

**VOS Electric, Inc. and International Brotherhood  
of Electrical Workers, AFL-CIO, Local Union  
1340. Case 11-CA-14834**

December 7, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On August 18, 1992, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a reply 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 recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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

We agree with the judge that the Respondent rebutted the General Counsel's evidence of the Respondent's knowledge of the discriminatees' union affiliation. Even assuming that the General Counsel has established a prima facie case, we agree with the judge that the Respondent demonstrated that it would not have hired the alleged discriminatees in the absence of any protected conduct on their part.

*Jasper C. Brown Jr., Esq.*, for the General Counsel.  
*Robert J. Janssen, Esq.*, and *C. David Stellpflug, Esq.*  
(*Stellpflug, Janssen & Nell*), of De Pere, Wisconsin, for  
the Respondent.  
*James Pickin, Rep.*, of Newport News, Virginia, for the  
Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

WILLIAM N. CATES, Administrative Law Judge. Local Union 1340, International Brotherhood of Electrical Workers, AFL-CIO (the Union), filed an unfair labor practice charge against VOS Electric, Inc. (the Company), in Case 11-CA-14834 (formerly Case 5-CA-22476) on January 13, 1992. The charge, which was amended on February 25, 1992, alleges the Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by on or about November 18, 1991, refusing to hire some 32 employee-applicants because the employee-applicants joined, supported, or

assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid and/or protection. After an investigation, the Regional Director for Region 11 of the National Labor Relations Board (the Board), on February 26, 1992, issued a complaint and notice of hearing charging the Company with violating Section 8(a)(1) and (3) of the Act by its failure since on or about November 18, 1991, to hire the following named individuals:

Scott Bittinger <sup>1</sup>	Mark Kiessling <sup>2</sup>
Shawn P. Campbell	John C. Lewis
Gilbert D. Diehl	Steven E. Lewis
Franklin D. Edwards	Dale E. Marlin
Charles E. Fuller	Scott A. Moore
David Gaskill	Carl Edward Morrisette Jr. <sup>3</sup>
Julis F. Gibson Jr.	Chester Odom
Addison M. Goddard	Ronald A. Parish
Charlie A. Hall Jr.	Timothy W. Quail
Eric C. Horton	Roger D. Ramsey
William B. Howard	John F. Roger
Brian R. Howell	Mark E. Rosenberger
Robert W. Ingram	James L. Simmons
Jeffrey D. Jones	Daniel M. Stenquist
Terry M. Jones	William D. Wilson
Gene D. Jordan	Raynard L. Wood

I heard this case in trial at Courtland and Franklin, Virginia, on June 1 and 2, 1992, respectively. The Company filed a timely answer to the complaint in which it admitted certain allegations but denied it violated the Act in any manner.

I have carefully reviewed the trial record and have studied the posttrial briefs by counsel for the General Counsel and counsel for the Company. I have been influenced by my assessment of the witnesses as they testify. Based on the above and as explained below, I will conclude the Company has not violated the Act in any manner set forth in the complaint.

**FINDINGS OF FACT**

**I. JURISDICTION**

The Company is a Wisconsin corporation, licensed to do business in the State of Virginia, where it is engaged as an electrical subcontractor at the Union Camp Paper Mill located in Franklin, Virginia. During the 12 months preceding issuance of the complaint, a representative period, the Company received at its Union Camp Paper Mill jobsite located in Franklin, Virginia, goods and raw materials valued in excess of \$50,000 directly from suppliers outside the State of Virginia. During the same representative time, the Company performed services for customers located outside the State of Virginia valued in excess of \$50,000. It is alleged in the complaint, the parties admit, the evidence establishes, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> Bittinger's name was amended into the complaint at trial. Also at trial, William T. Cook's name was amended out of the complaint.

<sup>2</sup> Kiessling's name is spelled Keisling in the complaint, however, the above appears to be the correct spelling.

<sup>3</sup> Morrisette is listed as Edward R., however, it is believed the above listing is correct.

