

**J. E. Merit Constructors, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.** Cases 15-CA-10661 and 15-CA-10713

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On January 26, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint.

<sup>1</sup>The General Counsel, the Charging Party, and the Respondent have accepted 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.

The judge erroneously referred to Union Business Agent John Simoneaux as Paul Simoneaux.

*Charlotte White* and *Paul H. Derrick, Esqs.*, for the General Counsel.

*G. Michael Pharis* and *Thomas R. Peak, Esqs. (Taylor, Porter, Brooks & Phillips)*, of Baton Rouge, Louisiana, for the Respondent.

*Michael J. Stapp, Esq. (Blake & Uhlig, P.A.)*, of Kansas City, Kansas, for Boilermakers Union.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard in Baton Rouge, Louisiana, on June 26, 27, and 28, 1989, on an original unfair labor practice charge filed on April 11, 1988, and separate complaints issued on October 11, 1988, in Case 15-CA-10661, and on November 15, 1988, in Case 15-CA-10713, alleging that the Respondent<sup>1</sup> violated Section 8(a)(3) and (1) of the Act by refusing to hire job applicants because of their union affiliation. In its

<sup>1</sup>The name of the Respondent appears as amended at the hearing. References in this proceeding to "J. E. Merit" and "UMC of Louisiana" pertain to the same entity.

duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record in this proceeding, including consideration of the posthearing briefs,<sup>2</sup> and my opportunity directly to observe the witnesses while testifying and their demeanor, it is found as follows.

I. JURISDICTION

The Respondent is a Louisiana corporation with a place of business in Baton Rouge, Louisiana, from which it is engaged in industrial construction and maintenance. In the course of said operations, the Respondent annually provides services valued in excess of \$50,000 to customers in Louisiana, each of which, in turn, manufactures and ships goods valued in excess of \$50,000 directly to customers outside the State of Louisiana. The complaints allege, the answers admit, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO,<sup>3</sup> and its Local 582, headquartered in Baton Rouge, Louisiana, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

This consolidated proceeding is primarily concerned with an employer's failure to act favorably on employment applications submitted by a craft union during the latter's initial organization campaign. These applications presumably were completed by union members for the purpose of both securing employment and to further the Union's organizational objectives.

The Respondent, formerly known as UMC of Louisiana, Inc., is a construction contractor whose operations include heavy maintenance performed at various industrial sites both within and outside the State of Louisiana. It has historically operated on a nonunion basis. In this capacity, it routinely bids against competing contractors, whose number includes both nonunion and those who do recognize and enter into agreements with affiliated labor organizations. In 1988, the

<sup>2</sup>The Respondent's reply brief, filed on September 6, 1989, is stricken. Special permission not having been granted for such filing, pursuant to the General Counsel's motion of September 7, 1989, the reply brief has not been read or otherwise considered since not sanctioned by any relevant provision of the Board's Rules and Regulations.

<sup>3</sup>The caption is amended to delete Case 15-CA-10561, which has been severed in order to accommodate a settlement. Thus, a complaint was issued in that case on charges filed by the International Union of Operating Engineers, Local 406. During the hearing, the General Counsel, in response to a withdrawal request, deleted all allegations in that complaint except an independent 8(a)(1) challenging an unlawfully broad no-solicitation rule. That allegation was the subject of a settlement agreement approved by me, which is in evidence as ALJ Exhs. 3(a) and (b). Compliance having been achieved, by order of me dated September 28, 1989, the General Counsel's motion to withdraw the complaint was granted.

Respondent was involved in work at some 22 jobsites in the vicinity of Baton Rouge, including the instant Exxon oil refinery.

Dating back to 1981, the Respondent has maintained an almost continuous presence at Exxon in conjunction with miscellaneous maintenance tasks. Its work force at that facility is volatile, shifting dramatically, depending on the nature of the job. Turnarounds, which involve renovation and overhaul of component parts of the refinery, are the largest and most complex jobs. As they progress, refinery production operations are halted, thus, creating a time-critical scenario, causing the contractor's manpower needs to swell. To ensure that the disruption to the customer's operations be as limited as possible, the contractor depends on broad scale temporary hiring of casual labor. Commencing in early March 1988, the Respondent, at Exxon, was involved in four turnarounds. As events unfolded, the Respondent's payroll, during these jobs, expanded to about 1500 employees, including craftsmen traditionally represented by building trade unions, including boilermakers, pipefitters, and welders represented by Local 582.

Local 582's attempt to organize the Respondent's projects at Exxon was a step in its "Fight Back Program" against several nonunion maintenance contractors operating within its territorial jurisdiction.<sup>4</sup> As was true with other targeted contractors, Local 582 delayed until the turnarounds were soon to begin or in progress before showing its hand.<sup>5</sup> Apparently, prior to any formal steps to organize, several Local 582 adherents had secured employment with the Respondent, and were actually on the Exxon job when, by telegram dated March 7, 1988,<sup>6</sup> Local 582 notified the Respondent as follows:

This is to notify you that the International Brotherhood of boilermakers Iron Ship Builders Blacksmiths Forgers and Helpers are actively engaged in organizing your employees working at the Exxon Plant at Baton Rouge, Louisiana. The following employees wish to be identified as members of our organizing committee. They are among many engaged in organizing on this job. Our organizing committee is listed below:

|                   |                   |
|-------------------|-------------------|
| John A. Murphy    | Anthony Vicknair  |
| Charles Clardy    | Richard R. LeJuen |
| Jerry Sullivan    | Carey Taylor      |
| Brian Sellers     | Leon Kimble       |
| Charles Bowles    | Ted Bowman        |
| Anthony Polotzola |                   |

We remind you that their rights are protected by Section 7 of the National Labor Relations Act.

This announcement would be followed by a strategy central to the "strike back" campaign. Pursuant thereto, Local 582 solicited its members to seek employment with the Respondent and other targeted employers.<sup>7</sup> To that end, by let-

<sup>4</sup>See, e.g., *Sunland Construction Co.*, [309 NLRB No. 180 (1989)]; *Harmony Corp.* [301 NLRB 578 (1991)].

<sup>5</sup>Notice is taken of the fact that recognition was officially sought at Sunland on March 8, 1988, and at Harmony, on March 7, 1988.

<sup>6</sup>Unless otherwise indicated, all dates refer to 1988.

<sup>7</sup>G.C. Exh. 5. These letters included blank employment applications used by the Respondent in its hiring process, as well as those used by Sunland Construction Co., Inc. and Harmony Corp. Local 582 filed unfair labor practice

charges dated March 9, Business Agent Paul Simoneaux, appealed to Local 582 members as follows:

Enclosed you will find three (3) applications for non-union Contractors. As you know we have started our "Fight Back Program." We need the membership of Local 582 to complete the applications and return [them] to us *as soon as possible*.

Your cooperation with this matter is imperative. LETS FIGHT BACK NOT SIT BACK.

If you have any questions please contact the Local immediately.

On March 14, Simoneaux met with the insurgent employees, who designated Charles Clardy, Gary Bose, and John Murphy as the employee leaders of the campaign. They were given hats, badges, and blank organization cards to assist in their efforts to organize.

On March 27 and 28, the following ad appeared in the "State Times," a Baton Rouge newspaper:

#### UMC OF LOUISIANA

Is now accepting applications for major turn-around work in the Baton rouge area for all crafts. Turn-around work will begin in april [sic] & last thru June with a 60 hour work week. If qualified, apply in person.<sup>8</sup>

Consistent with the appeal set forth in the Union's letter of March 9, numerous applications were purportedly completed by, or on direction of, Local 582 members, and then delivered to the Union.<sup>9</sup> Subsequently, according to the testimony of Simoneaux, on March 29, he delivered 56 applications to the Respondent's offsite personnel office in Baton Rouge. With the exception of Dawson Fontenant and James Guice, the record does not disclose that these individuals ever appeared in person at the Respondent's premises or took independent steps to secure employment. The Respondent made no job offers to any within this group. In fact, testimony adduced in its behalf reveals that it was unaware of the existence of these applications until August, well after completion of the turnarounds, and hiring incidental thereto.

