ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0982-16-R
Certification (Construction - Card Based)

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v NLG 2011 Inc. c.o.b. as Nautical Lands Group and/or Nautical Lands General Contracting Inc., Responding Party

OLRB Case No: 1180-16-U
Unfair Labour Practice

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v NGL 2011 Inc. c.o.b. as Nautical Lands Group and/or Nautical Lands General Contracting Inc., Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - November 10, 2017

DATED: November 10, 2017

Catherine Gilbert
Registrar

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ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0982-16-R**

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **NLG 2011 Inc. c.o.b. as Nautical Lands Group** and/or Nautical Lands General Contracting Inc., Responding Party

OLRB Case No: **1180-16-U**

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **NGL 2011 Inc. c.o.b. as Nautical Lands Group** and/or Nautical Lands General Contracting Inc., Responding Party

BEFORE: Kelly Waddingham, Vice-Chair

APPEARANCES: Kathryn Carpentier and Jim Congdon appearing for the applicant; Paul Boshyk, Nicole Rozario, Kevin Pidgeon, Greg Armstrong and Dean LePage for the responding party

DECISION OF THE BOARD: November 10, 2017

Background

1. Board File No. 0982-16-R is an application for certification filed on July 6, 2016, under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") which the applicant, the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the Carpenters" or "the Union") elected to have dealt with under section 128.1 of the Act.

2. Board File No. 1180-16-U is a subsequently filed unfair labour practice (ULP) complaint alleging that the responding party NLG 2011

Inc. c.o.b. as Nautical Lands Group and or Nautical Lands General Contracting Inc. ("NLG") committed violations of sections 70, 72, 76, 86 and/or 87 in reprisal for employees' support of the Union in the certification application.

Preliminary Motion

3. On the first day of hearing, the Union made a preliminary motion to call as part of its evidence a July 26, 2016 audio recording and transcript of a conversation between two NLG management employees, Messrs Armstrong, Broderick and Mr. Daniel Sullivan. The Union alleges that following the date of application, NLG intimidated and threatened the employment of Mr. Sullivan, suggested that he lie about his employment status, and terminated the employment of Mr. Joshua Savoie.

4. The responding party agreed that the tape is reliable, but disputes its probative value and submits that it has admitted to most of its contents. It further alleges that to admit the tape would have a negative impact on labour relations.

5. I allowed the recording and transcript to be entered into evidence. There is no dispute about the authenticity or accuracy of the tape recording. NLG has admitted to some but not all of the allegations in the ULP. The audio tape and the transcript are clearly relevant, of probative value to the issues at hand, and the best evidence of what was said. As the Board noted in *1425786 Ontario Inc.,* [2003] O.L.R.B. Rep. 687 (Ont. L.R.B.) ("*Wylie*") the recording allows for tone and phrasing to be "more readily revealed", and is simply a superior form of contemporaneous note-taking.

6. With respect to NLG's concern regarding the negative impact on labour relations, this is not a contractual dispute resolution in the context of an on-going relationship between the parties. The Board's primary duty is the enforcement of the Act. The Board is concerned here with determining the facts relevant to the issues that arise in the certification proceeding and a ULP. The tape and transcript will assist the Board in determining those issues.

7. In addition to the audio recording, *viva voce* evidence, was adduced from six witnesses – Daniel Sullivan, Josh Savoie, Union representative Jim Congdon, NLG's Construction Superintendent Greg

Armstrong, Health & Safety Representative Sean Broderick, and Dean LePage, NLG Senior Construction Project Manager.

8. The Board turns first to the application for certification.

9. There are two main issues to be determined by the Board in the application for certification. The first issue is employee status. The responding party submits that the two workers who were at work on the date of application for certification (July 6, 2016), were not NLG employees. The responding party asserts that Daniel Sullivan was an independent contractor, and Josh Savoie was employed by Labour Ready. If Messrs Sullivan and Savoie are found to be employees of the responding party, the second issue to be determined is whether Mr. Savoie performed bargaining unit work for the majority of the day on the date of application for certification.

Mr. Sullivan's Employment Status

Evidence

10. NLG is a general contractor. In March 2016, NLG started work on a private school, the Kanata Academy ("the Kanata Project").

11. Mr. Sullivan is an apprentice carpenter. In May 2016, Mr. Sullivan was looking for work, having just completed his third year at Algonquin College to become a carpenter. In the past Mr. Sullivan had secured work in one of two ways, either through the Carpenters' Union hiring hall or by directly contacting a company. In early May 2016, when Mr. Sullivan drove past the Kanata Project, he saw NLG's sign, and decided to contact NLG.

12. On May 12, 2016, Mr. Sullivan called NLG and spoke with "Vince", who was at the time the Construction Superintendent. Vince asked Mr. Sullivan to attend at the work site that same day. When Mr. Sullivan arrived at the worksite, Vince asked him about his previous work experience, and walked him through the worksite to discuss the work that was required on the Kanata project.

13. Mr. Sullivan did not provide a quote for the work at the Kanata Project. He proposed an hourly rate of $25.00 per hour, Vince did not agree to that amount and proposed $20.00 per hour. Mr. Sullivan agreed to the lower rate of pay.

14. Mr. Sullivan began work at the Project the following day. NLG set Mr. Sullivan's hours of work from 7:00 a.m. to 3:30 p.m. He was required to attend NLG's weekly health and safety meetings run by Mr. Broderick.

15. Mr. Sullivan testified that his daily work routine began by signing in at the Kanata Project site office. NLG's Construction Superintendent, Mr. Armstrong assigned and supervised Mr. Sullivan's work on a daily basis.

16. Mr. Armstrong tracked and verified Mr. Sullivan's hours using the sign-in sheet. He would then prepare time sheet summaries which were provided to payroll. Mr. Sullivan was paid weekly, NLG did not deduct Employment Insurance, Canada Pension Plan, or income tax from Mr. Sullivan's pay cheque.

