of the election, and the Respondent has not provided a legally sufficient justification for the omissions. See *Woodman's Food Markets, Inc.*, 332 NLRB 503, 503-505 (2000).

[14] *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

[15] Contrary to the Respondent's claim that there has been no showing that it failed to include on the voter list any employees who were eligible under that formula, the voter list omitted the names of 10 of the 12 employees who cast challenged ballots who were eligible to vote under the *Steiny/Daniel* formula: Juan Fernandez, Michael Roman Gil, Omar Sarmiento, Juan Calle, Eddy Peres, Segundo Altimirano, Emmanual Felix, Rafael Franco, Angel Godoy, and Manuel E. Sanchez.

[16] The record shows that the list omitted five employees whom the parties agreed were eligible: Hugo Cabrera, Raymund Garcia, Edison Ortiz, Jose Villalobos, and Angel Javier.

[17] The Respondent contends that because of the showing-of-interest requirement, the Union must have had the correct home addresses and phone numbers of at least 30 percent of the employees. Even if this were true, it hardly demonstrates that the Union had the correct home addresses and phone numbers for the remaining employees.

[18] Although some employees eligible to vote under the *Steiny/Daniel* formula voted even though the Respondent did not include them on the voter list, the Union correctly notes that it is possible there were additional employees who would have been eligible under that formula who did not attempt to vote because they were unaware of the election.

[19] In claiming that there is no evidence that RHCG's managers or other individuals maintained employees' personal phone numbers "in the course of their work responsibilities," our colleague ignores the testimony of Respondent's vice president of operations that when the Respondent's supervisors and foremen need to contact employees about work, they frequently contact them on their cell phones. Accordingly, Andre Marc-Charles, the individual Respondent assigned to compile the voter list, needed only to ask those people for the unit employees' phone numbers in order to obtain them.

Our colleague argues, in the alternative, that the Respondent cannot be faulted for failing to contact supervisors to obtain certain voter-list information (employee phone numbers) not maintained in its computer database but stored on the supervisors' phones. But, as shown, the rule does not provide that only employee phone numbers maintained in a computer database are "available" for voter-list purposes. We also find

vanced by requiring employers to furnish employee contact information to the nonemployer parties to a representation case, we see no reason to permit employers to withhold such contact information simply because they do not store the information in a computer database. [20] And our colleague's dissent does not persuade us otherwise.[21]

Our colleague argues that it is unwise for the Board to require an employer to furnish employee phone numbers unless they are maintained in a computer database, because the employer may be uncertain about the supervisory status of some of its workers. Our colleague conjures up a parade of horribles whereby if an employer questions an individual it mistakenly believes is a supervisor to obtain the unit employees' phone numbers, it will be accused of engaging in unlawful surveillance of Section 7 activity. Conversely, if it declines to question an individual who is ultimately found to be a supervisor, it will face an election objection for failing to include on the voter list the phone numbers of the unit employees known only to that supervisor.

However, in the more than 2 years that the rule has been in effect, the specter of increased litigation forecast by the dissent has not come to pass—and for good reason. If an employer relies on certain individuals to convey work-related information to, or receive work-related information from, unit employees, such individuals are its agents, if not its supervisors. Our colleague does not explain, and we fail to see, how an employer could be deemed to have engaged in unlawful union surveillance if it asks such individuals to disclose the unit employees' phone numbers—utilized in the course of their work—so that it may comply with the Board's voter-list requirement. The requested information does not reveal the union sentiments or the union activity of the unit employees (or of the supervisors or agents), and the employer has a lawful reason for requesting the information, which it will presumably convey when making the request. For the same reasons, we fail to see how an employer could be deemed to have coercively interrogated such individuals by asking them for the contact information of the unit employees.

And this case does not implicate the concerns raised by our colleague. The Respondent's failure to include phone numbers was not due to uncertainty over who its supervisors were. Rather, this case, like the more than 90 percent of pre-Rule and post-Rule Board cases involving elections, involves an employer who entered into a stipulated election agreement, waiving its right to a preelection hearing. Moreover, although Andre Marc-Charles, the individual assigned to compile the voter list, testified that he spoke to supervisors to obtain information relating to employees who might be eligible under the *Steiny/Daniel* formula, he admitted that he did not ask any supervisors for the phone numbers of the unit employees they had. Neither the Respondent nor our colleague can persuasively justify Andre Marc-Charles' failure to do so,[22] or dispute that Marc-Charles could have timely obtained the phone numbers by requesting them from supervisors and foremen.

Our colleague also appears to complain that the time period provided in the Rule for producing the contact information is unreasonable "under any circumstances"

untenable the claim that employee phone numbers were unavailable to the Respondent for voter-list purposes given that the record shows that employee phone numbers were available to and used by the Respondent for work-related communications. Moreover, our colleague ignores that Andre Marc-Charles recognized the need to contact supervisors for information required for voter-list compliance (relating to *Steiny*/*Daniel* eligibility) that was likewise not maintained in the Respondent's computer database.

[20] We also reject the Respondent's suggestion that the preamble to the final rule - providing that employers would not be required to ask the unit employees for their own phone numbers in preparation for the list - undermines our conclusion that the Respondent's failure to include the employees' personal phone numbers on the voter list warrants setting aside the election. 79 Fed. Reg. 74343 fn. 169. The Respondent was not required to ask its unit employees for their own phone numbers; it simply had to ask its *supervisors and foremen* for the phone numbers of the unit employees they already had and used in the ordinary course of business. Nor does it matter that the Respondent might not have had the phone numbers of every eligible voter. See 79 Fed. Reg. 74338 fn. 146 ("the fact that an employer may not possess the . . . personal phone numbers for each and every one of its employees does not demonstrate that it is not worthwhile to require the employers to disclose those employees' . . . personal phone numbers that it does possess.")

[21] While our colleague continues to express his disagreement with certain provisions of the Board's recent rulemaking, the time for extensive policy debate over the provisions of the rule has come and gone—the Board's rule was lawfully enacted, see *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016), and both we and our dissenting colleague are bound to faithfully apply it, regardless of our agreement or disagreement with any particular requirements it establishes. The rule is not susceptible to alteration in an individual adjudication. Nonetheless, we will respond to the concerns our dissenting colleague raises to the extent that they are relevant to adjudicating the particular dispute before us.