## II. LABOR ORGANIZATION STATUS

It is alleged in the complaint, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE FACTS

The Company, which is based in Wisconsin, contracts for electrical and instrumentation type work at various facilities throughout the United States.<sup>4</sup> Currently, the Company has 11 contracts at jobsites in States including Alabama, Arkansas, Texas, Utah, Wisconsin, and Virginia (Franklin). Corporatewide, the Company employs in excess of 500 employees. The only jobsite involved in the instant case is the Union Camp Paper Mill site at Franklin, Virginia. The Company, in addition to its current contract with Union Camp Paper Mill, has had two prior contracts for electrical work at this same facility. The two other contracts at the Union Camp Paper Mill site were in February 1990 and May 1991. The contract for the electrical services that gives rise to the dispute was awarded to the Company by competitive bidding and work started on the project in November 1991. The contract is for approximately \$3.5 million including materials and labor and is described as a "hard dollar job."<sup>5</sup>

Company President Ron Van Den Heuval (President Heuval) testified that in bidding for the Union Camp Paper Mill "hard dollar job" he based the Company's successful bid on "quantities of and . . . materials cost . . . overhead such as per diem . . . health insurance . . . fringe benefits . . . and the labor rate [he] want[ed] to use for that job." According to Superintendent Oliver, the job involves 100,000 plus man hours. Company President Heuval and Superintendent Oliver said they decided on a labor cost that would not exceed an average of \$10 per hour.

After the Company was awarded the contract and based on the need for electricians and helpers, the Company advertised in November in various newspapers (Tidewater News, Virginia Pilot, Columbia State, and The Savannah News Press) for "industrial electricians and helpers of all experience levels." Applicants were directed to apply at the jobsite or mail their resumes to the Company in care of Superintendent Oliver. Oliver stated approximately 30 to 40 job seekers came to the jobsite daily during the time (10 to 20 days) the newspaper advertisements were being run. Oliver said that all together the Company received between 500 and 600 applications for employment at its Union Camp Paper Mill project. Oliver testified he hired electricians and helpers as needed throughout the period from late November 1991 to March 1992. Oliver said that all job applications (left at the site or mailed to the Company) were separated according to the rate of pay an applicant was seeking and by the job classification indicated—foreman, journeyman, or helpers.

Superintendent Oliver said that in staffing the site he first sought to transfer current employees from other company locations or to hire employees who had previously worked for the Company. Oliver said he next sought to employ those he

knew or knew about their work habits and skill levels. Oliver said he also tried to determine if an applicant knew anyone that he (Oliver) knew so the person knowing the applicant could vouch for the applicant's skills and work habits. Oliver said he also noted the rate of pay an applicant was asking for or expecting. Oliver said he did not want to hire anyone that was asking for or had been making \$2 or \$3 more per hour than the Company could afford to pay because such applicants would be "dissatisfied" with the job and "quit" as soon as a better paying job came along. Oliver said he did not telephone anyone for an interview because there were always applicants at the site waiting to be interviewed. According to Oliver, no applicant was hired by merely dropping off an application at the jobsite and not requesting or waiting for an interview. Oliver testified:

If they dropped off an application and didn't wait around . . . they had a very slim chance of getting hired, or they just didn't. I can't think of any, you know, that I would have hired like that, because I had too many to pick from that were there.

You know, a bird in the hand is better than one in the bush.

Oliver testified that if a job seeker came to the site for an interview and indicated they had already filed an application, he asked the applicant what pay rate he/she had indicated on his/her application because the applications had been filed based on the rates of pay the applicants were seeking.

Superintendent Oliver described his overall approach to interviewing and selecting employees as follows:

Well, the way I go about hiring somebody is first off do I know them, did they ever work for me before. I have worked in construction all over the southeast and I know thousands and thousands of people. Did they know me, did they know anybody that I know, you know, that I would say could vouch for that person. Are they traveling, are they going to work with me somewhere else down the road.

What kind of pay have they been used to making and what am I looking for. Am I looking for journeymen or helpers, in other words what is my span of pay rate that I'm looking for, what is my average rate on the job, what did I bid the job for, what level of person can I hire to keep my average rate in such a way that we can try to make money on the job.

Oliver described his interviewing techniques as:

Mostly . . . it was just a talking, you know, we talked about, I would talk about almost anything just to kind of get a feel for what, you know, how they felt, what their attitude was like. And I also talked about the jobs they had done.