17. Shortly after Mr. Sullivan received his first pay cheque, he approached Mr. Armstrong to ask that deductions be made. Mr. Armstrong told Mr. Sullivan that NLG did not make deductions for anyone, including himself. NLG did not provide Mr. Sullivan with health benefits, vacation pay, public holiday pay, or overtime pay.

18. Mr. Sullivan provided his own hard hat, safety glasses, and safety boots to the work site. Mr. Sullivan testified that he regularly brought his carpenter's belt which included typical carpentry hand tools, such as a carpenter's hammer, speed square, chalk line, measuring tape, levels, pliers/side cutters, adjustable wrenches and spade bits to the work site.

19. Mr. Sullivan occasionally brought larger tools such as a hammer drill, and twice brought his circular skill saw to the worksite. Mr. Sullivan testified that NLG paid him an extra hour for the use of hammer drill, and replaced a blade for his skill saw. In cross examination Mr. Armstrong testified that NLG replaced the blade because NLG believed that it was responsible for "consumables".

20. A few weeks after Mr. Sullivan began working at NLG, he was told by Mr. Armstrong that his hourly wage would be increased based on his job performance.

21. Mr. Sullivan worked full time for NLG from May 2016 to September 2016, when he left for a higher paying job which was closer

to his home, and provided benefits. When Mr. Sullivan left his employment he did not receive a Record of Employment.

22. During this period of time, although he was free to do so, he did not work for any other company. Mr. Sullivan testified that one weekend he assisted a friend who "bit off more than he could chew" with his mother-in law's house.

Argument & Analysis

23. NLG asserts that Mr. Sullivan was an independent contractor. The Union maintains that Mr. Sullivan was a dependent contractor.

24. The Act defines the term "dependent contractor" as follows:

> "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

25. In the oft-quoted decision of *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, the Board described the considerations at play in this type of case:

> 23.The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that <u>persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining</u>. The determination of who is a dependent contractor is now a comparative exercise that requires

reference to a much broader range of labour relations considerations.

24.This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25.The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26.Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27.This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This

> reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.
>
> [emphasis added]

26. The overwhelming weight of the evidence tendered herein supports a finding that Mr. Sullivan was a dependent contractor, and therefore an NLG employee, on the date of application.

27. I do not accept NLG's argument that Mr. Sullivan was soliciting work as an independent contractor when he contacted NLG looking for work. Mr. Sullivan's meeting with Vince was an interview, in which Vince enquired about Mr. Sullivan's work experience, and reviewed what was needed on the Kanata project. Mr. Sullivan did not provide NLG with a quote for the work that was required on the project. He did not operate a sole proprietor, he had no structure of an independent business, he had no employees, no presence off the work site, he did not advertise. He was simply looking for work.

28. Nor do I accept NLG's argument that Mr. Sullivan's initial (unsuccessful) attempt to negotiate a higher hourly rate is indicative of an independent contractor attempting to exercise a measure of control over the opportunity for profit in the performance of his services. Mr. Sullivan was paid a fixed hourly wage, only for the hours that he worked which as the Board found in *MTM Landscaping Contractors Ltd.* 2016 CanLII 21253 (ON LRB), removed him from the potential for losses or profits that are associated with independent contractors. Mr. Sullivan was paid a fixed hourly wage.

29. The fact that NLG did not withhold and remit income tax or other statutory employment deductions for Mr. Sullivan's does not indicate that Mr. Sullivan was an independent contractor. The Board is more interested in the substance of the relationship than in the manner in which the parties structure their compensation arrangements.

30. The day-to-day relationship between Mr. Sullivan and NLG belies the suggestion that Mr. Sullivan was an independent contractor. Mr. Armstrong assigned, supervised and directed Mr. Sullivan's work. Mr. Sullivan was not contracted to perform a specific type of work, such as installing millwork. He performed whatever work was asked of him by NLG on any given day, he was fully integrated into NLG's business.

31. Mr. Sullivan was scheduled to work Monday to Friday 7:30 a.m. to 3:00 p.m., accordingly, there was very little, if any, flexibility in the schedule for Mr. Sullivan to work independently of his relationship with NLG. Mr. Sullivan's only source of income was NLG and had been for the two months immediately preceding the application filing date.

32. For all the above noted reasons I find that Mr. Sullivan was a dependent contractor working for NLG. There is no dispute that Mr. Sullivan was an apprentice carpenter, performing bargaining unit work on the date of the application. Therefore I find that he should be included in the bargaining unit.

Mr. Savoie Employment Status

Evidence

33. On June 20, 2016 Labour Ready, a temporary labour supply company, sent Mr. Savoie to the Kanata Project, in response to a specific request from Mr. Armstrong to dispatch Mr. Savoie. Mr. Armstrong requested Mr. Savoie because he had previously worked with him, and knew that he was able to work on the tools and do clean up.

34. Labour Ready is a company which provides temporary labour to other businesses. Labour Ready enters into arrangements with other companies in its service area to provide temporary workers at a fixed hourly price (or prices if different types or classifications of workers are required). Labour Ready assumes all responsibility with respect to paying the workers, taxes, WSIB and insurance liabilities etc. for the individuals that it dispatches. Mr. Savoie is an experienced construction worker who had undergone Labour Ready's basic orientation and training. Labour Ready had dispatched him to approximately 30 different worksites between July 2015 and July 2016.

35. The contract under which Labour Ready supplies temporary employees to NLG, provides that NLG is responsible for including the temporary worker in their health and safety program; completing time

cards; and providing site-specific training and equipment to the temporary employee. The contract also stipulates that NLG is responsible for supervising, and directing the activities of the workers.