[22] Our colleague also argues that the expanded voter-list requirements inappropriately fail to accommodate employees' privacy interests. Every court to have considered the matter has rejected our colleague's position, and we see no need to repeat the lengthy explanations the Board provided in the Rule for its conclusion that the substantial public interests advanced by the expanded disclosure requirements outweigh the employees' acknowledged privacy interest in the limited information that will be disclosed to a limited group of recipients to be used for limited purposes. 79 Fed. Reg. 74335–74352, 74427–74428. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 223–226 (5th Cir. 2016) (affirming *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116, *7–*11 (W.D.Tex. 2015); *Chamber of Commerce of the United States of America v. NLRB*, 118 F.Supp.3d 171, 208–215 (D.D.C. 2015).

in cases where employee contact information is not stored in the employer's computer database. However, employers and elections come in all shapes and sizes, and the manner in which employers conduct their operations varies. 79 Fed. Reg. 74353–74357, 74422. "[I]n the Board's experience, the units for which lists must be produced are typically small— with half of all units containing 28 or fewer employees over the past decade." 79 Fed.Reg. 74354. See also 79 Fed. Reg. 74422 (noting that in the past decade the Board has conducted elections in units smaller than five employees). In cases involving small units, the quantum of information required for production of the voter list is, by definition, quite limited. The number of individuals potentially possessing the necessary information is similarly limited, "meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task." 79 FedReg. 74354.[23] And, in reality, employers have many more than 2 business days to undertake the process. The description of representation case procedures, which is served with the petition, explicitly advises employers of the voter-list requirement. Accordingly, employers concerned about their ability to produce the list can begin working immediately, before an election agreement is approved or an election is directed—and thus *before* the clock begins running on the 2-business day time period. 79 Fed.Reg. 74353–74354.

The Board also explained why it had rejected the contention that construction industry employers are entitled to a categorical exemption from the 2-business day timeframe because they may be required to use the *Steiny*/*Daniel* formula requiring analysis of 2 years of payroll records. Not only may parties stipulate not to use that formula, but also some petitions are for units already covered by collective-bargaining agreements, resulting in employers' ready access to the necessary information. The Board also explained that not all construction industry employers have significant numbers of employees covered by the formula and that although construction employers may maintain the records necessary to produce the list at different job sites, modern technology renders transmission of the necessary information to the person(s) compiling the list practicable. 79 Fed. Reg. 74354. The Board also found it significant that prior to the final rule, construction industry employers, whether large or small, and whether decentralized or not, only had 7 calendar days to produce an *Excelsior* list, and that the advent of overnight mail and electronic filing and service by itself warrants a reduction in the period of time to produce the list. 79 Fed.Reg. 74354. See also 79 Fed.Reg. 74353.

Finally, our colleague, like the Respondent, argues that the time afforded the Respondent to produce the voter list was "especially" unreasonable given the combination of circumstances of this case, where (1) the *Steiny*/*Daniel* eligibility formula is applicable, (2) the Respondent does not maintain its employees' telephone numbers in a computer database (or in a single paper file), and (3) the unit is larger than the average Board unit. However, if the Respondent believed that the normal 2-business day time frame was inadequate, it could have negotiated with the Petitioner for a longer period of time to produce the list or, failing that, it could have refused to enter into an election agreement and gone to a hearing to explain why it needed more time to produce the list. See 29 C.F.R. §§ 102.62(d), 102.67(l). See also 79 Fed.Reg. 74354–74355 ("under the final rule, the regional director has discretion to grant an employer more time to produce the list, upon a showing of extraordinary circumstance which may be met by an employer's particularized demonstration that it is unable to produce the list within the required time limit due to specifically articulated obstacles to its identification of its own employees."). But the Respondent did neither. Instead, the Respondent voluntarily entered into a stipulated election agreement providing for the normal 2-business day timeframe. Having done so, the Respondent has no cause to complain that it should have been given more time. Cf. *AOTOP, LLC v. NLRB*, 331 F.3d 100, 105 (D.C. Cir. 2003) ("Because the Company made no specific request for an interpreter, it will not be heard now to claim the Board's failure to provide one rendered the election unfair."); *Micro Pacific Development Inc. v. NLRB*, 178 F.3d 1325, 1335–-1336 (D.C. Cir. 1999) (having entered into election agreement in which it stipulated that unit containing all of its employees constituted an appropriate bargaining unit, employer was precluded from arguing that NLRB erred by combining employer's resident and nonresident employees into a single bargaining unit); *Pulau Corp.*, 363 NLRB No.8, slip op. at 1 fn. 1 (2015) (employer's challenge to regional director's designation of election date is not properly before the Board because it did not present its challenge to the director prior to the election) .[24]

[23] Those employers that maintain all the contact information for their employees in a single paper document will have an easier time still complying with the Rule.

[24] We also note that the Respondent was explicitly informed of the voter-list requirement (including the eligibility formula applicable in construction industry cases) in the description of the representation case procedures served by the Regional Director on August 12, 2015, more than 2 weeks before the stipulated election agreement was approved on August 27, 2015. See generally 79 Fed. Reg. 74354 ("employers gen-

ORDER

The National Labor Relations Board orders that the Respondent, RHCG Safety Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Claudio Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Claudio Anderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section in the judge's decision, as amended in this decision.

(c) Compensate Claudio Anderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, 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 award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Claudio Anderson in writing that this has been done and that the discharge will not be used against him in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix."[25] 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 30, 2015.

(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.

IT IS FURTHER ORDERED that Case 29–RC–157827 is severed and remanded to the Regional Director for Region 29 and that the election held on September 18, 2015, be set aside and a new election held.

Dated, Washington, D.C. June 7, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, concurring in part and dissenting in part.

This case provides another illustration of concerns expressed in my dissenting views regarding the Board's

erally will have more than a week to prepare the voter list, assuming they begin work when they receive the petition and are explicitly advised of the voter list requirement in the description of representation case procedures served with the petition.").

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

Election Rule.[1] Similar to another recent Board decision, *European Imports, Inc.*, 365 NLRB No. 41 (2017), it illustrates the downside of the Election Rule's "preoccupation with speed between petition-filing and the election."[2] Applying the Election Rule in *European Imports*, the Regional Director scheduled an election to occur a mere 20 days after the union filed its representation petition, and some disputed employee-voters were guaranteed as little as *3 days' notice* of the election.[3] Here, the Board applies the Election Rule's expanded voter-list disclosure requirements, which provide that the employer must give the Board's Regional Office and the union a complete list of eligible voters within *2 business days* after the Regional Director either approves a stipulated election agreement or issues a decision and direction of election. This was especially challenging in the instant case because voter eligibility turned in part on the number of days particular individuals were employed in the preceding 12 months, and in some instances, the number of days they were employed in the preceding 24 months.[4] In addition, under the Election Rule's expanded disclosure requirements, the voter list must include—to the extent "available" to the employer—each eligible employee's personal email address and personal phone numbers, in addition to other detailed information.[5]

The Respondent's voter list identified 84 eligible voters, and the record establishes that approximately 90 percent of the home addresses contained in the list were incorrect (only four of the listed home addresses were accurate). Moreover, the list included no phone numbers, and the Respondent argues it had no obligation to provide phone numbers because they were not "available" within the meaning of the Election Rule.[6] Under the traditional standard applied by the Board regarding voter lists, I agree that the election should be set aside based on the large number of incorrect home addresses. However, I continue to disagree with the Election Rule's expanded voter-list disclosure requirements—particularly in combination with the accelerated election timetable imposed by the Election Rule—and I believe the judge and my colleagues err when they find that employees' personal phone numbers were "available" to the Respondent.[7] Thus, I believe the Board cannot appropriately conclude that the Respondent's failure to disclose employees' phone numbers independently warrants setting aside the election.