Three days after the alleged delivery of the applications, on April 1, the Union filed its initial refusal-to-hire charge.<sup>10</sup>

The complaints allege that the Respondent's failure to act favorably on Simoneaux's mass submission was founded on discriminatory considerations and violative of Section 8(a)(3). Similar allegations are made with respect to individ-

charges contesting the hiring practices of all three firms. On September 5, 1989, I issued a decision in *Sunland Construction Co.*, concluding, inter alia, that Sunland had engaged in a variety of unfair labor practices in combatting Local 582's organizational effort. Earlier, Administrative Law Judge Walter Maloney found that Harmony had discriminated against a single individual during a similar drive by Local 582. See *Harmony Corp.*, supra.

<sup>8</sup>G.C. Exhs. 19(a) and (b). A followup appeared in that newspaper's Sunday edition, "The Sunday Advocate," on April 3. G.C. Exh. 19(c).

<sup>9</sup>G.C. Exhs. 7(a)-(ccc). At the hearing, the Respondent conceded, in the interest of expediting the proceeding and only provisionally, that all applications involved in the case are authentic and were executed for the purpose of obtaining employment. It was agreed, however, that those matters would be subject to litigation in the event that a compliance proceeding proves necessary, with the General Counsel, at such time, having the burden of proving both authenticity of the applications and that each reflected a sincere intention of securing work.

<sup>10</sup>A representation to this effect by the Respondent's counsel is confirmed at the C.P. Br. 7.

uals who appeared personally at the Respondent's personnel office in quest of employment, namely, Dawson Fontenot, James Guice, Joseph Bergeron, L. J. Garza, A. J. Joseph, Arthur Ree Richardson, and Von Earl Williams.

The Respondent defends with respect to the mass filing, as well as the individual filings by Bergeron, Fontenot, and Guice on grounds that the absence of evidence that it was aware of these applications, or of any link between them and the organization campaign, gives rise to a fatal failure of proof under *Wright Line*, 251 NLRB 1083 (1981). By way of defense, it is asserted further that Garza and Williams, when contacted by the Respondent, indicated that they were committed elsewhere, while Joseph and Richardson were actually hired.

## B. Concluding Findings

### 1. The mass applications

#### a. The filing

As indicated, Business Agent Simoneaux testified that he delivered 56 applications to the Respondent's employment office in Baton Rouge on March 29.<sup>11</sup> He describes each as completed by a qualified journeyman and member of Local 582. Simoneaux was accompanied at the offsite employment office by Assistant Business Agent John Kelly.<sup>12</sup>

This step coincided with the Respondent's placement of daily classified advertisements seeking all crafts. When the union representatives appeared about 9 a.m., some 40 to 45 prospects were already in line. Apparently, Simoneaux alone joined them, but, eventually, because he had an appointment, he elected to bypass the others, going to the front. He overheard someone instructing applicants to complete their applications and place them in a basket. Simoneaux therefore dropped the applications in that basket, recalling that he did not remove the rubberbands which bound them both vertically and horizontally.

#### b. The refusal to hire

During the hearing, the Respondent conceded that its records do not disclose that job offers were made to named discriminatees other than:

|                       |                |
|-----------------------|----------------|
| Luciano Garza         | A. J. Joseph   |
| Arthur Ree Richardson | Ferrall Alford |
| Von Earl Williams     |                |

The Respondent, also having represented that company records would reflect such offers, if made, it is inferred that, with the above exceptions,<sup>13</sup> the Respondent took no action on the employment applications which lie at the core of the issues of discrimination in this case.

<sup>11</sup> This group included Lawrence Walter Taylor. His application seeks a position as "Superintendent of maintenance supervisor." G.C. Exh. 144. While it is entirely possible that this allegation is beyond the purview of the Act, such issues will be resolved in any compliance proceeding made necessary by an appropriate finding of discrimination.

<sup>12</sup> Kelly appeared as a witness, but was examined on a limited basis concerning the circumstances surrounding the delivery of the applications.

<sup>13</sup> This group originally included a Lawrence Johnson. At the hearing, it was developed that two individuals by this name were involved, with only one, having been offered work by the Respondent. The Respondent later agreed that this was not the Lawrence W. Johnson named in the complaint.

The Respondent also conceded that during the period between March 29 and May 10, approximately 42 boilermakers were hired at Exxon, some of this number representing workers recalled or reassigned after a prior layoff from that job.<sup>14</sup>

The Respondent, through its personnel staff, admits that these applications were not considered, but claims that they were not available for consideration, and that even if possessed within its employment offices, they were not subject to routine review under its hiring practices, and hence evidence is lacking that steps were taken on behalf of the applicants that would have disclosed their linkage with union organization.

In this respect, it appears that an April 15 amendment to a previously filed unfair labor practice charge identified by name 58 applicants who were allegedly denied employment for discriminatory reasons.<sup>15</sup> According to Personnel Director Harry Breeden, and his aides, Wanda Taylor and Gerald Boudreaux, on request of the Respondent's attorney, a search was initiated around the first of May to determine whether those listed in that charge had filed applications or worked in the past for the Respondent. That search did turn up applications, but only those bearing names of applicants who had prior employment with the Respondent. Other than that, none were found. Later, in August, just prior to a meeting with a Board investigator, the personnel staff, once more at the instance of the Respondent's attorney, rechecked the office. This time, the applications were found, properly filed, one by one in alphabetical order under the designation, "boilermakers." Neither Taylor, Boudreaux, nor Breeden had previously reviewed these applications. Boudreaux and Breeden explained that it was their assumption that all had been filed by a temporary summer employee.<sup>16</sup> As I understand the testimony, these applications, if actually filed on March 29, would have been located on the first search.<sup>17</sup>

While anything is possible, for purposes of this case one might assume that, as described by Simoneaux and Kelly, the applications of those named in the charge filed on April 15, and later uncovered in the Respondent's files, were dropped in a repository at the employment offices on March 29. What happened to them thereafter is a matter of speculation which transcends the dispositive issue in this case.

#### c. Concluding findings

##### (1) Preliminary statement

The parties divide initially over the question of whether the General Counsel has substantiated the initial proof responsibility under *Wright Line*, supra. This requires proof that union allegiance was at least part of the Respondent's motive for not hiring from the batched applications. In other words, the General Counsel must demonstrate that (1) applications were filed during hiring stages, (2) the Respondent

<sup>14</sup> The number of vacancies that might have been available for named discriminatees is a matter for determination in any future compliance proceeding.

<sup>15</sup> This refers to an amended unfair labor practice charge in Case 15-CA-10549-2. R. Exh. 12. The disposition of that charge is unexplained on this record.

<sup>16</sup> The temporary employee was Scott Pharis, who happens to be the son of the Respondent's lead counsel.

<sup>17</sup> It is not surprising that each side argues that its witnesses be credited because their testimony was "uncontradicted."

knew of their source, (3) it harbored union animus, and (4) it acted on that animus in failing to hire any from this group.

By way of overview, it is noted that the knowledge issue is crucial. For, as shall be seen, the credible evidence confirms that the Respondent, once aware that organization was in progress, would have been most reluctant to respond favorably to the Union's hiring ploy.