Oliver indicated an applicant's persistence impressed him. Oliver said that an applicant that appeared at the worksite looking for work before the workday commenced "had a edge" over anyone else looking for work. Oliver said that if an applicant called at a time that he was not hiring he might have instructed the person to call back or come by later but that he did not call anyone in for an interview.

<sup>4</sup>Most of the Company's work is performed at existing businesses.

<sup>5</sup>A "hard dollar job" as described by Company Superintendent Ray Oliver (Superintendent Oliver) is where "you bid a job for a certain amount and that's all you're going to get for doing that job" as opposed to a time and materials job where "you're selling your productivity and you do what it takes to get the job done."

Company President Heuval testified that when the work force for any project exceeded approximately 50 employees, the Company utilized temporary employment agencies to assist in staffing the project. Heuval said the Company utilized the services of two such companies in staffing “the lower end of the skill levels” at the Franklin, Virginia site. The two outside employment agencies the Company utilized at the Union Camp Paper Mill project were Ameristaff and Abacus.

Superintendent Oliver said it was necessary to use the two temporary agencies:

Because they took a lot of the burden of the work off of me. You know, they were, they could do the interview, they could call them in and that was basically the biggest reason.

The employees that were hired by the two employment agencies worked at the Company site but remained employees of the employment agencies. Some of the employment agencies employees were after a period hired by the Company. President Heuval said Ameristaff employed a maximum of 28 employees and Abacus peaked at 24 employees at the Union Camp Paper Mill project. Heuval said the Company hired approximately 191 employees at its Franklin, Virginia jobsite including the employees it hired from Ameristaff and Abacus. He explained that did not mean the Company had 191 employees on the jobsite at any given time. Heuval said the Company never exceeded an employee complement of 124 at any given time and that the Company never exceeded approximately 85 employees of its own.<sup>6</sup>

Company President Heuval testified the Company has non-discrimination policies which he personally wrote and that the Company hires “strictly by merit” without regard to “race, color, creed, sex, fear of retaliation age, nationality [or] religion.” Heuval said union applicants were treated no differently than nonunion applicants. President Heuval stated union membership or lack thereof does not concern the Company so long as the applicants meet the wage rate the Company has designated for any particular jobsite.<sup>7</sup>

Superintendent Oliver said he had no problem hiring union applicants and stated he even told Union Business Manager

<sup>6</sup>I am not unmindful that the list reflecting all employees that worked for the Company at its Union Camp Paper Mill project jobsite reflects only 177 employees with 6 of those being supervisors and approximately 43 being employees that transferred from other jobsites of the Company. I find it unnecessary to reconcile or further address these differences in order to decide the issues. Whatever the exact number of employees may have been approximately 30 were qualified electricians with the remainder being helpers or laborers according to Superintendent Oliver.

<sup>7</sup>President Heuval testified the Company employes IBEW members. He based his knowledge on the fact he is the trustee of the Company’s 401(K) pension plan. Heuval said 47 employees corporate wide had switched their pension plans from the Union to the Company. He also stated 11 employees currently do not accept the Company’s health and dental coverage and have the funds paid instead into a trust fund. Heuval said that normally indicated such employees belong to a labor organization. Heuval said 5 of the latter 11 are currently working at the Franklin, Virginia jobsite. Additionally, President Heuval said that nine employees that work for the Company (corporatwide) have been sued with liens placed on their homes by their particular local unions because the locals had rules that prohibited its members from working for the Company herein.

James Pickin to “tell his people to put . . . in applications” with the Company.<sup>8</sup> Oliver said he treated applications presented to him by Business Manager Pickin just like other applications and added he never looked on an application when interviewing an applicant to see if the applicant was union or not. Oliver testified an applicant’s union sympathies “didn’t bother [him] [h]e said he had hired union people and used union people because everyone [had] to feed their family.”<sup>9</sup>

Business Manager Pickin testified he not only attempted to be hired by the Company but that he also sought to persuade the Company to hire members of his local union exclusively. Pickin said he first made application with the Company in May 1991 but did not at that time indicate he was affiliated with the Union. He said he thereafter telephoned the Company once or twice and was told the Company would be hiring through an employment agency—Abacus. Pickin applied with Abacus in July 1991. Business Manager Pickin said he visited the Company’s jobsite on November 11, 1991, and updated his employment application noting his union affiliation and position on the application. Pickin said he spoke with a company representative named Smitty.<sup>10</sup> According to Pickin, Smitty told him the Company had been awarded a big job at Union Camp Paper Mill and that a Superintendent Oliver would be coming to the jobsite the following week to start taking applications and conducting interviews for employment.