36. Mr. Savoie was initially dispatched to NLG on a daily time ticket. After a week, Mr. Savoie was switched to a weekly ticket. Mr. Armstrong testified that he knew that Mr. Savoie would be working on the project for a longer period of time, and that a weekly ticket was administratively easier for NLG.

37. Mr. Savoie began his workday at NLG at approximately 7:30 a.m. by signing in at the NLG site trailer. At the end of the week Mr. Armstrong used the sign in sheet to record and approve Mr. Savoie's work ticket. Mr. Savoie would then return to the Labour Ready offices to hand in his ticket and receive his pay. Labour Ready then invoices NLG.

38. Mr. Armstrong provided Mr. Savoie with his daily work assignments and supervised his work. There were no Labour Ready Supervisors on the site. When Mr. Savoie required time off to attend a dentist appointment, Mr. Armstrong approved the request.

39. Mr. Savoie was subject to NLG's health and safety policies, and attended its weekly health and safety meetings. In cross-examination, Mr. Armstrong testified that if Mr. Savoie did not follow NLG's policies, he would not have kept him working at the project.

Argument & Analysis

40. NLG argues that Mr. Savoie was an employee of Labour Ready Temporary Services Ltd. ("Labour Ready"). The Union maintains that he was an NLG employee.

41. The circumstances of Mr. Savoie's employment on the Kanata project gave rise to a tripartite relationship involving Mr. Savoie, NLG and Labour Ready. Such circumstances are not uncommon in the construction industry, in which workers and subcontractors are routinely engaged on an "as needed" basis.

42. During the course of argument, counsel for NLG referenced *B.M. Metals Services Inc.*, 2012 CanLII 63784 (ON LRB) and *Pointe-Claire (City) v. Quebec (Labour Court)*, 1997 CanLII 390 (SCC) asserting that the Board should adopt a more purposive approach, and focus on

the party which exercises the most control over all aspects of the work of the employee, not simply the daily supervision.

43. The Union referred to several cases in which the Board found, on similar facts, that Labour Ready was not the true employer: *Thorium Contracting Limited* 2010 CanLII 8043 (ON LRB), *Manorcore Construction Inc*. 2010 CanLII 61168 (ON LRB), *Metko Construction Inc*. 2013 CanLII 77073 (ON LRB), and *Bomben Plumbing & Heating Ltd*. 2013 CanLII 53646 (ON LRB). The applicants also brought my attention to two cases that involved labour supply businesses similar to Labour Ready: *Westendorp Demolition and John Westerndorp Enterprises Inc*. 2011 CanLII 57532 (ON LRB) and *Rochon Building Corporation* 2015 CanLII 4680 (ON LRB).

44. The Board has addressed the tripartite relationship on many occasions. In *Giffels Constructors* 2015 CanLII 81653, the Board reviewed the development of the law on this question at paragraph 31 to 34:

> 31. In *B.M. Metals Services Inc., supra*, and in subsequent decisions, the Board adopted the analytical approach described by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, 1997 CanLII 390 (SCC), [1997] 1 S.C.R. 1015. In *Pointe-Claire (City)*, *supra*, the Supreme Court was called upon to determine whether the Quebec Labour Court made a patently unreasonable decision in declaring the worker at issue an employee of the City. The Supreme Court was critical of the Labour Court's analysis in tripartite relationship cases, in particular its over-reliance on either of two tests to determine the true employer: the "legal subordination" test and the "integration" test (see paragraphs 35-47). The "legal subordination" test generally addressed the question of which party was in control of the day-to-day assignment and direction of work performed by the individual at issue. The "integration" test (derived from independent contractor-vs-employee cases) considered the extent to which the work of the individual was integrated into the alleged employer's business. The Supreme Court stated that a "more comprehensive approach" was called for in such cases:
>
> > 48. According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as

> exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

32. While most references to *Pointe-Claire (City), supra* pay particular attention to the above paragraph and, in particular, to the list of factors set out in the final sentence, the paragraph that follows is also noteworthy. In paragraph 49, the Court comments favourably on the Ontario and Canada Labour Relations Boards' reliance on a "fundamental control" test to identify the true employer in tripartite relationship cases. The Court described the test as follows:

> 49. […]The application of the fundamental control test leads to an analysis of which party has control over, inter alia, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of factors that are similar to those suggested by the comprehensive approach set out in *Vassart* and in the Court of Appeal's decision in the instant case.

33. The Union submits that the Board has by now effectively abandoned the *York Condominium* test in favour of the analysis articulated by the Supreme Court in *Pointe-Claire (City), supra*. However, as noted above, application of the *York Condominium* test, in

> theory if not in practice, did/does not foreclose consideration of other relevant factors. Whichever analytical framework or test is chosen it should, as stated by the Supreme Court, "[allow] for a consideration of which party has the most control over all aspects of the work on the specific facts of each case." By strictly adhering to a particular set of specified factors – whether drawn from *York Condominium* or *Pointe-Claire (City)* – and applying them in a rigid manner, the Board runs the risk of creating situations in which "the test runs the facts." This scenario must be resolutely avoided.

45. After carefully considering all the evidence in this case it is clear that NLG held the fundamental control over Mr. Savoie's employment. In coming to this conclusion, the Board's focus is on the substance of the employment relationship, rather than the form. Labour Ready did not hire Mr. Savoie. Mr. Armstrong determined that Mr. Savoie was required at NLG's Kanata project, in July 2016, because he had the ability to do clean up and work on the tools. It was Mr. Armstrong's specific request that Labour Ready dispatch Mr. Savoie, which lead to him being *hired*. (see *Thorium Contracting Limited (supra)).*

46. When Mr. Savoie arrived at the Kanata project, it was NLG's Superintendent Mr. Armstrong, and not Labour Ready who assigned, directed and supervised Mr. Savoie's work at the Kanata project. Mr. Savoie used NLG's tools and materials to complete the work with which he was tasked. When Mr. Savoie required time off to attend a dental appointment, he spoke with Mr. Armstrong, not Labour Ready.