#### (2) Union animus

The Respondent insists that it freely hired qualified employees without concern for union status. As an abstraction, there can be no doubt that its past employment rolls numbered many journeymen with such ties. Indeed, when one considers the pool of skilled craftsmen nurtured through joint labor-management apprentice programs, one might question whether major projects could be manned effectively without tapping that sector of the market. The issue here, however, has a narrow focus. It tests the hiring practices on the heels of notification that a particular labor union was engaged in an active organization drive, thus, raising the question of whether this supervening event would be addressed by Respondent in developing its future manning strategy. The economic realities offer little assurance that it would not.

Thus, the Respondent considers itself as among the class of contractors which refer to themselves as "merit employers." This is nothing more than a "buzz" reference to non-union shop. It is a calling antithetical to any form of contractual relationship with traditional building trade unions. Indeed, one might fairly assume that this class of employers, at least in the area of costs, enjoys a labor-oriented, competitive edge in an industry where bidding wars generate revenues, and effective performance turns on the ability to attract competent workers on a casual, short-term basis. The benefit of operating nonunion in this industry is magnified when one considers that most industrial maintenance work is more labor intense than customarily encountered in other forms of construction activity, with the ratio of labor to material costs proportionately higher.

There can be little debate that any formal organization drive by an affiliated labor union challenges this fundamental economic advantage. It follows that indiscriminate hiring from that source clearly would enhance the peril.<sup>18</sup> In this

<sup>18</sup>This is not to say that there is not a fairness issue here, or that it is untenable to argue that an employer should be privileged to avoid mass hiring of applicants whose declared objective is to further organizational interests. Recently, my own reservations concerning the law in this area were recorded in a companion case involving Local 582, as follows:

It is not farfetched to regard the "strike back" strategy as built upon a form of entrapment reminiscent of other "blackmail" devices which in 1958 led to enactment of the Section 8(b)(7) strictures on recognition picketing. It is true that neither picketing, nor secondary activity was directly involved here. Instead, the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as an unwitting conspirator in the effort to achieve union goals—be they organizational or economic—through pressures, rather than through the statutory procedures designed to assure that compulsory bargaining begins with procedures preserving freedom of choice. My own uneasiness with this possibility offers no comfort to the Respondent. Its avoidance will require development of an eclectic rationale, to limit the trend reflected under present Board law. Thus, there can be no question that the members of Local 582 who completed, signed, and offered applications to the Union, were implementing their Section 7 right "to form, join, or assist labor

light, hiring decisions confronting the Respondent on and after March 7 may be equated with a choice between suicide and survival.<sup>19</sup>

The probabilities underlying this assessment are not to be lightly dismissed as hypothetical. The instinct for caution in this area is a documented fact. Thus, Personnel Director Breedon in July 1988 conducted a labor survey in Charleston, West Virginia, which was then under consideration as a potential market area. A building industry official in that area, Floyd Sayre, assisted in the investigation. In his formal report, Breedon felt it pertinent to highlight Sayre's recommendation concerning hiring in Charleston, as follows:

Mr. Sayre stated that as far as manpower, there shouldn't be any problem recruiting qualified craftsmen but all of the applicants should be screened carefully to avoid any union infiltration. [C.P. Exh. 4.]

The General Counsel and the Charging Party contend that this is precisely what occurred here. In support, specific testimony has been adduced from two members of Local 582, Phillip Pedeaux and Leonard Efferson, who worked for the Respondent as foremen on the Exxon turnarounds.<sup>20</sup> Critical elements of their testimony demonstrates that, following advent of the Union, the Respondent's operating officials were predisposed against hiring members of Local 582 at this site.

Thus, Phillip Pedeaux, before Exxon, had worked several jobs for the Respondent in the past. He testified that in March after organizational badges began to appear, his boss, Charlie Brown, a former member of Local 582, who knew of Pedeaux's union affiliation, asked if Pedeaux knew "any boilermakers that might want to go to work." Pedeaux gave him the names of Chester Price, Ronnie Walls, and Damien Thomas.<sup>21</sup> Brown allegedly replied: "They don't want to hire any union people at this time." Brown, who admitted to seeking names or prospects from all of his foremen, denied making any such statement. He adds that, at the time, he knew that Pedeaux, like all his foremen, was a member of Local 582. Brown suggests that his foremen's hiring recommendations were short-circuited by a moratorium declared

organizations." As to such a class, I am alerted to no precedent which might support a withholding of Section 8(a)(3) on the basis of a labor organization's motives. Authority, which I am bound to follow, is to the contrary. Thus, the Board has repeatedly held that employers may not lawfully refuse to hire paid, full-time, professional union organizers, even if they seek employment for the ulterior purpose of unionization. See e.g. *H. B. Zachry Co.*, 289 NLRB No. 117, and cases cited therein at JD, p. 4 (1988) [Fn. omitted].

In passing, it is noted that the Charging Party takes me to task for having requested the parties to brief this very issue. To do so, perhaps, was naive, but in my opinion the issue might well require deeper insights than simplistic references to Sec. 7 might allow. In any event, it certainly is within the administrative law judge's province to seek education from the parties, even if the issue be insubstantial, or the policy, settled.

<sup>19</sup>It is noted that, after the submission of briefs here, the Fourth Circuit Court of Appeals on September 20, 1989, refused to enforce the Board's Order in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70. Although the Court reasoned that the Board erred in ruling that an employer could be faulted under Sec. 8(a)(3) for terminating a paid union organizer, no one with such standing is involved in this proceeding. Accordingly, the court's rationale is of no relevance to any issue presented in this case.

<sup>20</sup>Notice is taken of the fact that art. XVII, par. 2, of the International constitution precludes members from accepting employment with a nonunion contractor "without prior written approval of the business manager." The record does not disclose whether Pedeaux or Efferson were privileged with such approval during their employment stints with the Respondent.

<sup>21</sup>The various complaints do not name these individuals as discriminatees.

on such requests because other jobs were winding down, a condition that would release craftsmen for transfer.<sup>22</sup>

Pedaux describes a second incident occurring in mid-March when during a supervisors meeting, Mickey McGhee, also a foreman, recommended an individual for hire. Brown, according to Pedaux, asked if the man was union-affiliated. McGhee said, "No." Brown allegedly replied, "That is the kind of people we are looking for." McGhee confirms that he recommended an employee to Brown, but denies that their conversation included any reference to union membership.<sup>23</sup> According to McGhee, this conversation, which he places in February, was the only time he suggested to Brown that an individual be hired. Brown, despite a hazy recollection of the incident, insists that he did not question McGhee concerning the union affiliation of the individual involved.

Although I am concerned as to pressures that might have been acting on Pedaux, as to these incidents his testimony was believed. Brown's denials thereof were totally unimpressive. His capacity for recall was precise as to exculpatory matters, but nonexistent in other critical areas. This selectivity undermined my confidence in the accuracy of his accounting. As to these incidents, I believed neither Brown, nor McGhee.

My impression was different with respect to an alleged conversation concerning union protagonist Randy Blanchard. Thus, according to Pedaux, about 1-1/2 weeks after the campaign began, Brown remarked that an employee organizer, Randy Blanchard,<sup>24</sup> had engaged in activity that aroused his "concern."<sup>25</sup> Later, according to Pedaux, Brown said, "He was going to get rid of Randy, if he had to lay the whole crew off." On April 17, according to Pedaux, work for the boilermakers at this operation was completed, and he, together with his crew, were then laid off. Apparently, Blanchard was laid off 2 weeks earlier on April 4. Neither the layoff of the crew, nor that of Blanchard, are challenged as discriminatory. In this instance, the probabilities favor Brown and he is given benefit of the doubt.<sup>26</sup>

<sup>22</sup> According to Brown, hiring from other of Respondent's sites had the advantage of avoiding the expense of physical examinations and drug screening.