Business Manager Pickin said he notified his local membership the Company would be hiring and that he would be taking applications to the Company. He asked the membership to come to the local’s office and truthfully fill out job applications. Pickin instructed his membership to reflect on their applications that they had “been through an apprenticeship” program and that they were members of the Union. Pickin testified 10 to 12 members thereafter prepared employment applicants. Pickin said he again visited the Company’s jobsite on November 18:

I encountered [Supt.] Oliver on the outside of the trailer, I figured out who he was<sup>11</sup> and I encountered him and I told him who I was, that I was Assistant Business Manager of my local and I was offering him the terms of an agreement as I would any other contractor and we would be willing to work the job agreement out, a one job agreement.

<sup>8</sup>Business Manager Pickin acknowledged Superintendent Oliver told him he would hire union people and did not have a problem with it. Pickin also acknowledged a company secretary informed him that Abacus was being utilized by the Company to interview and hire applicants. Pickin testified he did not inform or encourage his local union membership to apply at Abacus. Pickin said he did not direct the membership to file applications at Abacus because “they had been use to making \$15. Abacus, was paying \$10 and no more, and I felt they deserved more than \$10.”

<sup>9</sup>Oliver said that between November 1991 and March 1992, he hired seven union applicants as electricians. The record reflects the Company has not hired electricians after March 1992.

<sup>10</sup>The parties stipulated the Company has a Superintendent Gerald Smith, but the parties would not stipulate it was Superintendent Smith that Pickin spoke with on November 11.

<sup>11</sup>Pickin had never met Oliver prior to this occasion.

He informed me that there was no way that VOS Electric would sign an agreement of any kind, that he was going to need quite a few electricians, that he would hire his electricians from the street, that it was an employer's market, he could pay any dollar he wanted to to any electrician he wanted to. There were a lot of people walking the streets and he could do that.

Pickin testified that after his conversation with Superintendent Oliver, he received a "fax" type message from a sister local of the Union that indicated the Company would be hiring 60 to 80 employees over a period of time at a pay scale of \$10 to \$12. Pickin said that after receipt of the fax, he had unemployed electricians from time to time fill out applications "some 20 or so" for employment with the Company which he "at various times delivered . . . to VOS' trailer."

Pickin testified he delivered a "handful of applications" to the job site on December 11, 1991, but that since Superintendent Oliver was not there, he did not leave them with anyone else in the office.

Pickin testified he returned to the job site on December 16, 1991, with employment applications which he was able to present to Superintendent Oliver. Pickin testified:

I presented [Supt. Oliver] with these applications for employment. He looked at them, we spoke and he looked at them as if he didn't quite know what to do with them but he did accept the applications as I presented them.<sup>12</sup> I informed him they were qualified electricians, they were unemployed and they were looking for work.

Pickin testified Supervisor Oliver did not indicate he would contact him or his members.<sup>13</sup> Pickin stated Oliver told him he was going to hire "a lot of people but not people who were making too much money, that he was looking for a lower rate electrician."

On January 13, 1992, Pickin, on behalf of the Union, filed unfair labor practice charges with the Board charging the Company with unlawfully failing and refusing to hire applicants affiliated with the Union.

Business Manager Pickin testified that on March 11, 1992, he had 14 of his out of work local union members fill out employment applications at the union office and then he and the 14 members went to the Company's jobsite. At the jobsite, he gave the 14 applications to a secretary along with the following letter:

<sup>12</sup> Superintendent Oliver acknowledged "I didn't quite know what to do with them, because I had never been handed a stack of applications before, you know. But I put them on my desk and treated them just like the rest of them."