Separate from the election issue, my colleagues also find that RHCG violated the National Labor Relations Act (NLRA or Act) by interrogating and discharging employee Claudio Anderson. I agree that Anderson was unlawfully interrogated in violation of Section 8(a)(1) of the Act.[8] As explained below, however, I disagree that

[1] 79 Fed. Reg. 74308–74490 (Dec. 15, 2014) (codified at 29 C.F.R. Sec. 101.23 et seq., Sec. 102.60 et seq., and Sec. 102.30). I dissented from the Election Rule for reasons set forth in views I authored jointly with former Member Johnson. Id. at 74430–74460 (dissenting views of Members Miscimarra and Johnson).

[2] Id. at 74436 (dissenting views of Members Miscimarra and Johnson).

[3] In *European Imports*, supra, the representation petition was filed on Friday, February 3, 2017; the Regional Director's Decision and Direction of Election, which approved the inclusion of certain voters whose inclusion was not clear from the petition, issued on Thursday, February 16; the Notice of Election had to be posted by Monday, February 20; and the election was held on Thursday, February 23. See *European Imports*, 365 NLRB No. 41, slip op. at 1–2 (Acting Chairman Miscimarra, dissenting).

[4] In the construction industry, where sporadic employment patterns are typical, eligibility to vote in a representation election depends on whether an individual was employed for a sufficient number of days over 12- and 24-month periods preceding the election eligibility date. See fn. 13, infra.

[5] 29 C.F.R. Sec. 102.62(d). See fn. 11, infra and accompanying text.

[6] The record also establishes that the Respondent's voter list omitted at least 15 individuals who were eligible to vote in the election. Because I agree with my colleagues that the number of incorrect addresses warrants setting aside the election based on the traditional standards applied by the Board, I do not reach or pass on whether the omission of 15 individuals from a bargaining unit consisting of roughly 100 employees would independently justify setting aside the election.

[7] My colleagues say that my duty is to faithfully apply the Election Rule. I believe my duty is to faithfully give effect to the intent of Congress as expressed in the National Labor Relations Act, as I understand it—and where my understanding differs from that of the current Board majority, my duty is to dissent. But even if my colleagues are correct, nothing in the Election Rule compels the conclusion that the phone numbers of unit employees were "available" to the Respondent under the particular circumstances of this case; and for the reasons explained below, I believe they were not. Accordingly, since the Election Rule requires only that the nonpetitioning party furnish the petitioner "available" phone numbers, I would dissent even if I agreed with the Election Rule's voter-list requirements.

[8] I agree with my colleagues that Supervisor David Scherrer unlawfully interrogated Anderson under the totality of the circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). However, contrary to my colleagues, I do not rely on the fact that Scherrer did not inform Anderson of a legitimate purpose for the questioning and did not provide Anderson with assurances against reprisals. By taking these factors into consideration, my colleagues treat questions regarding union matters as *inherently* coercive, requiring the employer to take affirmative steps to mitigate the coercion. The Board rejected this view in *Rossmore House*, and it is inconsistent with that decision to include these considerations in a totality-of-the-circumstances analysis. In this regard, I agree with former Member Hayes, who observed that "proof that an employer has informed an employee that it has a legitimate purpose for questioning and has given assurances against retribution is not prerequisite to finding that an interrogation is lawful." *Evenflow Transportation, Inc.*, 358 NLRB 695, 696 fn. 4 (2012), adopted by reference 361 NLRB No. 160 (2014).

RHCG violated Section 8(a)(3) by discharging Anderson.

Discussion

RHCG Safety Corp. (RHCG or the Respondent) performs demolition and concrete work in two separate divisions, a demolition division and a concrete division. Pursuant to a Stipulated Election Agreement approved by the Regional Director on August 27, 2015, an election was conducted among RHCG's full-time and regular part-time demolition workers on September 18, 2015. The Union lost the election 46 to 36, with 7 nondeterminative challenged ballots, and now seeks to overturn the election. I agree with my colleagues that the election must be set aside, but only for the reasons set forth below.

1. *The Voter-List Objection.* The Election Rule requires an employer to provide a list of eligible voters—commonly referred to as an "*Excelsior*[9] list"—to both the Region and the other party or parties within 2 business days of the Regional Director's approval of a stipulated election agreement or direction of an election.[10] The Election Rule further requires that the list include "the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters" as well as of "individuals who . . . will be permitted to vote subject to challenge."[11] Failure to comply with this requirement constitutes grounds for setting aside the election.[12]

Here, as the judge found, the list submitted by RHCG contained about 84 names and home addresses. However, only four home addresses were correct, the list included no phone numbers or email addresses, and the list omitted a number of eligible voters. The Petitioner filed an objection, alleging that RHCG provided it with an inadequate voter list.

My colleagues sustain the Petitioner's objection and set aside the election based on three independent reasons: (1) approximately 90 percent of the addresses on the list were inaccurate; (2) RHCG did not provide phone numbers for any of its employees; and (3) the list omitted the names of at least 15 eligible voters, 10 of whom were eligible to vote under the *Steiny/Daniel* formula the parties agreed to utilize.[13]

As stated above, I agree with my colleagues' conclusion that the election should be set aside because 90 percent of the addresses in the voter list were incorrect,[14] and I do not reach or decide whether the omission of 15 employees from the list (10 of whom were only eligible under the *Steiny/Daniel* formula) independently requires a new election.[15]

Unlike my colleagues, however, I believe the record establishes—especially given the accelerated election timetable imposed by the Election Rule—that the phone numbers of eligible voters were not "available" to RHCG. Therefore, I disagree that the omission of employee phone numbers from the voter list independently warrants setting aside the election.

It is uncontroverted that RHCG does not maintain any database or other repository containing employees' personal phone numbers, and there is no evidence that RHCG's managers or other individuals maintained a list of employees' personal phone numbers in the course of their work responsibilities. Nevertheless, the judge found that employee phone numbers were "available" to RHCG because some employee phone numbers were

[9] See *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[10] 29 C.F.R. Sec. 102.62(d). By comparison, under *Excelsior Underwear*, which governed for nearly 50 years until the Election Rule was adopted, the employer had 7 calendar days from the date the Regional Director approved the election agreement or directed an election to provide the voter list.

[11] 29 C.F.R. Sec. 102.62(d). Again comparing the Election Rule requirements with prior practice, under *Excelsior* the employer was required to include in the list only the names and addresses of eligible voters.

[12] 29 C.F.R. Sec. 102.62(d).

[13] See *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). Under the *Steiny/Daniel* formula, "in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date." *Steiny & Co.*, 308 NLRB at 1326.

[14] See, e.g., *Mod Interiors, Inc.*, 324 NLRB 164 (1997) (setting aside election based on 40-percent address inaccuracy rate); *American Biomed Ambulette, Inc.*, 325 NLRB 911 (1998) (setting aside election based on 56-percent address inaccuracy rate).