<sup>23</sup> The individual involved, John Duke, was not a member of the Boilermakers union. McGhee, a Louisiana resident, was not a member of Local 582. He was a member of the International, and its National Transient Lodge, an arm which has geographic jurisdiction throughout the United States.

<sup>24</sup> Blanchard, though a known union protagonist, was not among the employee organizers listed in the Union's letter of March 9. G.C. Exh. 4.

<sup>25</sup> Pedaux testified that Kenny Hebert, the job superintendent, would enter the lunch tent while Blanchard was organizing, and stand and watch Blanchard. Blanchard was not called and there is no evidence that any employee was aware of any form of surveillance. Hebert admitted that he appeared in the lunch tent, but claims that he did so as part of his daily routine, and that he regularly monitored conditions in that area several times each day. He denied that he ever followed Blanchard around or stared at him in the lunchroom. While it is entirely possible that Pedaux might have suspected that Hebert was engaged in surveillance, he does not disclose that he was told that this was Hebert's intent, and based on his uncorroborated testimony, I am not persuaded that this was the case. Moreover, I credit what I construe to be adequate denials on Hebert's part that he had ever done so.

<sup>26</sup> In any event, the evidence of animus suggested here is cumulative to other statements imputed by Pedaux to Brown. The General Counsel correctly observes that Brown failed to deny the remark concerning Blanchard, but that was because I foreclosed the Respondent from litigating its defense to that assertion. In fact, the Respondent was impelled to request that evidence be stricken to the effect that Blanchard, when terminated, was given an excellent performance review by Brown, who also declared Blanchard "eligible for rehire." However, Respondent's employment jacket on Blanchard was received [R. Exh. 21]; it shows that Blanchard was laid off on April 4, but then was rehired, and again laid off on May 9. It is difficult to imagine that this entry

Leonard Efferson, another member of Local 582, was hired by the Respondent in February as a welder, then, on March 5, he was promoted to foreman on the Exxon job. He worked until his crew was laid off on March 31.

According to Efferson, at the time of his promotion, on March 5, he inquired of Project Superintendent Richard Oliver as to whether he would have a crew, but was told "no" because hands were unavailable at the Respondent's personnel office. Oliver asked if Efferson knew of anyone. Efferson relates that he reacted by leaving the room and contacting Simoneaux, who apparently referred a foreman (Johnny Leveron) and five others. When he reported this to Oliver, the latter, according to Efferson, reacted angrily, admonishing Efferson: "[T]his wasn't a union job and for me not to be calling no hall." Despite this, Efferson testifies to a second conversation, some days later, in which he complained to Oliver about a lack of competent help. He relates that when Oliver expressed his own concern as to the inability to obtain qualified help, Efferson suggested: "All he had to do was call the Boilermakers Hall and get his qualified people, the people that he needed."

Maintenance Superintendent Gaylon Landrey testified that on manning Efferson's job, he asked the latter if he knew of any available hands, and that Efferson eventually gave him a list to be put through personnel. Those names, headed by Leveron, with a contemplated starting date of March 8, were apparently transcribed by Landrey and submitted to personnel.<sup>27</sup> According to Landrey, Efferson never told him he had called the union hall for men.

In the case of Leveron, Oliver testified that he knew Leveron, who had worked for Oliver in the past, and had spoken to Oliver directly concerning employment at Exxon. He specifically denied that Efferson told him that he had called the union hiring hall, and further denied stating that caution would be exercised in hiring, or that he did not want "those people" in the plant. Finally, he denied having told Efferson that help was not available at the employment office. Efferson's testimony seemed too pat, was not regarded as entirely plausible, and in the face of my negative impression concerning his credibility, the denials by Oliver are credited.

Efferson also relates that subsequently in early March, before widespread union activity became evident, in the presence of Operations Manager Chustz, he was asked by Oliver to report "any organizing going on." He was asked for his loyalty, and, at the time, gave it willingly. When questioned by Oliver as to union members on his job, Efferson identified his foreman, Johnny Leveron, as a member of Local 582. The most salient aspect of Efferson's testimony concerning this session is the following comment he attributes to Oliver at that meeting: "Personnel would have to be careful about the applicants that they brought in, that they were going to have to look over them carefully and screen them

was false, or that, when made, there was any basis for suspecting that Blanchard would be central to testimony that might be produced against the Respondent in this case. In the circumstances, the rehire of Blanchard suggests, at a minimum, that the Respondent had no inclination, and hence had not declared, that it would act against him in reprisal for union activity.

<sup>27</sup> R. Exh. 9. Work orders prepared by the personnel office reflect immediate action in connection with Leveron's hiring. R. Exh. 10(a).

for union membership, and that he didn't want those people . . . in the plant."<sup>28</sup>

Oliver recalled a meeting in his office attended by Ronnie Chustz and Efferson. Its purpose was to update Efferson on the responsibilities of a supervisor during an organization campaign. Efferson was told, "Some of the things we wanted him to do and things we didn't want him to do." He could recall no discussion regarding manning the job. He denied telling Efferson that he had to be careful about applicants or that they would be screened for union membership.

Chustz describes this meeting as having occurred after he and Attorney Pharis had visited the jobsite to alert supervision concerning the organization attempt underway at that time. Apparently, Efferson, who had recently been made foreman had not attended those meetings, so Chustz instructed Oliver to call him to the latter's office. He did so, whereupon Chustz instructed Efferson as to "the dos and don'ts of union activities and his responsibilities of the company." Chustz agrees that neither he, nor Oliver, stated that the personnel office was screening for union membership, or that union people were not wanted on the job.

Here again my misgivings concerning Efferson lead me to prefer the mutually corroborative testimony of Chustz and Oliver. It is considered unlikely that Oliver, at that time would have been so careless with a known union member, whose true loyalties were yet to be identified.

### (3) The Respondent's hiring practices

Notwithstanding the evidence of animus, a question exists as to whether, under the Respondent's hiring practices, the filing of an application, without more, establishes an appropriate threshold for a claim of discrimination. In this regard, it appears that persons looking for work apply at an offsite personnel office located in Baton Rouge. That operation is maintained by three full-time employees. They are afforded advance notice of major turnarounds, with listings of the required classifications and their number.<sup>29</sup>

The hiring process begins with onsite management. During the initial manning, supervisors, pursuant to the Respondent's customary procedures, will pick a few key individuals by name. Such requests, whether in connection with startup or midjob hiring, are processed through the personnel department. Thus, after names are submitted by the job superintendent and the individuals contacted,<sup>30</sup> they will be summoned to the personnel office for physical examination and drug screening, and, once cleared, will be sent to the project.

Beyond that, personnel itself is responsible for building an effective work force to complete the initial manning and to fill vacancies as they arise in the course of a job. Should supervisors be unaware of candidates for unfilled vacancies, a

<sup>28</sup> Efferson described Oliver as showing reluctance towards him, evident from the fact that he was twice asked for his loyalty. Apparently, Oliver had overcome this by the time he mentioned the screening of applicants.

<sup>29</sup> R. Exhs. 11(a), (b), (c), and (d).

<sup>30</sup> A possible discrepancy exists between the testimony of Landrey and Personnel Assistant Wanda Taylor as to who actually contacts those requested by name. Landrey avers that this was done by personnel, while Taylor states that it is done by the supervisor involved. The difference does not smack of significance, and it was my impression on the face of the record that the contact is sometimes made in the field and sometimes by personnel. It is also noted that Landrey suggested that there is a limitation on the number of key personnel that can be selected by operating personnel. Taylor was aware of no such limitation. There probably was none.

blind request will be made that the personnel department provide the craftsmen, while making all employment judgments along the way. In this process, personnel's primary recruitment tool is the "termination log." This is a listing of employees laid off in the past from the Respondent's jobs, who have good physical and drug screens.