47. NLG's agreement with Labour Ready and the terms and conditions under which Labour Ready dispatched Mr. Savoie to the site required that NLG must supervise, and direct the activities of the workers, thereby exercising fundamental control over Mr. Savoie. Further, the *viva voce* evidence of all the witnesses was clear and consistent in establishing that Labour Ready did not provide any onsite supervisory services to NLG. Furthermore, based on NLG's own evidence, Mr. Savoie was not a skilled tradesmen that did not require supervision.

48. As provided for in the agreement between NLG and Labour Ready, Mr. Savoie was required to follow NLG's health and safety policies and attend its weekly meetings. NLG had the power to discipline Mr. Savoie, if he failed to comply with NLG's policies. Indeed on one

occasion when Mr. Savoie received a letter of warning regarding the improper use of power tools.

49. NLG exercised the ultimate control over Mr. Savoie's employment. On or about July 18, 2016, Mr. Armstrong called Labour Ready and advised that Mr. Savoie was no longer required at the Kanata site. As a result Mr. Savoie was out of work for one week.

50. As the Board described in *Thorium Contracting Limited (supra)* and *Manorcore Construction Inc*., *(supra)* Labour Ready was simply the paymaster who paid Mr. Savoie on the basis of information provided to them and authorized by NLG. There is no evidence to suggest Labour Ready had any independent knowledge of the work performed by Mr. Savoie or what those payments relate to.

51. Having regard to the evidence and authorities relied on and for the reasons expressed, I find that NLG was the employer of Mr. Savoie at the job site on July 6, 2016, the application filing date.

Did Mr. Savoie perform bargaining unit work for the majority of the day, on July 6, 2016 –the Date of the Application for Certification?

Evidence

52. There was lengthy examination in chief and cross-examination regarding the work Mr. Savoie performed on July 6, 2016. All of the witnesses had inconsistencies in their evidence and appeared to be affected by self-interest. The Board will recount the evidence only to the extent that it is relevant for its decision.

53. Messrs Sullivan and Savoie testified that on July 6, 2016, they worked together for the majority of the day. In contrast, Messrs. Armstrong and Broderick testified that Mr. Savoie spent the majority of the day doing site clean up, moving bricks and sweeping debris from the scaffolding.

54. Messrs. Sullivan and Savoie testified that on July 6, 2016, when they reported to work, Mr. Armstrong told them that Clifford Smith was absent due to illness, and assigned Mr. Savoie to work with Mr. Sullivan.

55. Mr. Sullivan testified that with the exception of about 40 minutes of extra cleaning on the scaffold, Mr. Savoie worked the entire

day with him on the 4 assigned jobs; building guardrails, working on the ring beam, building fire-boxes, and erecting hoarding. Mr. Savoie measured length and used the skill saw to cut wood; fastened guardrail pieces together; installed the kick plate; assisted Mr. Sullivan to straighten the ring beam and install the rebar. Mr. Savoie cut wood and screwed pieces of wood together for the fireboxes. He held fencing in place, and installed tap cons to erect the hoarding. Mr. Sullivan testified that when the hoarding was completed he and Mr. Savoie left the worksite early at 2:30 p.m., due to the extreme heat.

56. Mr. Savoie testified that he worked with Mr. Sullivan for most of the day. In examination-in-chief, Mr. Savoie gave a detailed and thorough explanation of how he drew the measurements on the wood and operated the skill saw. Mr. Savoie had never worked on a ring beam, and so he followed Mr. Sullivan's instructions, and assisted him to straighten the corners, fasten down the form and install rebar. Mr. Savoie testified that he screwed the fireboxes together, and worked to erect the hoarding, hold the fencing in place and hammer holes.

57. Mr. Savoie testified that Mr. Broderick showed him pictures of the scaffolding on his personal phone in the afternoon, and directed him to move the bricks at the edge to the centre of the scaffolding on the third and fourth level. Mr. Savoie estimated that it took him approximately 30 minutes to move the bricks.

58. In protracted and detailed cross-examination, Messrs. Sullivan and Savoie changed their testimony about the sequence of the 4 jobs, the time they started each job, and the length of time it took to complete the job. Both men acknowledged that the time lines were approximations.

59. Mr. Savoie acknowledged in cross examination that his independent recollection of July 6, 2016, was not particularly good, and was informed by the 3 or 4 times that he had discussed the events of July 6th with Messrs. Sullivan and Congdon. In examination in chief Mr. Savoie gave one version of the sequence of the jobs, and the amount of time it took to complete each job. In cross-examination he provided 2 other versions.

60. Messrs. Armstrong and Broderick testified that on July 6, 2016, Labour Ready labourers, Mr. Pat Hynes and Mr. Savoie spent approximately 5 hours cleaning the scaffolding. Mr. Savoie worked on the scaffolding, moving bricks and clearing debris, while Mr. Hynes

worked on the ground, putting the debris in piles and moving it into the dumpster.

61. Initially Mr. Armstrong testified that Mr. Sullivan worked alone on July 6, 2016, straightening the ring beam (2-3hrs), building the guardrail (5 hours), and erecting the hoarding (30mins). Later, in examination in chief, Mr. Armstrong testified that he assigned Mr. Savoie to work with Mr. Sullivan on July 6, 2016, because Mr. Smith was absent due to illness. According to Mr. Armstrong, Mr. Savoie's work was limited to handling tools and materials.

62. In cross-examination when it was put to Mr. Armstrong that Mr. Savoie used the circular saw to cut pieces of wood for the guard rail, he testified that "if Josh did this, he did it without permission, and in violation of my site policies". Mr. Armstrong admitted that Mr. Savoie had used the reciprocating saw and a grinder at the work site.