[15] I note, however, that the *Steiny/Daniel* eligibility formula requires an employer to review 2 years' worth of personnel records to determine who may have been employed for a total of 45 days during the 24 months preceding the election eligibility date; the election was held in September 2015; and RHCG only began using a computer program to monitor employees' time and attendance around July 2015. Before that date, it used sign-in/sign-out timesheets. With only 2 business days to compile the *Excelsior* list and 2 years' worth of timesheets to review, it is unsurprising that some employees eligible to vote under the *Steiny/Daniel* formula were missed. Former Member Johnson and I warned of situations like this in our dissent to the Election Rule, observing that the extremely compressed window of time to produce the extensive voter-information disclosures required of employers under the Election Rule would likely result in more rerun elections when a union fails to secure a majority vote in the first election. See 79 Fed.Reg. at 74454–74455 (Members Miscimarra and Johnson, dissenting).

stored in the phones of some of its supervisors.[16] This finding is unprecedented: the Election Rule itself does not define the term *available*, and until today, the Board had never deemed employees' phone numbers stored on supervisors' phones but not otherwise maintained by their employer to be "available" for purposes of the Election Rule's voter-list disclosure requirements. Nevertheless, my colleagues adopt the judge's interpretation of the Election Rule. For several reasons, I disagree that the Election Rule imposes on employers a duty to identify each and every supervisor and require these individuals to search their phones for employees' personal phone numbers (and, under the Election Rule, employees' personal email addresses).

First, such a requirement is unrealistic given the 2-business-day time limit imposed by the Election Rule for the employer to transmit the eligible-voter list. According to my colleagues, employers like RHCG must contact each and every supervisor and require them to search their phones[17] for employees' personal phone numbers (and, under the Election Rule, their personal email addresses as well)—going back 2 years, consistent with the *Steiny/Daniel* eligibility formula when applicable—and to transmit this information to management officials who, in turn, must aggregate this data for inclusion in mandatory disclosures that must be filed and served within *2 business days* after the Regional Director issues the decision and direction of election or approves an election agreement. In addition, and at the same time, RHCG was required to manually search 24 months' worth of sign-in sheets to identify who even qualified as eligible voters (since, under the *Steiny/Daniel* formula, eligible voters include anyone employed for 30 days or more within the 12 months preceding the eligibility date for the election, or 45 days or more within the 24-month period preceding the eligibility date if they had some employment during the 12 months preceding that date).[18] In my view, it is unreasonable for the Board to conclude that employees' personal phone numbers are "available" and must be disclosed under the Election Rule under any circumstances,[19] but especially under circumstances such as these.[20]

Second, in deeming employees' personal phone numbers "available" when supervisors store them on their phones, and in mandating that employers require supervisors to search their phones for those phone numbers, the judge and my colleagues overlook another aspect of the Election Rule—namely, that it prevents employers from learning, *prior* to the election, who constitutes a "supervisor" because the Rule defers to *post*election proceedings the resolution of most questions regarding voter eligibility and supervisory status.[21] Moreover, the Board applies an often counterintuitive view of supervisory status—see, e.g., *Buchanan Marine, L.P.*, 363 NLRB No. 58 (2015) (tugboat captains presiding over six-member crews are not supervisors); *WSI Savannah River Site*, 363 NLRB No. 113 (2016) (lieutenants who lead response teams to repel armed terrorist attacks on nuclear powerplants are not supervisors)—and employers may well be uncertain whom the Board will or will not deem to be supervisor. It defies reason to hold that the Election Rule mandates a *pre*election search for employees' personal phone numbers stored in supervisors' phones, when the same Election Rule provides that employers in most cases cannot even litigate who qualifies as a supervisor until *after* the election.[22]

Third, as expressed in the dissenting views to the Election Rule, I believe the Rule's expanded voter-list disclosure requirements inappropriately fail to accommodate

[16] RHCG has approximately 13 or 14 supervisors in the demolition division.

[17] The majority does not say that only work phones must be searched, so evidently supervisors must be required to search their personal phones as well as their work phones.

[18] *Steiny & Co.*, 308 NLRB at 1326.

[19] In defense of reducing the 7-day deadline for transmitting the voter list to a 2-business-day deadline, my colleagues repeat various arguments advanced by the Board majority in the Election Rule. They omit, however, the driving force behind this change and others effected by the Election Rule: the Board majority's determination to hold elections "at the earliest date practicable." 79 Fed. Reg. at 74310. The specific arguments my colleagues reiterate are all in service of that overarching goal. But as former Member Johnson and I explained in our dissenting views, when it comes to Board-conducted elections "the Act makes other considerations more important than speed." 79 Fed. Reg. at 74432–74433.

[20] My colleagues fault Andre Marc-Charles, the individual RHCG assigned to compile the voter list, for not asking supervisors for employee phone numbers stored on their phones, and they also fault RHCG for not negotiating with the Petitioner or asking the Regional Director for more time to file and serve the voter list. But as stated above, before today the Board had never held that employees' personal phone numbers stored in supervisors' phones are "available" for purposes of the Election Rule's voter-list disclosure requirements. RHCG and Andre Marc-Charles cannot be faulted for failing to predict that such data would be deemed "available" *in this case*.

[21] See 79 Fed. Reg. at 74438 fn. 581 ("Without a preelection hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters . . . will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election.") (dissenting views of Members Miscimarra and Johnson).

[22] See fn 21, supra; see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (an administrative agency's interpretation of its own regulations is entitled to great deference "unless it is plainly erroneous or inconsistent with the regulation").

employees' privacy interests.[23] Here, my colleagues likewise fail to adequately appreciate employees' privacy interests in their personal phone numbers. When an employee uses his or her personal phone to call or text a supervisor, this does not mean the employee consented to the employer's regular use of the employee's personal phone number, much less that he or she consented to the dissemination of his or her personal phone number to third parties. Indeed, Andre Marc-Charles, who is in charge of RHCG's payroll, testified without contradiction that RHCG does not require employees to provide their personal phone numbers. In this context, it is unreasonable to suggest that an employee's use of a personal device to reach a supervisor, which caused the employee's personal phone number to be stored in the supervisor's phone, means the phone number is "available" for purposes of the Election Rule, requiring the transmittal of this information to the Government (i.e., the Board) and to third parties (i.e., a union).[24] By providing that employee personal information must be disclosed only to the extent it is "available," the Election Rule obviously contemplates that there is no blanket obligation for an employer to obtain and assemble such information. To the extent the Election Rule provided this limited accommodation of employee privacy interests, the Board's decision in the instant case effectively eliminates it.