In addition, personnel takes applications from various craftsmen. These applicants are required to return regularly to sign an out-of-work log,<sup>31</sup> or to contact personnel by telephone, to have their names entered on a "call-in log."<sup>32</sup> In this fashion, the personnel office is kept informed of the applicants' continuing availability and interest in employment.<sup>33</sup>

In summation, the established system of priorities assigns primacy to the names furnished by supervision. Beyond that, applicants are first selected from the termination log. Along that same line, recruiters will contact supervisors at other of Respondent's jobs to identify recently, or soon to be, released craftsmen. The next source is the out-of-work log,<sup>34</sup> then, the call-in log, and finally, the applications.<sup>35</sup>

The testimony that applications themselves are the last source to be accessed is aided by a persuasive strain of rationality.<sup>36</sup> Their utility as an initial reference is impeded by several factors. First, demands on hiring personnel during the peak hiring periods do not allow for processing the raw applications into a manageable form.<sup>37</sup> During this period, each day, hundreds of job seekers pass through the employment office. It is a cycle in which demands on time and energy of the employment staff does not enable the filing and sorting of applications. Instead, at the end of each day, those filed are gathered, a rubber band is placed around them, and they are put in a drawer. Later, after the turnaround season, they are classified by skill, and then filed alphabetically.<sup>38</sup>

<sup>31</sup> A sign is posted in the lobby of the employment office which urges applicants to: "please sign the sign-in log once a week."

<sup>32</sup> The call-in log is apparently a convenience offered to applicants who reside at significant distances from the employment office. Employees are not notified of this option on a blanket basis, and apparently it is limited to those who claim an inability to appear each week to sign in.

<sup>33</sup> Prior to notice of a major turnaround, the logs are implemented to build a pool of workers. Thus, when a turnaround becomes imminent, some prospects will be contacted, tested, and screened, to facilitate expedited assignment when the need arises.

<sup>34</sup> Contrary to the General Counsel, the testimony of Wanda Taylor that there is no "rule" that requires applicants to sign this log, when considered against the entirety of her testimony, does not detract from the above system of priorities, and the fact that those who do comply have a greater employment opportunity than those who do not.

<sup>35</sup> An exception to this system of priorities exists in emergency situations where someone qualified happens to be in the office. In that case, according to Taylor, availability takes precedence over the listings, and that individual will be hired. Although Gerald Boudreaux, a personnel recruiter, testified that he was unaware that this had in fact occurred, contrary to the General Counsel, his testimony does not reflect that he "insisted that Respondent never makes hiring decisions in such a manner, regardless of the exigencies."

<sup>36</sup> The testimony of Connors and Boudreaux as to their diverse methods of selecting from applications strikes as a matter of personal preference and in no way undermines the credibility of the above-described system of priorities.

<sup>37</sup> According to the credited testimony of Personnel Assistant Taylor, only three people work in the employment office on a regular basis. Of them, no one is charged with responsibility for reviewing applications as they are filed. In fact, she relates, with corroboration from coworker Gerald Boudreaux, and Personnel Manager Harry Breeden, that applications are reviewed only after all other sources are exhausted in the effort to fill a vacancy.

<sup>38</sup> The applications are maintained only for 6 months. Periodically, the personnel staff culls the files to remove the dated applications, which are then placed in storage. Personnel Assistant Wanda Taylor testified that this is done twice annually. Gerald Boudreaux, a recruiter, testified that he tries to go

These circumstances plausibly suggest that the applications are awkward and inefficient as an immediate hiring source, and that they are not even arranged to permit an efficient search until well after manpower demands have subsided. Furthermore, unlike the termination log, applications provide no assurance of physical qualifications; and, unlike the sign-in and call-in logs, they offer no promise of availability in this industry where craftsmen, over a vast geographic area, rove between short term jobs.<sup>39</sup>

My confidence in this system of priorities is strong enough to survive, and does not necessarily conflict with, an important question which emerges from Respondent's own evidence. Thus, the unlikelihood that Local 582's applications would have produced employment was the theme underlying Breeden's testimony that, to his knowledge, the applications themselves were not used by the personnel department to procure boilermakers, welders, or pipefitters during the Exxon turnaround.<sup>40</sup> However, Boudreaux, who had responsibility for hiring welders, testified that some welders were hired solely from application. Furthermore, a document prepared for trial by the Respondent, on its face, suggests that Steve Drury, Hermon Hynes, and Clint Taylor might well have been hired solely on the basis of their applications [R. Exh 24]. Although the documented discrepancies were called to Breeden's attention, his explanations were speculative and the Respondent rested without furnishing competent evidence to refute or explain away the facial implication that these three boilermakers were hired solely on the basis of their applications.<sup>41</sup> While these incidents do not refute the practice as defined by Respondent's witnesses,<sup>42</sup> they do demonstrate, at least presumptively, that the Respondent could not meet all of its needs from the various logs and requests by name.<sup>43</sup>

through the files each month for this purpose, but is not free to do so during the turnaround period.

<sup>39</sup> Unquestionably, as counsel for the Charging Party observes, the screening of applications is unlawful. See, e.g., *KRI Constructors*, 290 NLRB 802 (1988). And in this case, there is ample room for suspicion that this might have occurred here. However, that possibility springs immediately from a close question of credibility pertaining to statements attributed to Brown, a non-administrative, operating supervisor. Considering the sheer numbers involved, and the pragmatic, my best judgment accords credence to the Respondent's testimony that no review of applications was made except in the process of filling vacancies after exhaustion of other priority sources. For this reason, I decline to infer that applications were routinely or otherwise scanned for union membership.

<sup>40</sup> Contrary to the General Counsel and the Charging Party, the Respondent's job offer to Farrell Alford was not based solely on application. In addition to filing his March 3 application, Alford had done so earlier on January 20 (G.C. Exh. 14), and thereafter had signed the out-of-work list on five occasions in 1988 prior to the March 5 job offer. Furthermore, I credit Night Superintendent Kenny Hebert's denial of knowledge as to the hiring practices used by the personnel department, and therefore reject any conjecture on his part as to how job candidates were secured.

<sup>41</sup> The General Counsel inadvertently states that R. Exh. 24 reflects that two others, Ronnie Breaux and J. C. Graves, filed applications. This was not the case.

<sup>42</sup> I reject the General Counsel's assertion that it would have been futile for the applicant's to perfect their job claims by signing the weekly log. Here, there is no evidence that any applicant was apprised of statements attributed to Respondent's officials reflecting a bias against hiring members of Local 582.

<sup>43</sup> Suspicion emerges from Respondent's attempt to disassociate the advertisements placed in local newspapers on March 27 and 28 and April 3 from any imminent need for craftsmen. In this respect, a composite of the testimony of Breeden, Boudreaux, and Taylor is to the effect that this occurred pursuant to the Respondent's practice of advertising for help, irrespective of need, about twice annually in order to stimulate applications, to get a fresh view of skills

Accordingly, it is concluded that the General Counsel has established, prima facie, that Simoneaux's apparent filing was sufficient to evoke employment claims which, at a minimum, would charge the Respondent with the obligation to consider those, which it *knew to have union orientation*, equally with others whose quest for employment did not go further.