<sup>13</sup> Superintendent Oliver testified he did not call or contact anyone to come for an interview, be they union members or otherwise. Business Manager Pickin testified he visited the jobsite again on January 6, 1992, and turned in three or four more job applications. He could not recall if he gave the applications to a secretary in the construction trailer or someone else. Pickin visited the jobsite again on January 8, 1992, and turned in two or three more job applications. He said one of his unemployed local union members, Terry Jones, was with him and filled out an application at the site and presented it to a secretary.

March 11, 1992

Mr. Ray Oliver, Project Superintendent  
VOS Electric Inc.  
Franklin Paper Mill  
Franklin, Virginia

Dear Mr. Oliver:

With me today are 15 unemployed applicants for employment who are members of Local Union 1340, International Brotherhood of Electrical Workers. All are residents of this area, have passed a journeyman's examination given by the duly constituted construction local union or have been certified as a journeyman wireman by a joint apprenticeship and training committee and are willing to work under the same terms and conditions which have been extended to other employees who are qualified in the trade.

You will not be able to employ more qualified and productive employees in any labor market.

Please feel free to contact any of these applicants through this office.

Sincerely,

/s/ James E. Pickin  
James E. Pickin  
Asst. Bus. Manager

Pickin testified Superintendent Oliver was not present at the jobsite when he and the others arrive. Pickin waited for Superintendent Oliver to return from the airport with Company President Heuval but he said the applicants that accompanied him "were in a hurry to get home" and did not wait around. Pickin said he spoke with Oliver and Heuval about work at the jobsite and unionism. According to Pickin, Heuval told him he had been a past union member and that his father and brothers were union members.

Pickin stated that the following day he received a telephone call from Superintendent Kussow who asked him to have five specifically named applicants who had left their applications at the Company the day before to come in for an interview. According to Pickin, Kussow "wanted to interview [the] five people and he would in turn hire those people if they met his qualifications." Pickin notified the requested applicants who went to the jobsite the next day (a Friday) where they were interviewed and told to report for work the following Monday (March 16, 1992). The five were Eric Horton, James Simmons, Scott Moore, Carl Morrisette, and Mark Kiessling. The five were hired at a pay scale of \$13 per hour.

It is necessary to highlight the testimony and/or review the job applications of the 32 applicants named in the complaint. I have addressed the named applicants in alphabetical order.

Scott Bittinger testified he filled out an application on December 3, 1991, which was taken to the Company by Business Manager Pickin on December 16, 1991. Bittinger said he never visited the construction site at any time, nor did he receive any calls from the Company. Bittinger testified he has 5 years of experience as an electrician and last worked for less than \$13 an hour when he was an apprentice. Bittinger indicated on his application that he expected to make \$15.25 per hour and that he had completed the Union's

apprenticeship program. Bittinger listed the IBEW as a professional organization that he belonged to.

Shawn P. Campbell testified he submitted an application at the jobsite on November 11, 1991. He testified a secretary told him that neither Superintendent Oliver, nor anyone else in authority, was there to interview him, that the Company would be in touch with him. He testified the Company did not thereafter contact him. Campbell testified he has 9 years of experience and it had been 4 years since he earned \$13 or less per hour. On his application, Campbell indicated he had completed the IBEW's apprenticeship program and listed the Union as a professional organization that he belonged to. Campbell indicated he expected to earn \$15 per hour.

Gilbert D. Diehl testified he filled out an application on December 5, which was delivered to the jobsite by Union Business Manager Pickin on December 16, 1991. Diehl testified he has 25 years of experience and indicated on his application that he expected to earn \$15 per hour. Diehl said it had been several years since he made \$13 or less per hour. Diehl said he made no contact with the Company and the Company did not contact with him. Diehl does not mention the Union on his application, however, he testified that the job references he listed on the reverse side of his application were all union jobs.

Franklin D. Edwards did not testify at the trial. However, the parties stipulated that Business Manager Pickin delivered Edwards' application to the Company on December 16, 1991. On the application, which appears to have been prepared on December 5, 1991, Edwards indicated he had completed an apprenticeship program of the Local Union. The last employment reference on his application reflects Edwards made \$19.75 per hour.

Charles E. Fuller testified he filled out his employment application at the union hall on November 27, and that Business Manager Pickin took it to the Company on December 16, 1991. He said he has had no further contact with the Company. He has 25 years of experience. Fuller left the salary requirement part of his application blank but said he has not worked for \$13 or less per hour since the late seventies. He reflected on his application that he had completed an electrician's apprenticeship program and under professional organizations listed he was a member of the IBEW.