Fourth, mandating that employers require supervisors to search their phones for employee contact information will inevitably invite collateral litigation in state or federal court, not to mention the filing of blocking charges alleging the employer has violated the Act by demanding that *statutory employees*—mistakenly identified as supervisors—disclose the personal phone numbers of fellow employees. In defense of their holding, my colleagues insist that the employer is only required to ask "supervisors" for employees' personal phone numbers, not the employees themselves. Yet the Board's volumes are filled with divided opinions in Section 2(11) cases, and the Board has consistently rejected my view that supervisor determinations should, among other things, be consistent with "common sense."[25] Navigating the Board's contradictory cases regarding supervisor status under Section 2(11) is not for the faint of heart, and parties can—and will—make mistakes in both directions, with objections and/or blocking charges to follow. If an employer believes Employee X is *not* a supervisor and therefore refrains from demanding a search of his or her phone for coworkers' personal phone numbers, any self-respecting union will predictably file a postelection objection—if it loses the election—alleging that X *is* a supervisor and the voter list erroneously omitted employees' personal phone numbers stored on X's phone. On the other hand, if the employer believes that Employee X *is* a supervisor and requires a search of his or her phone or phones resulting in the discovery of numerous coworker personal phone numbers, any self-respecting union will predictably file an unfair labor practice charge alleging that Employee X is *not* a supervisor, and the compelled search of Employee X's phone(s) and forced disclosure of coworkers' personal phone numbers constituted unlawful surveillance or other interference with or coercion of employees' Section 7 rights in violation of Section 8(a)(1), which may block the election or provide the basis for postelection objections. Either way, today's decision will predictably result in more litigation, more expense for the parties, and—ironically, given the premium placed by the Election Rule on speed—greater uncertainty and delay regarding whether or when any election will take place and whether the results of that election, if and when it occurs, will be given effect by the Board.

[23] In our dissenting views to the Election Rule, former Member Johnson and I criticized the Rule's expansion of *Excelsior* disclosure mandates to require employers to furnish available personal telephone numbers without adequately protecting employees' legitimate privacy interests in that information. See 79 Fed. Reg. at 74452–74454 (Members Miscimarra and Johnson, dissenting). One federal court has rejected concerns that disclosure of this information subjects employees to a risk of identity theft because, according to the court, this risk arises in the first place from the fact that "organizations maintain records electronically," and such records may be hacked. *Associated Builders & Contractors of Texas, Inc. v. NLRB,* No. 1–15-CV-[00]026 RP, 2015 WL 3609116, at *11 (W.D. Tex. June 1, 2015), affd. 826 F.3d 215 (5th Cir. 2016). In this case, however, it is undisputed that RHCG does *not* maintain any record—electronic or otherwise—of employees' personal phone numbers. By their decision today, my colleagues effectively require employers like RHCG to *create* such an electronic record for the first time whenever an election has been stipulated to or directed, thereby giving rise to the risk of identity theft described by the court in *Associated Builders & Contractors*, supra. See also 29 C.F.R. Sec. 102.62(d) (requiring the voter list to be filed and served electronically). Again, in this respect, I believe my colleagues and the judge impose an obligation that is contradicted by the Election Rule's limitation of the required disclosures to phone numbers that are *already* "available." Indeed, the majority's finding here contradicts the definition of the word *available* as "present or ready for immediate use." See https://www.merriam-webster.com/dictionary/available (last viewed March 15, 2017).

[24] Aside from the "availability" limitation, which my colleagues effectively negate today, the Election Rule rejected every other accommodation of employee privacy interests that former Member Johnson and I advocated, along with numerous parties who provided input during the rulemaking process. See 79 Fed. Reg. at 74453–74454 (Members Miscimarra and Johnson, dissenting).

[25] See *Buchanan Marine*, supra, slip op. at 10 (Member Miscimarra, dissenting) (suggesting that the Board's supervisor determinations should pass "the test of common sense," which my colleagues criticized as "a new test for supervisory status").

2. *Anderson's alleged discharge.* RHCG's vice president of operations in charge of the demolition division, Christopher Garofalo, testified without contradiction that RHCG does not provide its employees paid vacation, an employee's job is not guaranteed if he takes time off or goes on vacation, and RHCG fills the positions of employees who take time off if it needs those positions filled.

On August 5, 2014, Claudio Anderson began working for the Respondent as an unskilled laborer in the concrete division.[26] Anderson worked at a number of construction sites under Supervisor David Scherrer and Supervisor Nick Pavon. In July 2015, while working at 2301 Tillotson Avenue, Bronx, New York (Tillotson jobsite), Anderson requested one month time off to visit his mother in Panama, and Scherrer granted his request. Anderson understood that his position would likely be filled: he testified that he let Scherrer know about his plan to take an extended leave because Scherrer "need[ed] somebody to replace him." July 23, 2015, was Anderson's last day at work.[27] However, before leaving for Panama, Anderson received a call from his mother, who told Anderson he did not need to come. Thereafter, Anderson sought to return to RHCG. Specifically, from July 30 to August 2, 2015, Anderson texted Scherrer several times asking for an opportunity to work. Scherrer replied that he had filled Anderson's spot, and he asked Anderson to come see him.[28] On August 4, Anderson met Scherrer at the Tillotson site. Scherrer told Anderson that there was no work for him. According to Anderson, Scherrer suggested that Anderson speak with Nick Rodriguez, an employee in the demolition division. Anderson also testified that Rodriguez told him that VP of Operations Garofalo said that Anderson and some other guys could not work for RHCG anymore.[29] After the conversation with Rodriguez, Anderson believed that he was discharged. Anderson did not contact Supervisor Pavon or any other supervisors to try to obtain work.

The judge rejected the Respondent's contention that Anderson did not suffer an adverse employment action. The judge relied on Scherrer's failure to put Anderson to work and Rodriguez' testimony regarding Garofalo's statement. The judge found that the Respondent discharged Anderson in violation of Section 8(a)(3) because it believed that he was becoming involved with the Union. My colleagues affirm the judge's finding that the Respondent discharged Anderson, and they find that the discharge was unlawful under the *Wright Line*[30] test. I dissent from their findings for the following reasons.

First and most importantly, I believe the record compels a finding that Anderson's employment with the Respondent ended when he voluntarily took time off, and this precludes a finding that he was discharged. It is undisputed that Anderson voluntarily left his job at the Tillotson jobsite on July 23, 2015, to visit his mother in Panama. The record shows that the Respondent made no promise of continued or subsequent employment to Anderson when he voluntarily left the Tillotson jobsite. Vice President of Operations Garofalo testified without contradiction that RHCG does not provide its employees paid vacation, an employee's job is not guaranteed if he takes time off or goes on vacation, and RHCG fills the positions of employees who take time off if it needs those positions filled.[31] Anderson acknowledged that RHCG's employees get replaced when they are gone for an extended time. Indeed, Anderson stated that he let Supervisor Scherrer know about his plan to take an extended leave because Scherrer "need[ed] somebody to replace him."[32] Supervisor Scherrer also informed An-

[26] Supervisor David Scherrer testified without contradiction that while working under his supervision, Anderson put down wire mesh, moved rebar, and swept.

[27] See R. Exh. 3.

[28] Scherrer also asked whether Anderson worked in the Union, which I agree was an unlawful interrogation. See supra fn. 7.

[29] Contrary to Anderson, Scherrer testified that he instructed Anderson to contact Supervisor Pavon, with whom Anderson previously worked. Employee Rodriguez denied talking with Anderson, and Garofalo denied knowing who Anderson was, let alone saying that Anderson could not work for RHCG anymore. (Again, Anderson was employed in the concrete division, and Garofalo oversaw the demolition division.) The Respondent excepts to the judge's failure to give adequate consideration to the testimony of Scherrer, Rodriguez, and Garofalo. The Respondent also excepts to the judge's ruling prohibiting it from questioning Anderson regarding his filing of a possibly fraudulent insurance claim, where the judge based his ruling on his view that "there is no issue of credibility in this case," which is clearly incorrect. Because I agree with the Respondent that Anderson was not unlawfully discharged, however, I find it unnecessary to pass on the Respondent's exceptions.