#### (4) The knowledge issue

The "chink" in the General Counsel's case relates to whether the proof establishes that the Respondent was aware that the Union was behind any pending applications. If substantiated, this element would tie the knot on a robust case of proscribed discrimination. However, the strong suspicion generated by the balance of the affirmative case is complicated by the absence of direct evidence that any representative of the Respondent was aware that union officials had filed the batched applications prior to the turnaround, or that its designees had a basis for identifying them with Local 582, or any activity sponsored by that entity.

The testimony of Simoneaux and Kelly as to what they encountered on March 29 at the employment office hardly warrants the requisite inference. Neither was ostentatious in their presence. They identified themselves to no one.<sup>44</sup> The applications, though bound, bore no message directly identifying them with Local 582 or the organizational effort.<sup>45</sup>

The suggestion that the Respondent could have linked Simoneaux and Kelly with Local 582 rests on testimony that their car had "strike back" stickers affixed to the bumpers—two in the front, two in the back. In addition, both averred that, on leaving the area, several unidentified persons, appeared on an deck adjacent to the Respondent's trailer and observed them, but said nothing. In finding this unpersuasive, it is noted that neither Kelly, nor Simoneaux suggested that their vehicle was in a position from which it could have been

available in the labor market, and to provide capacity to man an unexpected job which might emerge when other jobs are fully manned. However, the ads in question specifically define the job, its location, and the fact that it "will begin in April and last thru, June with a 60 hour work week." This wording is specifically addressed to and likely would attract persons with immediate availability, and stands as an inartful appeal to those seeking employment at other times. This discrepancy, while hardly inspiring confidence in the witnesses involved, is somewhat redundant. The advertisement is relevant to a single issue; namely, the Respondent's employment needs on and after March 29—a fact evident from the Respondent's concession that at least 42 boilermakers were hired in that timeframe. In agreement with the Respondent, the use of classified advertisements was not tantamount to an admission that it was hiring on the basis of raw applications. In passing, it is noted that the testimony of Farrell Alford, who addressed ads placed in February, is of no aid to the inquiry.

<sup>44</sup> Notice is taken of the fact that Local 582's simultaneous effort to organize the St. Francisville job of Sunland Construction also included the submission of batched applications. This, took place at that location initially on March 9, and then again on March 17 and 25 and April 6. With the exception of April 6, Local 582 delivered the batched applications at Sunland through employees who previously identified themselves to Sunland as union organizers. The open union involvement at Sunland stands in stark contrast with the low-keyed March 29 action by Simoneaux, who was no stranger to the Union's strategy at either jobsite. No explanation is offered as to why Local 582, having identified its Exxon organizers by letter of March 9, while previously declaring its hand in open, unambiguous fashion pursuant to the employment strategy at Sunland, would opt for the esoteric, in conjunction with the applications, at the Respondent's Exxon jobsite. These contradictions are no less mysterious than the Respondent's inability to locate the mass applications on the initial search.

<sup>45</sup> Simoneaux testified that he had no purpose in mind when he declined to remove the rubberbands.

observed by any agent of the Respondent. Moreover, from the crowded conditions described by Simoneaux, the observers on the deck would not necessarily have had ties with the Respondent. In sum, this evidence is too vague to furnish a reasonable basis for concluding that Respondent knew that morning that the mass applications had been dropped by union representatives, or that any had visited the employment office at that or any other time.

The General Counsel and the Charging Party argue that the batched applications could be distinguished from the mainstream of filings on several grounds.<sup>46</sup> First, it is argued that the employment history showed past employment with union contractors.<sup>47</sup> Second, it is contended, that several applications name Union Representatives Simoneaux and Kelly as among their references.<sup>48</sup>

In the circumstances, the content of the applications are of no avail. For, I consider it unlikely that any were reviewed prior to the completion of new hiring in connection with the Exxon turnarounds. Where, as here, an employer has shown a predisposition to discriminate, the purity of testimony offered in its behalf is never free from doubt. In this instance, however, the evidence that applications were not routinely reviewed within that timeframe struck as entirely plausible and believable.<sup>49</sup> During this period, the inventory of raw applications would swell on a daily basis with the filing of many additional applications. Indeed, the line of job seekers was so long on March 29 that Simoneaux could not wait, opting instead to drop the applications with anonymity.<sup>50</sup> Accordingly, I am convinced that the small personnel staff had no need to take the time to sort, review, and file each application. There is no reason to assume that the logs would have been overlooked by the hundreds of job seekers, who presumably were available for work, and who passed through the employment offices in that period. The logs provided a less cumbersome vehicle for identifying available prospects,

<sup>46</sup> As a preliminary, I draw no conclusion that the batched applications were submitted in a form which necessarily would have been recognized by the Respondent as separate and distinct from others filed on March 29. Simoneaux's own testimony supports the probability that many applications would have been filed that day. Credible evidence also establishes that these neutral filings, like Simoneaux's, would have been bound by Respondent's personnel staff at days' end. In this light, it is just as easy to infer that his packet was indistinct from others assembled that day, as it is to assume that it was sufficiently different to attract attention.

<sup>47</sup> Of the contractors named in the applications, the record does not, in every case, identify which is union and which is not. It does appear that at least nine applicants had prior or current employment with Harmony and Sunland, both "merit shop employers."

<sup>48</sup> This in my opinion created a cogent basis for linking 13 of the batched applications with Local 582. On the face of these documents, the signer identified himself, unambiguously, with either that Union or one of its officials. See G.C. Exhs. 102, 103, 108, 109, 111, 114, 115, 126, 128, 129, 136, 143, and 154. Although a separate, purely independent basis for finding knowledge would exist as to this group, the inference would assume that their applications were read by a representative of the Respondent under timely conditions. As shall be seen, I am not convinced that such was the case.

<sup>49</sup> This conclusion is not inconsistent with Boudreaux's testimony that some welders were hired strictly from applications. The timing and circumstances concerning these incidents is undefined. I see no reason to permit a half-baked suggestion to take precedence over my belief of a practice which, on the record, is rooted in fully developed, highly probable evidence. Accordingly, and as these exceptions were not shown to have been a byproduct of any form of comprehensive search, absent proof that this took place, my judgement is to accept that applications were not subject to routine review.

<sup>50</sup> Dawson Fontenot, an individually named discriminatee in this case, testified that when he had to stand in line when he filed his application on February 1,

which short circuited the need to wade through a mass of unsorted applications. Thus, even if employment histories and references showed union allegiance or uninterrupted employment with union contractors,<sup>51</sup> since I do not believe that applications were scanned routinely, I am unwilling to infer knowledge on this basis.

#### (5) Analysis

In agreement with the General Counsel and the Charging Party, the allegations of discrimination begin with my clear impression that the Respondent would consciously avoid any action which would further union organization on this or any other jobsite. Its aversion to the hiring of Local 582 members as of March 29 is a given.