David Gaskill prepared his application at the jobsite on November 20, 1991, and gave it to a company secretary. He upgraded his application on March 3, 1992. Gaskill said he has 6 years of experience and on his application indicated he had completed the local union's apprenticeship program and that he expected to be paid \$15.25 an hour. He reflected under professional organizations that he belonged to IBEW Local 1340. No one from the Company contacted Gaskill.

Julis F. Gibson Jr. filled out his employment application at the union hall on December 13, and Business Manager Pickin took it to the Company on December 16, 1991. Gibson contends that all employment references on his application are union employers, however, he made no specific reference to the Union on his application. Gibson left blank that part of his application related to what he expected to be paid as well as other portions of the application. Gibson said it had been 4 years since he earned \$13 or less per hour.

Addison M. Goddard testified he personally submitted his application to the Company on November 21, 1991. He said a secretary told him the Company was not hiring at that time

but would be in the future. Goddard testified he has 35 years of experience and said it had been a year since he worked for \$13 or less per hour. Goddard said all employment references on his application were union employers. Goddard left blank that portion of his application relating to what he expected to be paid, however, the last employment reference on his application reflects he was paid \$18.50 per hour and the lowest he was paid by any employer referenced on his application was \$15.25 per hour. Under professional organizations, Goddard listed he was a member of the IBEW.

Charles A. Hall Jr. testified he prepared a job application on January 8, 1992, and that Business Manager Pickin took it to the union hall on or about that date. Hall left the salary and professional organizations portions of his application blank but did reflect he had completed an apprenticeship program that Local 1340 administered. Hall testified the employment references on his application were all union employers. Hall said he has 8 years of experience.

Eric C. Horton was hired by the Company in mid-March 1992. Horton said he submitted an original application at the jobsite on November 12, 1991, and submitted a second one in March 1992. Horton testified he has 4 years of experience and said the employment references on his original application were all union employers. Horton reflected on his original application that he had completed the JATC apprenticeship program which he indicated was sponsored by the State of Virginia. Horton left blank that portion of his application pertaining to expected wages.

William B. Howard testified he has 15 years of electrical experience and that he completed his application for employment with the Company on December 2, which was taken to the Company by Business Manager Pickin on December 16, 1991. Howard said he prepared a second application at the jobsite on March 11, 1992. Howard testified he was never hired or contacted by the Company. On his original employment application, Howard reflected he had completed the apprenticeship program of Local 1340 and listed as a professional organization that he belonged to the IBEW. Howard left blank that portion of his application related to what wages he expected to be paid; however, the last employment reference on his application reflects he earned \$28 per hour and the least he was paid by any employer of reference was \$15.25 per hour.

Brian R. Howell testified he made application for employment at the jobsite on November 12, 1991. Howell said he has 5 years of experience and stated the employment references on his application were all unionized jobs. Howell said he was never contacted by the Company. Howell reflected on his application that he had completed the joint apprenticeship training program which he indicated was sponsored by the State. Howell left blank that portion of his application related to professional organizations and the wages he expected to be paid. Howell said the last time he earned less than \$13 per hour was in 1991.

Robert W. Ingram submitted his employment application to the Company on November 12, 1991. Ingram testified he has 27 years of electrical experience and said the employment references on his application were all union employers except one. Ingram reflected on his application that he had completed a joint apprentice training program that he reflected was sponsored by the State of Virginia. Ingram reflected he expected to be paid at least \$12 per hour.

Jeffrey D. Jones prepared an employment application at the union hall on December 17, 1991, and Business Manager Pickin took the application to the Company on January 8, 1992. Jones testified he went to the Company twice but does not recall who he spoke with, but said it may have been a secretary. Jones testified he has 16 years of experience and that the employment references listed on his application were all union employers. Jones listed the IBEW as a professional organization that he belonged to. Terry M. Jones did not testify at the trial. Business Manager Pickin testified he saw Jones fill out an application at the Company and give it to a secretary. Jones' application is signed and dated January 7, 1992. On the application, Jones indicated he expected to be paid \$15 per hour and indicated under professional organizations that he was a member of IBEW Local 1340.