63. Mr. Broderick testified that on July 6, 2016, he assigned Mr. Savoie and Mr. Hynes to clean up the scaffolding, and checked on their progress every 30 minutes. In cross-examination, when it was put to Mr. Broderick that on July 6, 2016, Messrs. Sullivan and Savoie worked together, he stated "I find that hard to believe based on those two didn't get along."

64. Mr. Broderick denied seeing Mr. Savoie working on the ring beam or using a skill or circular saw on July 6, 2016. Mr. Broderick testified that Mr. Savoie was a general labourer, not a skilled worker and therefore he was not allowed to work on the power tools.

65. In cross examination, Mr. Broderick acknowledged that on June 24, 2016, after he found Mr. Savoie using a grinder without a safety guard to cut cement, he recorded in his log that he told Mr. Savoie that he must use a safety guard when operating power tools. In cross examination when Mr. Broderick was asked why he didn't record that Mr. Savoie was not authorized to use power tools, Mr. Broderick testified that it "slipped his mind".

66. Keeping the above testimony in mind, the Board turns to the relevant sections of the audio recording made of the July 25, 2016 conversation of Messrs. Armstrong, Broderick and Mr. Sullivan. Mr. Armstrong is recorded 3 times referencing the work that Messrs. Sullivan and Savoie were doing on July 6, 2016:

> 5:06-5:34 That's what ticks me off, the fact that Josh's name on there. Is that someone saw him putting up guardrails [putting wood..loud machine noise]. Because I think the union has got a lot of undercover guys.
>
> 9:03-9:14 Yeah, and like my defence is, is I say, well one of my other guys is missing that day, and I had to put some guardrails in, a fucking emergency, so I got my labourer to help me. What the fuck. But its my prerogative, what I want to use [unintelligible].
>
> 13:14-13:34 And they saw you guys putting up guardrails, and working on the beam, and they've gotten your name. And that's it. I mean why would you write up Josh's name, he's a fucking labourer, [unknown voice: did you talk to him?] so its obviously someone who was observing and [hasn't asked] too many questions, but just taking down the names. They wanted to know who was doing their fucking work, what are their names.

67. In cross-examination Mr. Armstrong agreed that the reference to "you guys" at 13:14 on the audio tape is Messrs. Sullivan and Savoie. Mr. Armstrong agreed that when he said "working on the beam," he meant the ring beam.

68. On the final day of testimony, in cross examination, Mr. Savoie, acknowledged that on the previous hearing day, February 23, 2017, while Mr. Sullivan was under oath, during the lunch break, Mr. Savoie discussed with Mr. Sullivan the work that the men had performed on July 6, 2016. Mr. Savoie denied that they discussed the time it took them to complete each job.

69. Mr. Congdon, the Union representative for the Carpenters testified that at the beginning of the hearing he told Messrs Savoie and Sullivan that they could not discuss the case once they were under oath, and began to testify. Mr. Congdon testified that on February 23, 2017, he spent the lunch break with Messrs. Savoie and Sullivan and denied that there was any discussion between the men about the work that was performed on the application filing date.

Argument & Analysis

70. The test for determining whether an employee is employed in a construction industry bargaining unit is set out *E & E Seegmiller Limited*, [1987] O.L.R.B. Rep. January 41:

> i. whether the individual was employed by the responding party employer and at work on the date of the application for certification; and
>
> ii. if so, the work that the individual spent the majority of his/her time doing on the date of application;
>
> iii. or where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

71. Mr. Savoie was an NLG employee at work on July 6, 2016, the application filing date. The only issue is whether Mr. Savoie was performing bargaining unit work for the majority of the day.

72. The Board has serious concerns regarding the reliability of the *viva voce* evidence in this proceeding. The Board is particularly concerned by NLG's allegation that there may have been a breach of the Board's witness exclusion order. Regardless, of whether or not there was a breach of the Board's exclusion order, the Board finds that the evidence of Messrs. Armstrong and Broderick was not particularly strong. During a strenuous cross examination both men seemed at times confused and gave different versions of the sequence of the jobs and the length of time it took to perform the jobs.

73. The Board finds that Mr. Armstrong's evidence was not particularly helpful. Mr. Armstrong testimony that Mr. Savoie spent the majority of the day doing site clean-up changed significantly during both direct examination and cross-examination. Initially, Mr. Armstrong testified "no one" worked with Mr. Sullivan on the guardrails, ring beam, and erecting hoarding. Mr. Armstrong then testified that Mr. Savoie "assisted" Mr. Sullivan by handling materials and tools. Mr. Armstrong's acknowledgement in cross examination that Messrs. Sullivan and Savoie were required to work closely together because Mr. Smith was absent, and that some of the work on the ring beam required two men, completely contradicts his examination in chief that Mr. Savoie spent the majority of his day cleaning scaffolding.

74. Although there were inconsistencies and contradictions in the evidence of Mr. Armstrong, Sullivan and Savoie, all 3 witnesses testified that on the application filing date (July 6, 2016) Mr. Armstrong assigned Mr. Savoie to work with Mr. Sullivan to build guardrails, straighten the ring beam and erect hoarding. This evidence is corroborated by the audio recording.

75. Mr. Broderick's testimony that on July 6, 2016 he did not see or believe that Mr. Savoie worked with Mr. Sullivan is contradicted by the evidence of Messrs. Armstrong, Sullivan, Savoie, and the audio recording.