[30] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[31] The General Counsel effectively acknowledged that RHCG's employees have a break in their employment when they take time off. See testimony of Garofalo at Tr. 626 ("Q. [B]ecause RHCG doesn't provide vacation. . . . if someone wanted to go on vacation they would have to have a break in their employment and then come back?").

[32] Cases cited by the majority do not involve employees who voluntarily quit their jobs for personal reasons and later asked to come back. Rather, they involve employees who were effectively discharged while participating in a strike. See *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 477 (5th Cir. 2001); *Champ Corp.*, 291 NLRB 803 (1988). Anderson was not discharged. He took voluntary leave, knowing his position could be filled in his absence and expecting that it would be filled. By taking leave from this particular employer with these particular policies and practices, Anderson severed the employment relationship, at least for the time being. I disagree with the majority that whether Anderson intended to *permanently* sever his employment

derson that his spot had been filled when Anderson contacted Scherrer about coming back to the Tillotson jobsite.

The judge did not address the testimony of Garofalo and Anderson—testimony that supports a finding that Anderson voluntarily left the Respondent's employ. Instead, the judge found that events *after* Anderson left his employment demonstrate that Anderson was discharged.[33] Specifically, the judge relied on evidence that Scherrer did not put Anderson back to work after Anderson so requested, Scherrer told Anderson that there was no work for him, and employee Rodriguez told Anderson that Garofalo did not want him working for the company anymore. However, this evidence establishes that the Respondent did not *rehire* Anderson; it is irrelevant to determining whether the Respondent discharged Anderson in the first place. Further, the complaint did not allege that the Respondent unlawfully failed to hire Anderson; and even if failure to hire would be deemed closely connected to the complaint's unlawful discharge allegation, the parties did not litigate a failure-to-hire issue.[34] On this basis alone, I dissent from my colleagues' Section 8(a)(3) violation finding regarding Anderson.

Moreover, even if a failure-to-hire allegation is properly before the Board, I would dismiss the allegation. To establish a discriminatory refusal-to-hire violation under *FES*,[35] the General Counsel must show that (1) the respondent was hiring or had concrete plans to hire when the alleged refusal to hire occurred; (2) the applicant had experience or training relevant to the announced or generally known requirements of the position, or alternatively, the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicant. Once the General Counsel has made this showing, the burden shifts to the respondent to show that it would not have hired the applicant even in the absence of his or her union activity or affiliation. Id. at 12. In my view, the General Counsel failed to sustain his initial burden under *FES* because the record does not support a finding that the Respondent was hiring when the (un)alleged refusal to hire occurred. See id. at 24 (holding that there can be no discriminatory refusal to hire if there is no position).[36]

To see that the General Counsel did not meet his burden of proof, one must first understand the Respondent's hiring practices. The record evidence indicates that the Respondent does not maintain a list of applicants or former employees and does not contact previous applicants or former employees when a position becomes available for which they are qualified. Scherrer testified without contradiction that he never calls back a person who had expressed an interest in employment. Garofalo similarly testified that the Respondent does not maintain a list of applicants for a job. The testimony of Scherrer and Garofalo suggests that when a job opens up, the Respondent hires whoever is available at that moment rather than contacting individuals who had applied previously or former employees like Anderson who had expressed an interest in coming back to RHCG.[37]

There is no evidence that the Respondent had an available position for an unskilled laborer in the concrete division at the time Anderson inquired about returning to that division, which was between July 30 and August 4, 2015.[38] Scherrer said that he had no work for Anderson at the Tillotson jobsite at that time, and nothing in the record contradicts Scherrer's statement. The record shows that Scherrer hired two individuals at the Tillotson jobsite several weeks later—on August 24 and 31, respectively—but there is no evidence these positions were available between July 30 and August 4, and the Respondent has no practice of contacting past applicants when positions open up. In addition, the employees hired on August 24 and 31 each worked only 1 day at the Tillotson site and then moved to other job sites[39] where they performed excavation work, which Anderson did

relationship with the Respondent has any bearing on the question whether he voluntarily left the Respondent's employ in the first place.

[33] Tellingly, neither the judge nor the majority state the date on which Anderson was supposedly discharged. The Region's compliance officer will have to guess when the backpay period commences.

[34] See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[35] 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

[36] My colleagues say that my analysis of Anderson's discharge under *FES* improperly addresses an issue not properly before the Board, and they rely on the fact that the Respondent has not argued that *FES* rather than *Wright Line* should apply. I believe that the Board should apply the applicable law to the facts of each case, regardless of whether the parties have done so. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

[37] Contrary to the majority, I find RHCG's argument that Anderson "stopped working" for RHCG "because of [his] own inaction" consistent with its hiring practices. Other supervisors might have rehired Anderson if he had contacted them when an appropriate position was available.

[38] Given the undisputed fact that Anderson never worked in the demolition division, hiring records concerning that division would be irrelevant to the General Counsel's case.

[39] See GC Exh. 9.

not perform when employed by RHCG.[40] Further, although the Respondent hired more than 20 employees in the concrete division during the month of August, all of them were hired at least 1 week after August 4, when Anderson stopped seeking work at RHCG. In any event, it is unclear whether these employees were hired to perform unskilled labor.[41] Given the Respondent's hiring practices, evidence that the Respondent hired concrete workers a week after Anderson stopped seeking work at RHCG is insufficient to satisfy the General Counsel's burden to show that the Respondent had available work for Anderson at the time he sought to be re-employed by RHCG.[42]

Conclusion

For the reasons stated above, I respectfully dissent in part and concur in part with my colleagues' decision.

Dated, Washington, D.C. June 7, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

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 Claudio Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Claudio Anderson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Claudio Anderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, 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 award to the appropriate calendar year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Claudio Anderson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

RHCG SAFETY CORP.

The Board's decision can be found at https://www.nlrb.gov/case/29–CA–161261 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. 20570-0001, or by calling (202) 273-1940.

[40] Anderson testified that he previously worked excavation for another company, but he did not do so for the Respondent (Tr. 75). And there is no evidence that Supervisor Scherrer knew that Anderson could perform excavation work or that excavation-related positions were available between July 30 and August 4.

[41] All of the new hires except two started working the last week of August. The other two went to work at "51 Jay Street" performing "Concrete Superstructure" starting August 10 and 13, respectively. There is no evidence that "Concrete Superstructure" was the type of the work Anderson had performed for RHCG.

[42] My colleagues say that "the Respondent regularly returned employees to work after employees took time off for vacations and other reasons, including even the need to serve jail time." To the extent they assume that the Respondent would return employees to work regardless of whether it needed more workers at that time, I believe they fail to consider Garofalo's undisputed testimony that once employees leave, their ability to return to work depends on whether there is an available opening and sufficient work (Tr. 681). As discussed above, the record shows that there was no available opening for Anderson at the time he sought to return. Given the record evidence, there was no need for Scherrer to affirmatively testify that there was no work for Anderson at other concrete jobsites.