This, however, is where the inquiry begins. Animus itself is an element, itself not alone determinative of proscribed discrimination. The employer must be given a chance to give effect to its unlawful intent. Unlike its strategy at Sunland, here, Local 582 did not provide the Respondent that opportunity. The stealth with which the batched applications were deposited, nakedly and without fanfare, leaves a record lacking a reasoned basis for inferring that the Respondent was aware that any applicants were sponsored or supported by Local 582. Without such a finding, it cannot be concluded that the general refusal to act favorably on them was actuated by considerations other than those governing the Respondent's failure to hire hundreds of others under a legitimate system of priorities. Accordingly, the General Counsel has failed to meet its initial burden of proving that union activity contributed, at least in some measure, to the inaction with re-

<sup>51</sup> The Charging Party aptly points to the fact that the Board has upheld violations where specific proof demonstrates that those responsible for hiring, actually used past union employment as a basis for screening out union members. See *KRI Constructors*, supra. Aside from the absence of proof that applications were screened, this position is lacking in credible foundation. No attempt was made here to develop a pattern through comparison of the batched applications with those of the actually hired boilermakers. It is entirely possible that these documents, as well, showed employment with union contractors. This flaw is not excused under the holding in *Alexander's Restaurant & Lounge*, 228 NLRB 165, 179 (1977), where the Board recognized that such employment could demonstrate "a likelihood of union membership." For, that decision does not go so far as to suggest that prior union employment raises a presumption of current union allegiance. Any such notion would fail to take account of the diverse attitudes held by members, concerning their personal responsibility towards their union. After all, union hiring halls might mean the difference between working and spending one's days at the local employment service. If all members recognized adherence to union principles as a fair price for such access, there would be no need for internal constitutional bans on nonunion employment. Also mitigating against that assumption is the fact that in the construction industry, dependence on the skills nurtured through the efforts of organized labor would make it difficult to operate without utilizing people with past employment on union jobs. While I recognize that a similar dependency was sideswiped in *Alexander's Restaurant & Lounge*, supra, that view is entitled to far less weight when applied to staffing decisions affecting a restaurant and cocktail lounge, as was involved there. More importantly, unlike *Alexander's Restaurant & Lounge*, no attempt was made by the proponents of the complaints in this case to subpoena and proffer the applications of those hired after March 7. Therefore, unlike Judge Pannier, I have received argument, but not evidence, which would warrant a fairly based finding that said hiring reflected a pattern of avoiding employment of those with union jobs in their background. 228 NLRB at 174. Also lacking in merit is the contention that numerous of Respondent's supervisors had union ties in the past and therefore would know that individuals whose applications were batched enjoyed union affiliation. For, there is not a scintilla to suggest that any supervisor had access to the applications, or was mindful of who filed, or when.

spect to the 56 applications. The 8(a)(3) and (1) allegation as to them shall be dismissed.<sup>52</sup>

## 2. The individual cases

### a. Preliminary statement

The complaints also identify certain individuals as having been victimized separately by the Respondent's allegedly unlawful hiring practices. Two classes are involved. Thus, three of those named filed individually and, shortly thereafter, at Local 582's behest, again completed applications, which were included in the batched group deposited by Simoneaux. The second group of individual discriminatees is limited to applicants who filed privately, in advance of the union drive, and apparently without union sanction.

Although not withdrawn, the posthearing brief of the General Counsel makes no attempt whatsoever to assist the administrative law judge in analyzing these allegations, nor is any theory spelled out tending to support discrimination in the case of these individuals. In some cases, namely that of Von Earl Williams, and Arthur Ree Richardson, the claims of discrimination are not reasonably supported, and their continued maintenance smacks of frivolity.

### b. Dual filings

#### (1) Dawson Fontenot

Fontenot is a journeyman boilermaker and a long-time member of Local 582. In late December 1987, he personally appeared at the Respondent's offsite employment offices and signed an out of work list. Again on February 1, he went to that facility, and completed an application [G.C. Exh. 12], while also signing the out-of-work log.

Fontenot was the subject of an 8(a)(3) allegation in *Harmony Corp.*, Case 15-CA-10537, etc. Findings by Judge Maloney in that case indicate Fontenot was hired by Harmony on February 2, 1988, and after a brief layoff, was recalled. According to Judge Maloney, he was unlawfully terminated on March 26.

Consistent with his employment at Harmony, Fontenot, after February 1, never again registered on the Respondent's sign-in log. However, during his stint with Harmony, he received a blank application in the mail from the Union, which he completed on March 16 (G.C. Exh 13), and a few days later, personally delivered to Simoneaux.<sup>53</sup> This application

<sup>52</sup>The Charging Party states in its posthearing brief that, "There is no indication that . . . [Respondent] could not have hired these individuals at one of the twenty-one (21) other job locations in the greater Baton Rouge area." On the contrary, the Respondent's Exxon site was the entire focus of the hearing in this case. The Union's March 7 letter defining the scope of the organization drive was limited to that location. The complaints do not appear to name a single operating supervisor from any other jobsite. While facts concerning the Respondent's hiring needs and action at that location were litigated in depth, there was no attempt to explore conditions elsewhere. In consequence, there is no evidence whatever that employees in the crafts represented by Local 582 were needed and hired at those locations, and if so, from what sources. This attempt to broaden the scope of the proceedings constitutes a backdoor approach inconsistent with the entire course of the hearing, and, in any event, the missing evidence all relates to matters within the General Counsel's initial burden. In the circumstances, the failure to utilize these applications in connection with possible manning decisions affecting other jobsites does not support an inference of untoward conduct at those locations.

<sup>53</sup>This application was among those identified as having been delivered to the Respondent's employment office by Simoneaux on March 29. G.C. Exh. 16. It named Harmony, a nonunion target of the "Strike Back" strategy, as

listed Simoneaux as a reference, identifying the latter as "business manager." There was no job offer.

For reasons unexplained by counsel, the complaint dates the discriminatory refusal to hire as taking place on and after April 15. In any event, here again, as in the case of the batched applications, it has not been demonstrated that union affiliation was a factor contributing to this state of events. Thus, for the reasons stated in that connection, the proof does not substantiate that the Respondent would have known of any revelations set forth in the March 16 application.

In addition, the February 1 filing is too slender a predicate for an unfair labor practice occurring in mid-April. First, during the period prior to March 7, the evidence fails reasonably to suggest that the Respondent was reticent concerning the hire of employees who had worked on union jobs. The job offers to other similarly situated members of Local 582 confirm that this was not the case.<sup>54</sup> Finally, Fontenot's failure to update his interest by registering on the sign-in log after February 1 strikes me as the overarching, plausible explanation for his lack of success some 2-1/2 months later. Compare the case of Farrell Alford, a member of Local 582 for more than 26 years, whose applications showed an unbroken line of union jobs. He applied on January 20, but, unlike Fontenot, he returned to the Respondent's employment office on January 27, February 3, 17, and 24, to sign the out of work log. He was offered a job on March 3.

In the circumstances, it is concluded that union considerations played no role in the refusal to hire Fontenot since April 15. The 8(a)(3) allegation in his behalf shall be dismissed.

#### (2) Jams Guice

Guice, also a boilermaker, and member of Local 582, on February 6, personally filed an application at the Respondent's offsite employment office [G.C. Exh. 10].<sup>55</sup> He also received a blank application in the mail from the Union, and completed it on March 20 [G.C. Exh. 11]. Presumably this was forwarded to the Union for filing with the Respondent.<sup>56</sup> Although he asserts that these filings were against a background of three or four earlier log signings "in the last couple of years . . . when they had plenty of employment," the record is replete with references to the Respondent's hiring of Local 582 members in that timeframe. Beyond that the content of Guice's applications would not necessarily identify him as tightly allied with union interests. His February 6 application reveals employment with a nonunion contractor, while that of March 20 discloses two distinct instances of nonunion work. Here again, the allegations of discrimination are insubstantial and shall be dismissed.

the most recent employer, but also listed Business Agent Simoneaux as a reference.

<sup>54</sup>In its posthearing brief, p. 17, the Charging Party states that it "will not dispute the fact that Respondent hired Local 582 members both before and after the organizing campaign." This factor complicates the allegations of discrimination in this case, and requires proof rather than speculation that nonmembers were preferred over union members.

<sup>55</sup>In his prehearing affidavit, Guice attested to the fact that he had seen a sign at the employment office instructing applicants to sign the "work list." Though he understood that this was required, he could not recall doing so in conjunction with his February application.