76. In these circumstances, the audio tape evidence is the best evidence before the Board, and the comments made by Messrs. Armstrong and Broderick are admissions against interest. Both parties argued at some length over the weight to be given to the audio tape. There is no dispute that the audio tape is authentic. Nor is there any evidence or indication on the audio tape that Mr. Sullivan induced either Messrs Sullivan or Broderick to make a statement. The audio tape is the proverbial "fly on the wall", the most reliable recounting of the work Mr. Savoie performed on July 6, 2016.

77. The audio recording clearly indicates that Mr. Savoie was assigned to work with Mr. Sullivan on July 6, 2016, and did more than simply handle tools and materials. Mr. Armstrong states *inter alia:*

> 5:06-5:34 That's what ticks me off, the fact that Josh's name on there. Is that someone saw him putting up guardrails [putting wood..loud machine noise]. Because I think the union has got a lot of undercover guys.
>
> 9:03-9:14 Yeah, and like my defence is, is I say, well one of my other guys is missing that day, and I had to put some guardrails in, a fucking emergency, so I got my labourer to help me. What the fuck. But its my prerogative, what I want to use [unintelligible].
>
> 13:14-13:34 And they saw you guys putting up guardrails, and working on the beam, and they've gotten your name. And that's it. I mean why would you write up Josh's name, he's a fucking labourer, [unknown voice: did you talk to him?] so its obviously someone who was observing and [hasn't asked] too many questions, but just taking down the names. They

> wanted to know who was doing their fucking work, what are their names.

78. Mr. Armstrong acknowledged in cross-examination that the reference to "him" is Mr. Savoie and that "you guys" is Messrs Sullivan and Savoie. Mr. Armstrong references Mr. Sullivan installing guardrails and working on the ring beam. Mr. Armstrong states; "…that someone saw him putting up guardrails," "And they saw you guys putting up guardrails and working on the beam".

79. The reference to "putting up guardrails" in this case entails the specific tasks of hammering and screwing. Erecting guardrails on site is within the jurisdiction of carpenters and carpenters apprentices. The Board is satisfied that the reference to "putting up" guardrails is not simply handling materials, passing tools and holding materials in place.

80. Even if the Board accepted that Mr. Savoie's work was limited to assisting Mr. Sullivan, in the context of this case, the work that Mr. Savoie performed is Carpenter's work.

81. In *AON Builders Inc*., 2010 CanLII 11176 (ON LRB), the Board stated the following at paragraphs 13 and 14:

> 13. Simply because the Board will not evaluate the relative strengths of competing jurisdictional claims in determining employee status disputes in applications for certification, does not, however, mean that the Board makes its determinations concerning the status of employees performing shared work in a contextual vacuum. Rather, if the Board's decisions are to be relevant and meaningful, the work performed must be considered in the particular circumstances (to use the words of *H & D Construction, supra*) as opposed to considering a group of tasks in isolation and out of context. For example, workers in virtually every construction industry bargaining unit, to a greater or lesser degree, regularly move materials on jobsites. Accordingly, any meaningful examination of which particular bargaining unit any particular worker performing such tasks might falls into must, then, consider not only the fact that objects have been physically moved but must also consider other contextual factors. These factors potentially include: what was moved; for what purpose(s) were the objects moved; and, what the particular worker involved did

> with the objects after he had moved them. Not to consider such contextual factors in such situations is to risk expanding the number of potentially shared tasks to such a degree that workers can be found to be in more than one bargaining unit at a particular point in time which is exactly what the *majority of the time on the date of application* principle established by the *Gilvesy test* was specifically designed to avoid.
>
> 14. Therefore, where a numerically significant amount of shared work is at issue, the Board must look to relevant circumstance, beyond the physical tasks that an employee was doing, in order to determine whether or not he was performing the work of an employee in the particular bargaining unit in question.

82. In applying the above principles to a determination of the employee status of Mr. Savoie, there is no question that handing tools, and moving and holding materials in place is tending a carpenter. It is also work that can be performed by a construction labourer tending to a carpenter.

83. While it is true that Mr. Savoie was hired as a labourer, Mr. Armstrong requested that Labour Ready send Mr. Savoie to the site because he had experience on the tools. Mr. Savoie had worked on the tools at the worksite, as evidenced by NLG's June 24, 2016 letter of discipline for operating a power tool without a safety guard. In this context given Mr. Savoie's skill set and work experience, it is reasonable to infer that when Mr. Armstrong assigned Mr. Savoie to work with Mr. Sullivan, on the guardrails and ring beam, he was doing carpenters' work.

84. On all the facts, the Board is satisfied that Mr. Savoie was doing carpentry work for the majority of the day on the date of application, and he shall be included in the bargaining unit.

85. The Board is satisfied that the applicant is in a certifiable position, however, there seems to be a dispute between the parties as to the proper legal name of the responding party employer. The applicant union asserts the employer's name as NLG 2011 Inc. c.o.b. as Nautical Lands Group and/or Nautical Lands General Contracting Inc. The responding party, in its response, states its correct name as Nautical Lands General Contractors Inc. ("NLGC"). As a result, the Board directs the applicant to write to the Board, by no later than **November 16, 2017,** and indicate whether it is agreeing with the responding party's

assertion as to the correct name and/or whether the parties in this matter have been able to agree as to what is the correct legal name of the employer. Once the Board has resolved the outstanding issue of the correct name of the responding party, it will proceed with issuing certificates to the applicant.

Unfair Labour Practice Complaint

Evidence

86. On the morning of July 7, 2016, when Mr. Savoie signed in at the site office, Mr. Armstrong asked him if there had been union representatives on site. Mr. Savoie testified that he told Mr. Armstrong that he was not aware of union representatives on site, to which Mr. Armstrong replied that he did not like union representatives.

87. Mr. Armstrong did not dispute that he told Mr. Savoie that he didn't like "reps" on site. Mr. Armstrong was unsure if he told Mr. Savoie that the reason he was opposed to union representatives on site was that they didn't follow health and safety rules, and report to the site trailer.