Erin C. Shaeffer Esq., for the General Counsel.
David A. Tango Esq. and *Aaron C. Carter Esq.,* for the Respondent.
Tamir Rosenblum Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on various days in March and April 2016.

The petition in 29–RC–157827 was filed on August 12, 2015. Pursuant to a Stipulated Election Agreement approved by the Regional Director on August 27, an election was conducted on September 18, 2015. The agreed upon voting unit was as follows:

> Including all full-time and regular part-time demolition workers.
> Excluding all other employees, including concrete workers, clerical and professional employees, guards and supervisors as defined in the Act.

In the election, the challenges were sufficient in number to affect the outcome. As a result, a hearing was conducted before a hearing officer designated by the Regional Director and a report was issued on November 13, 2015. The Regional Director thereafter issued a Supplemental Decision on Challenged Ballots wherein he ordered that 20 of the challenged ballots be opened and counted and that 9 challenges be sustained. On January 27, 2016, a revised tally of ballots was issued and this showed that the challenged ballots were still sufficient in number to affect the outcome of the election.

In the meantime, both the Union and the Employer filed objections to the election.

The Union filed the unfair labor practice charge in 29–CA–161261 on October 2, 2015. This charge was amended on November 30, 2015. On December 18, 2015, the Regional Director issued a complaint in the unfair labor practice case and this alleged in substance;

1. That by a text message on July 30, 2015, the Respondent interrogated Claudio Anderson about his union activities.
2. That on or about July 30, 2015, the Respondent for discriminatory reasons, terminated Claudio Anderson.
3. That in September 2015, the Respondent threatened employees with job loss if they selected the Union as their representative.
4. That in September 2015, the Respondent threatened employees with a reduction in pay if they selected the Union as their representative.

On February 17, 2016, the Regional Director issued a Supplemental Decision on challenged ballots and Objections. At the same time, he issued an Order consolidating 29–RC–157827 with 29–CA–161261. In this report, the Regional Director overruled some of the objections and ordered that a hearing be conducted as to others. Inasmuch as the Company, on March 22, 2016, withdrew its objections, the remaining objections were litigated.

During the hearing, the Union and the Employer stipulated to the eligibility of 22 of the challenged ballots. I thereupon ordered that those ballots be opened and counted. I also concluded that the ballot of Padilla should not be counted because the evidence clearly showed that he had been terminated for nondiscriminatory reasons before the date of the election.

On March 21, the ballots of 22 individuals were opened and counted. But this did not result in a determinative vote. Thereafter, on March 22, the Union and the Employer stipulated that an additional 4 challenged ballots should be opened. When these ballots were opened and counted this resulted in the issuance of a fourth talley of ballots that showed that 36 votes were cast for the Union; 46 votes were cast against union representation; and that the number of undetermined challenged ballots now numbered seven. Because the challenges were no longer determinative and a majority of the valid votes were cast against union representation, the employer withdrew its objections to the election.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is agreed by all parties and I find that RHCG Safety Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. There is also no dispute that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II ALLEGED UNFAIR LABOR PRACTICES

The employer is engaged in construction work and its employees generally work in the field instead of at a home facility. It has two facilities, one at 83 Main Street, Bay Shore, New York, and the other at 112 12th Street, Brooklyn, New York. At times the Respondent has been referred to as Red Hook or Red Hook Safety Corp. Basically, the company is divided into two divisions, one doing demolition work and the other doing concrete work. Christopher Garofalo is the vice president of operations who oversees the demolition division. Tommy Frangipane is the vice president of operations and he oversees the concrete division. Each division utilizes supervisors who have the authority to discharge employees and to effectively recommend hiring.

The alleged discriminatee, Claudio Anderson, became an employee in August 2014 and worked in the concrete division. In this regard, it is noted that Union, which commenced its organizing efforts in August 2015, focused its attention on the demolition workers and not on the employees who worked in the concrete division. During 2015, Anderson worked at a number of construction sites under the supervision of David Scherrer, who in turn worked under the direction of Frangipane. The last jobsite that Anderson worked on was at 2301 Tillotson Avenue, Bronx New York.

In July 2015, while working at the Tillotson site, Anderson requested an extended period of time to visit his mother in Panama. This request was granted by Scherrer.

Soon thereafter, Anderson visited the offices of the Union and among other things signed a union authorization card. Also present at the Union's office were some other employees of the Respondent.

Before leaving for Panama, Anderson's mother called to tell

him that he didn't need to come after all. As a result, Anderson and Scherrer communicated with each other via a series of text messages about his return to work between July 30 and August 4, 2015.

With respect to these text messages, Anderson could not produce his phone as he testified that about 5 days before this trial started, he gave his phone to his sister in Panama. When directed to get the phone back, the General Counsel and the Charging Party's counsel thereafter advised me that the phone's text messages had been deleted when Anderson's sister registered the phone with her own carrier. They therefore conceded that if the phone was examined, it would not show the text messages. This began to sound like the Tom Brady story. (The quarterback for the Boston Patriots).

Nevertheless, phone records confirmed that a series of text messages were transmitted between Anderson's cell phone and the cell phone of Scherrer between July 30 and August 4. This contradicts the testimony of Scherrer who stated that he did not send or receive text messages with Anderson during this period.

Anderson testified that some time after his discharge, he notified the Union about his firing and was asked if he had any proof of discrimination. He then took screen shots of the messages with Scherrer and these were ultimately transmitted by the Union to the NLRB agent who was investigating this charge.

Given the entirety of the evidence, including the fact that the phone records show that the text messages were sent not only on the same dates but at the same times listed on the messages, I conclude that the text messages that were transmitted by Anderson to the Union were authentic even though they were not retained on his own phone.[1] The messages were as follows:

From Anderson July 30, 8:01 am
Sorry David I thing today is Friday

From Anderson July 30, 4:11 pm
Hi david I can work tomorrow and Saturday?

From David July 30 8:36 pm
What's going on with u?
U working for Redhook or u working in the union? [2]

From David July 30 11:04 pm
U got to tell me what's going on

From Anderson reply
I was there to talk you today but you left

From Anderson August 1 6:38 pm
Hi david I can star work Monday whit you?

From Anderson August 2 10:16 pm
Hi David I can star work tomorrow?

From David reply
No right now! I filled your spot come meet me tomorrow

Not right now

From Anderson August 2, 10:25 p.m.
What time

From Anderson August 4 9:31 am
Hi david good morning what chris said?

On or about August 4, Anderson visited the Tillotson Avenue jobsite and spoke to Scherrer who told him that there was no work for him. According to the credited testimony of Anderson, Scherrer then told him to speak with Nick Rodriguez who is a nonsupervisory employee who is often used by the company to convey messages to Spanish speaking employees. When Anderson asked why he couldn't work, Rodriguez told him that Garofalo said that Anderson and some other guys could not work for the Company anymore. Anderson reasonably took this to mean that he was fired.