<sup>56</sup>This application was identified as among those delivered by Simoneaux on March 29.

## (3) Arthur Ree Richardson

I am at a loss to understand why this *separate* allegation was not withdrawn. Richardson did not appear at the hearing, and the only evidence offered by the General Counsel are two applications—one dated January 25, 1988, and the second being that dated March 18 application which presumably was filed by the Union. (G.C. Exh. 145.) Not a scintilla of evidence, whether or not credible, was been offered which would support any conclusion that Richardson made direct efforts, independent of the batched filing, to obtain employment which were denied for unlawful reasons.<sup>57</sup> Other Local 582 members, who applied contemporaneous with his January application, and who spelled out similar job references were actually hired. The allegation that he was individually targeted for proscribed discrimination shall be dismissed.

c. *Individual filings*

## (1) Joseph Bergeron

Bergeron has been a member of Local 582 for 15 years. He is classified as a journeyman welder. He obtained an application from the Respondent's offsite employment office, which he completed on February 5, and then turned in at that office. (G.C. Exh. 6(a).) Since filing, he received no offers of employment. He claims that he signed the out-of-work log the day he filed his application and "mostly" every Monday after that—about 10 times. Apart from Bergeron's using the union hall to run off a copy of his application, the Union had nothing to do with this filing. Personnel Director Harry Breeden testified that he reviewed the termination, sign-in, and call-in logs, and could not recall seeing his name on any of these documents.

Bergeron did not impress me as a reliable witness, but, in any event, his association with unions, could only be gleaned from his application, which showed prior employment with union contractors. As in the case of the batched applications, I am unwilling to assume that this document was reviewed. Furthermore, during the period in which he filed, the Respondent hired employees with similar references in their applications, including known union members both at the managerial and journeyman levels. Because the credible evidence fails to establish that Bergeron, after February 5, registered on the sign-in log, and as the record provides no reasonable basis for inferring that union affiliation played any role in the Respondent's inaction with respect to this application, the 8(a)(3) allegation in his case shall be dismissed.

## (2) Luciano Garza

Garza, also a journeyman welder, is a member of Local 582. He completed and submitted an application at the employment office on February 1. (G.C. Exh. 6(b).) Thereafter, he claims to have been called twice,<sup>58</sup> but not until 3 or 4 months later. He received a further offer about 2 weeks prior to the hearing.

Garza's testimony was not entirely consistent, and on the face thereof, it is entirely possible that he was offered and

rejected a job some time in March. Indeed, documents offered by the Respondent show that Garza on March 3 was given a preemployment physical. While denying that he then was given the opportunity to take a welding test, Garza admits that he subsequently rejected an offer on the Exxon job. As for the timing of this offer, in response to examination by the Charging Party, Garza indicated that he could not remember "when in March of 1988" that he was offered employment. However, he later stated that it was 2 to 4 weeks after he took the physical. This job offer would have been made in the context of an application listing an employment history limited to union contractors.

The allegation of discrimination in his case is without merit. Convincing testimony fails to disclose that Respondent would have any basis for associating his application with the union drive, or that it refused to consider him for employment on considerations of union affiliation. In fact, he admits to a job offer, which he rejected. Beyond that, there is no showing that Respondent had any reasonable basis for considering him a viable candidate for employment. At the very least, the Respondent has shown that Garza was afforded the same treatment he would have been accorded had no form of union activity emerged. The 8(a)(3) and (1) allegation in his case shall be dismissed.

## (3) Von Earl Williams

Williams, a member of Local 582 for some 40 years, is a journeyman boilermaker. On January 11, he completed and filed an application at the Respondent's offsite employment office (G.C. Exh. 6(e)).<sup>59</sup>

Williams had been employed by the Respondent at Exxon in April 1987 for about 18 days until laid off. In addition he had employment stints with the Respondent when it operated under the names Jacobs Engineering and H. E. Weise.

Assuming that Williams was not offered work pursuant to his 1988 application,<sup>60</sup> their is no evidence that any failure to act on this filing was based on selection criteria differing from that in effect when he was hired by the Respondent in the past. Moreover, there is no evidence, nor reasonable basis for inferring that Respondent was aware that this former employee, had active union status during that period. In short, from all appearances on this record, Williams in January 1988 presented no stronger organizational threat than in 1987 or earlier dates when he manifested a will to work nonunion for the Respondent's predecessors. The 8(a)(3) and (1) allegation in his case shall be dismissed.

## (4) Aljire John Joseph

Joseph, a boilermaker-welder, is a long-term member of Local 582. On December 21, 1987, he visited the Respondent's Baton Rouge employment office, obtained a blank application, completed it and turned it in. (G.C. Exh. 6(e).) He claims that he provided the Union with a copy, but was not among those who completed applications for submission by the Union. Finally, Joseph avers that, though he signed the

<sup>57</sup>The Respondent has documented the fact that Richardson was hired on June 24 and was actively employed by it at the time of the hearing.

<sup>58</sup>Garza could recall signing the out-of-work log on only three occasions—first, on filing the application; second, 1 week later, and finally, a week before the hearing.

<sup>59</sup>Williams relates that he was given his physical examination that day. He admits that a physician expressed that his blood pressure "was a little high."

<sup>60</sup>Williams denied that he received such an offer. A notation on his application apparently made by Wanda Taylor suggests that he was contacted on January 12, 1988, but was working at the time. R. Exh. 23. The issue need not be resolved.

Respondent's out-of-work log on more than one occasion, he did not receive an offer of employment.

On cross-examination, Joseph admitted to having been hired by the Respondent, but was uncertain as to when, stating "it was in the early part before we started organizing the job."<sup>61</sup> The Respondent's records indicate that it employed Joseph from January 5 to March 3, 1988, at Dow Chemical jobsite as a class B pipefitter. Thereafter, in addition to filing an application, according to Breeden, his search disclosed that Joseph had signed the sign-in log only once, on April 5, 1988.

The 8(a)(3) and (1) allegation in Joseph's case shall be dismissed. Joseph's own employment experience indicates that prior to the instant campaign, the Respondent did not exclude prospects with a history of employment with union contractors. On the contrary, the evidence, at least in the cases of Luciano Garza, Farrell Alford, and Von Earl Williams, shows that applicants in that category were considered, offered jobs and actually hired by the Respondent. While it is true that he had signed the sign-in log after advent of the Union at Exxon, his prior employment with the Respondent and the date of his application obscures any fair assumption that the Respondent would have identified his quest for work with the Union's organizational objective. Thus, there is no reasonable basis for concluding that union membership was a factor influencing action taken by the Respondent on Joseph's application, as required by *Wright Line*, supra, and the 8(a)(3) and (1) allegations in his case shall be dismissed.

<sup>61</sup> Joseph also completed and filed an earlier application, dated November 19, 1987. R. Exh. 7.

#### CONCLUSIONS OF LAW

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

2. The Charging Party and its Local 582 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not, since April 15, 1988, refuse to hire the 56 applicants named in the complaint for reasons proscribed by Section 8(a)(3) and (1) of the Act.

4. The Respondent did not, since April 15, 1988, refuse to hire Dawson C. Fontenot and James R. Guice for reasons proscribed by Section 8(a)(3) and (1) of the Act.

5. The Respondent did not, since April 1, 1988, refuse to hire Joseph E. Bergeron, L. J. Garza, A. J. Joseph, Arthur Ree Richardson, and Von Earl Williams for reasons proscribed by Section 8(a)(3) and (1) of the Act.

6. The Respondent did not engage in any of the unfair labor practices set forth in the instant consolidated complaints.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>62</sup>

#### ORDER

The consolidated complaints are dismissed in their entirety.

<sup>62</sup> 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.