88. The following week (July 11-15, 2016), Mr. Armstrong was on vacation. Mr. Savoie's last day at NLG was Monday, July 11, 2016. Mr. Savoie did not attend his scheduled shifts at NLG on July 12th or 13th, 2016. Mr. Savoie testified he did not call to report his absence, rather he texted Mr. Sullivan and asked him to tell Mr. Armstrong that he was suffering from heat stroke and unable to attend work.

89. Mr. Savoie testified that on July 14, 2016, when he returned to work, Mr. Broderick told him to go home, and that Mr. Armstrong would call him when he returned from vacation. Mr. Broderick denies that he told Mr. Savoie not to return to work, or that Mr. Armstrong would contact him.

90. Mr. Armstrong testified that when he returned from vacation, he called Labour Ready and told them that NLG no longer required Mr. Savoie's services, without providing any reasons. When he was asked in cross examination about NLG's reason for Mr. Savoie's dismissal, he testified that there was no longer sufficient work, and that he chose to terminate Mr. Savoie's services, because he had less seniority than the other 2 Labour Ready workers. Additionally, there had been complaints from other workers that Mr. Savoie was frequently late.

91. Mr. Savoie was unemployed for one week prior to securing alternate employment.

92. On September 6, 2016 Mr. Armstrong sent a letter to Labour Ready in which he wrote:

> Through the course of certain proceedings before the Ontario Labour Relations Board, it has come to our attention that Labour Ready may be under the mistaken impression that Josh Savoie is not allowed back on NLGC's Kanata Academy jobsite in Stittsville, Ontario.
>
> The purpose of this letter is to confirm that Mr. Savoie is welcome on the Kanata Academy jobsite should you wish to assign him to perform available work….

93. Turning to the origin of the audio tape, Mr. Sullivan testified that after the application for certification was filed, he talked to Mr. Congdon about being nervous, Mr. Congdon had told him to record a conversation if he thought something might happen. On the morning of the July 25th, Mr. Sullivan used his cell phone to record a conversation between himself and Messrs. Armstrong and Broderick.

94. On the recording Mr. Armstrong states:

> I don't know what the fuck has been going on here lately on you. So, Everyone was freaked out at head office last week, sneaking around, asking questions. And, uh sound like they are taking us to court so everyone in head office is freaking out.

95. Mr. Armstrong then asks Mr. Sullivan if he is union. Mr. Armstrong tells Mr. Sullivan:

> If anyone asks, just tell them you're…for now, just say you're working as a handyman on site.

96. Mr. Armstrong continues:

> It seems like on the sixth, the incident seems to be the sixth. Now the strangest thing is that fucking asking question, and the thing is that the names they took were yours and Josh, so I checked the sixth was the day that Cliff wasn't here.

97. The audio tape continues with Mr. Armstrong stating that NLG has been able to avoid the union, and trying to determine how the union came to be on site.

98. The Mr. Broderick tells Mr. Sullivan:

> You're a handyman now.

99. On the recording Mr. Armstrong agrees with Mr. Broderick's suggestion, stating:

> Yeah you're a handyman and you're an independent contractor. You're not directly, like…but he says, they can even, they can argue that. They can say, well, does he bring his own tools? If we say no [unintelligible] No, then he's fucking employed there. So, its going to be a bit of an argument. So don't talk to anybody who asks you questions. We'll see what happens. The thing that pisses me off is, these motherfuckers come and they compromise people….

100. In cross examination Mr. Armstrong agreed that Mr. Sullivan had been hired as a carpenter and if anyone asked Mr. Sullivan, he should say tell them that he was working as a handyman. Mr. Sullivan elaborated saying that he was relaying what "head office" understands them to be, "jack of all trades".

101. On the recording Mr. Armstrong continues:

> Because you could fucking have an excellent job here for next fucking three, four years man. And these guys are trying to fuck that over. If I were you, I'd be burning the place down.

102. In cross-examination Mr. Armstrong agreed that when he said "these guys" he was referring to the union.

103. Mr. Armstrong can also be heard on the audio tape saying:

> I'm going to employ every [unintelligible] from the union [unknown laughter]. The rates that we pay, they don't want to do it man, Me, I'm not totally against it, like I'm saying, you know, if you're sending me a fucking guy that's worth every cent, you know? But like, what they're going to do, like Dean, Dean is very

> anti, because he was sixteen years in the carpenters' union. And he said they never faucking delivered what they promised. So [unintelligible] you're talking, before you fucking, so don't join anything unless you've spoken to him.

104. Mr. Armstrong tells Mr. Sullivan:

> If you do, if you want to sign up, give me a call. I'll speak to Dean about it. We've got other work [unintelligible] But like it might compromise the position here, they might say, well, we're not prepared to pay that rate…

105. Messrs. Armstrong and Broderick are both recorded speculating about who brought the Union on site. At one point in the audio-tape, Mr. Broderick states: "Yeah, somebody's a fucking rat here".

106. In cross-examination, Mr. Sullivan clarified some of the parts of the recording which were not audible. He testified that he told Mr. Sullivan that Dean LePage had told him that NLG's next job was a retirement home, and that Mr. Sullivan could negotiate his rate of pay. Mr. Armstrong told Mr. Sullivan that he should check with the Union to determine if the work was consistent, and that NLG could guarantee him work for 2 to 3 years. On the tape Mr. Armstrong states: "But, um, you gotta weigh up the rate vs. guaranteed work."

107. In September 2016 Mr. Sullivan left NLG after he was able to secure employment closer to his home.

Argument & Analysis

108. The Carpenters allege that NLG breached sections 70, 72, 76 and 87 of the Act. The relevant provisions read as follows:

> 70. No employer or employers' organization and no person acting on behalf of an employer or an employer' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use

coercion, intimidation, threats, promises or undue influence.