In my opinion, the evidence shows, contrary to the Respondent's defense, that Anderson was indeed discharged. The series of text messages show that Scherrer was not putting him to work and when Anderson visited the jobsite on August 4, he was told that there was no work for him. The icing on the cake was when Nick Rodriguez told him that the boss didn't want him working for the Company anymore. And even though Rodriguez cannot be considered to be a supervisor, it was shown that he acts as a messenger between the company and the Spanish speaking employees and that he has been used to transmit notifications of termination. The text messages also show that the reason for Anderson's discharge was the Company's belief that he was becoming involved with the Union.

Based on the above, I find that Anderson was discharged in violation of Section 8(a)(1) and (3) of the Act. I also conclude that by asking him if he was working for the Union or for the company, the Respondent illegally interrogated him in violation of Section 8(a)(1) of the Act.

As noted above, the Union filed its election petition on August 12, 2015. In response, the company, with the advice of counsel, held a series of meetings with employees before the election. It also distributed a series of leaflets at the meetings. These meetings, on three separate dates, were conducted by Garofalo at the various jobsites. He was instructed to follow the scripts that are essentially contained in the written documents that were passed out to employees.[3] When Garofalo needed to communicate with Spanish speaking employees, he utilized the translator services of an office employee named Gabriella.

Out of about 80 plus employees, the General Counsel produced two employees who testified about statements allegedly made by Garofalo at two separate meetings.

Raymondo Garcia testified that Garofalo through Gabriella, said that there was no work in Local 79 and that in Local 79 there were a lot of people who don't work.

Lauro Padilla testified that Garofalo said that if the Company won, he was going to give employees benefits and vacations and that if Local 79 loses, they were going to reduce employee salaries.

[1] The Respondent filed a petition to exclude these messages on the ground that they were not complete. That may be so, but I am convinced that they are authentic and therefore are admissible. Accordingly, I deny the Respondent's petition

[2] As previously noted, the Company is sometimes referred to as Red Hook.

[3] In this regard, there is no allegation that anything contained in these leaflets violated the Act.

Neither of these assertions was corroborated by any other persons who attended these meetings.

As to the testimony of Garcia, Garofalo stated that in the course of his speech he did mention that there were many members of Local 79 who were not working whereas his employees were working. To me this is simply making a comparison between the work opportunities available to members of Local 79 in the industry at large as compared to the amount of work that the Respondent has made available to its own employees. I do not construe this as a threat of job loss. In addition, I credit Garofalo's assertion that he neither made any promise of benefits nor made any threats of benefit loss in relation to the election. I shall therefore recommend that these allegations of the complaint be dismissed.

III THE OBJECTIONS

The evidence shows that the Respondent failed to provide an adequate *Excelsior* list. And based on this failure and the fact that the election was relatively close, I conclude that this objection should be sustained and that the election should be set aside.

Pursuant to *Excelsior Underwear*, 156 NLRB 1236 (1996), an employer in a Board conducted election, is required to file with the Regional Director a list of the names and addresses of all eligible voters within 7 days after either the approval of an election agreement or the issuance of Decision and Direction of Election.[4] The purpose of this rule is to provide the petitioning union an opportunity to communicate with eligible voters before the election. The failure to provide such a list or the submission of a substantially erroneous list is grounds for setting aside the election. *George Washington University*, 346 NLRB 155 (2005); *Sonfarrel, Inc*., 188 NLRB 969 (1971); *Ponce Television Corp*., 192 NLRB 115, 116 (1971).

The Stipulated Election Agreement required the Company to submit to the Region for transmittal to the Union, a list of its employees with their home addresses, phone numbers and e-mail addresses. This was agreed to by the Employer. The list that was submitted contained about 84 names and addresses. However, 80 of the addresses were not correct and the Union placed into evidence a group of 26 envelopes that were returned by the Post Office. Also, a union representative testified that when she and others went to make home visits, the employees were not at the addresses on the *Excelsior* list.

Additionally, the list did not contain *any* phone numbers or email addresses, notwithstanding evidence that the Company's supervisors maintained and utilized employee phone numbers on their own cell phones.

Finally, the submitted list did not contain the names of any former employees who worked for sufficient periods of time in the prior 2 years to make them eligible voters under what is called the *Steiny-Daniels* formula.[5] Thus, it is probable that the submitted *Excelsior* list omitted an entire category of employees who might have been eligible voters if they had been aware of the election.

The Union also alleges other conduct in support of its position that the election should be set aside. As I have concluded that the election should be set aside based on the employer's failure to provide an accurate and adequate Excelsior list, I need not deal with the other objections.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, the Respondent has violated Section 8(a)(1) of the Act.
2. By discharging Claudio Anderson because of his union activities, the Respondent has violated Section 8(a)(1) & (3) of the Act.
3. The unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.
4. The Union's objections regarding the failure to submit an accurate and adequate *Excelsior* list are sustained.
5. The conduct found to be objectionable is sufficiently serious to set aside the election and to hold a new one.

REMEDY

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

Having concluded that the Respondent unlawfully discharged Claudio Anderson, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. 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). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the employee in writing that this has been done and that the unlawful discharges will not be used against him in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the employee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, d/b/a Tortillas Dan Chavas*, 361 NLRB No. 10 (2014).

In addition to the above, the General Counsel seeks a remedy that would require the Respondent to reimburse Anderson for any expenses incurred while seeking interim employment. Although I can see the appropriateness of such a remedy, this is not the current law, which treats such expenses as an offset to a discriminatee's interim earning. As the General Counsel is

[4] In *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969), the Supreme Court upheld the validity of the *Excelsior* rule when it stated that the "objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision."

[5] In the Stipulated Election Agreement, the parties agreed that demolition employees who have been employed for a total of 30 working days or more within 12 months immediately preceding the eligibility date or who have been employed 45 days or more within the 24 months immediately preceding the election eligibility date, would be eligible to vote. Citing *Daniel Construction Co*., 133 NLRB 264, 267 (1961), as modified by 167 NLRB 1078 (1967), and *Steiny & Co*., 308 NLRB 1323 (1992).

asking that the Board change its current view of the law, I leave it to the Board to make any changes it sees fit.

Finally, as many of these employees speak Spanish as their first language, the notice should be in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, RHCG Safety Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of Construction & General Building Laborers, Local 79 or any other labor organization.

(b) Interrogating employees about their union activities.

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

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

(a) Within 14 days from the date of this Order, offer Claudio Anderson, full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Claudio Anderson and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Brooklyn and Bay Shore, New York, copies of the attached notice marked "Appendix."[7] 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 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2015.

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

IT IS FURTHER ORDERED that Case 29–RC–157827 be remanded to the Regional Director and that the election held on September 18, 2015, be set aside and that a new election be scheduled.

Dated, Washington, D.C. May 18, 2016

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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 discharge employees because of their membership in or activities on behalf of Construction & General Building Laborers, Local 79 or any other labor organization.

WE WILL NOT interrogate employees about their union activities

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

RHCG SAFETY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29–CA–161261 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.

[6] 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.

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