***

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

***

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

***

87. (1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

(a) refuse to employ or continue to employ a person;

> (b) threaten dismissal or otherwise threaten a person;
>
> (c) discriminate against a person in regard to employment or a term or condition of employment; or
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
>
> because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

109. The Union alleges that NLG reprised against Messrs. Savoie and Sullivan by questioning them about the Union and their involvement with the Union; terminating Mr. Savoie's employment; and threatening Mr. Sullivan's job security.

110. Mr. Armstrong admitted that on July 7, 2017, he asked Mr. Savoie if he knew that Union representatives had been on site, and told him that he did not like union representatives. The Board finds that Mr. Armstrong's comment that he did not like the Union representatives on site, made the day after the application for certification was filed, was meant to threaten and intimidate Mr. Savoie, regardless of whether or not Mr. Armstrong explained his reasons for making such a comment.

111. The Board finds that Mr. Savoie's termination was motivated in part by anti-union animus. Mr. Broderick did not contact Labour Ready when Mr. Savoie failed to report to work on July 12th or 13, 2016. Indeed when Mr. Armstrong returned from vacation, and contacted Labour Ready, to tell them NLG no longer required Mr. Savoie's services, he did not tell Labour Ready that Mr. Savoie had failed to report to work, or that he was frequently late.

112. A decision to dismiss an employee must be entirely free of anti-union animus. When the totality of the evidence is considered including the timing (one day after the application for certification) of Mr. Armstrong's enquiry and comment to Mr. Savoie regarding the Union being on site, the fact that neither Mr. Armstrong, nor Mr. Broderick reported to Labour Ready that Mr. Savoie failed to report to work on July 12th and 13th, 2016, or was allegedly frequently late, it is clear that

the termination of his employment was at least in some part related to anti-union animus.

113. Turning to the conversation on the audio tape. The Board notes at the outset that NLG initially denied all of the Union's allegations in its response. However, once the audio recording was disclosed NLG admitted to most of the allegations in the complaint.

114. The Board does not accept NLG's argument that Mr. Sullivan was deceitful, and led Messrs. Armstrong and Broderick into the July 25, 2016 conversation. There is simply nothing on the audio tape to indicate that Mr. Sullivan "manipulated" either Messrs Armstrong or Broderick to incriminate themselves.

115. The Board accepts NLG's submission that the audio recording was a "shoot from the hip discussion about unionization" between Messrs Armstrong, Broderick and Sullivan. It is precisely for this reason that the audio recording is reliable. The comments made by Messrs. Armstrong and Broderick on the audio recording are admissions against interest. Messrs. Armstrong and Broderick engage in "cowboy tactics" by attempting to corral Mr. Sullivan into submission. They were unguarded, frequently using vulgar language to make threatening, intimidating, and coercive comments, and ask questions which violate the Act.

116. NLG admitted that Mr. Sullivan asked Mr. Sullivan if he was a member of the Union, and if he had had discussions with the Union. At one point in the audio-tape Mr. Armstrong asks Mr. Sullivan; "You're not union, right?" The interrogation of an employee by a member of management about the employee's membership in a trade union constitutes a violation of the employee protections afforded by the Act. Mr. Armstrong's questions at the workplace about Mr. Sullivan's membership in the Union, in combination with promises of job security for 3 to 4 years if he decided not to become a member of the union, amount to interference with the selection of a trade union and therefore a violation of the Act.

117. NLG also admitted that Mr. Armstrong told Mr. Sullivan that if he chose to become a member of the Union it would compromise his position at NLG, because they would not pay union rates. There are several references to a union membership threatening Mr. Sullivan's job security at NLG. At one point Mr. Armstrong states:

> We'll see what happens. The thing that pisses me off is, these motherfuckers come and they compromise people, like, Hank here.
>
> Because you could fucking have an excellent job here for next fucking three, four years, man. And these guys are trying to fuck that over. If I were you, I'd be burning the place down.

118. On the audio tape Mr. Armstrong tells Mr. Sullivan:

> If you do, if you want to sign up, give me a call. I'll speak to Dean about it. We've got other work [unintelligible] But like it might compromise the position here, they might say, well, we're not prepared to pay that rate…

119. These comments constitute violations of the Act, as they are coercive and threats to Mr. Armstrong's job security. Now it is true that Mr. Armstrong testified that he was expressing his "opinion", and that he had not spoken to senior management prior to telling Mr. Sullivan that management was unwilling to pay union rates. Nevertheless, the comments do relate to Mr. Sullivan's job security, and were uttered by a member of management in the workplace. Given those two related factors, the Board has no difficulty concluding these comments amount to violations of sections 70, 72 and 76 of the Act.

120. Mr. Armstrong denied that he told Mr. Sullivan to lie about his employment status. However, on the audio tape Mr. Armstrong tells Mr. Sullivan to lie about his status as an employee of NLG and as a carpenter. Mr. Armstrong tells Mr. Sullivan that if anyone asks "just tell them you're… for now, just say you're working as a handyman on site"; "Yeah, you're a handyman and you're an independent contractor." These statements are made by members of management to Mr. Sullivan interfere with the process of unionization and intimidate and coerce Mr. Sullivan to lie with regard to a Board proceedings, and therefore violate sections 70, 76 and 87 of the Act.

121. For all the aforementioned reasons, the Board makes the following declaration and orders:

> 1. The Board declares that NLG violated ss. 70, 72, 76 and 87 of the Act;

2. The Board orders NLG to cease and desist from violating the Act; and

3. The Board orders NLG to pay to Mr. Savoie 5 lost wages in the amount of $411.25 which compensates for a loss of 5 days' pay at $11.75 per hour at 7 hours per day.

122. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

"Kelly Waddingham"
for the Board

APPENDIX A

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