Gene D. Jordan testified he did not personally apply but rather got his application from Business Manager Pickin. Jordan's application is dated December 10, 1991. Jordan said he has 28 years of experience and reflected on his application he has completed an apprentice training program sponsored by the Union. Jordan left blank those portions of his application that reflected membership in professional organizations and the wages he expected. Jordan testified he last earned \$13 or less per hour in 1984. The least amount of hourly wage Jordan reflected in his employer references was \$15 per hour.

Mark Kiessling testified he applied for employment with the Company in mid-January 1992 and then again in March. Kiessling testified he went with Business Manager Pickin to the Company on March 12, and a day or so thereafter was interviewed by Superintendent Kussow and hired effective March 16, 1992. Kiessling said he has 10 years of experience and is working at the Company for \$13 an hour. On his employment application, Kiessling reflected he had completed an apprenticeship program of the Union and under professional organizations indicated he belonged to the Union. Kiessling indicated on his application that he expected to make \$15 per hour.

John C. Lewis prepared an application on December 11, which was submitted to the Company by Business Manager Pickin on December 16, 1991. Lewis testified he has 39 years of experience and has worked in various parts of the United States. On his application Lewis reflected he has completed an apprenticeship program of the local union and he listed his employer from 1953 to 1991 as IBEW Local 1340. Lewis left blank that portion of his application related to what wages he expected to be paid.

Steven E. Lewis prepared an application for employment on December 20, 1991, which was submitted to the Company by Business Manager Pickin on January 8, 1992. Lewis testified he has 12 years of experience and he said he twice called the Company to follow up on his application but was told each time the Company was not hiring. Lewis testified two of the employment references on his application were union employers and one was not. Lewis indicated he has completed an apprenticeship program of the union and under professional organizations listed his IBEW membership. Lewis put a question mark on that portion of the application related to what wages he expected to be paid.

Dale E. Marlin testified he responded to a newspaper advertisement and went to the jobsite where he made application for employment on December 14, 1991. Marlin testified

he spoke with Superintendent Oliver while he was filling out his application. According to Marlin, they talked about the value of the Company's contract and Marlin said he told Oliver he was a member of IBEW Local 80. Marlin testified Oliver said he had tried to get into the union in his younger days but had not been successful. According to Marlin, Oliver asked if he still worked with his tools, climbed ladders, and did things like that. Marlin told Oliver he sure did. Marlin said Oliver told him that men of his [Marlin's] age usually ended up being foremen, and said he would have him in for an interview in 2 weeks or so. Marlin said he listed on his application both union and nonunion employer references. Marlin left blank that portion of his application related to what wages he expected to be paid. Marlin said he had not been paid less than \$13 per hour since 1979. He listed IBEW Local 80 as a professional organization he belonged to. Marlin testified the Company did not contact or hire him at any time even though he has 30 years of work experience. Marlin also testified he mailed out well over 200 resumes to companies around the country but had not been offered employment by any of them. He said it appeared he was overqualified for some jobs.

Superintendent Oliver said he did not like Marlin's attitude when he spoke with him. Oliver said Marlin "had politicked his way through life all the time . . . that's the attitude I got from him . . . he talked a big lot but . . . I don't think he had worked very much [with] his tools."

Scott A. Moore prepared an employment application on December 2, which was taken to the Company by Business Manager Pickin on December 16, 1991. Moore made a second application at the Company in March, a day or two before he was hired at \$13 per hour on March 16, 1992. Moore said he was interviewed by Superintendent Kussow before he was hired. On his original application, Moore reflected he had completed an apprenticeship program and received an apprenticeship degree. Moore left blank that portion of his original application that related to any professional organizations he belonged to or what wages he expected to earn. Moore testified it had been 4 years since he last worked for \$13 or less per hour.

Carl Morrisette filled out an application on December 5, which was taken to the Company by Business Manager Pickin on December 16, 1991. Pickin has 15 years of electrical experience and stated he could do whatever needed to be done on a project. Morrisette went to the jobsite the first week in March and was hired by the Company in mid-March 1992. Morrisette testified that Superintendent Oliver had "been more than reasonable with him and the other union members" on the project. On his original application for employment, Morrisette left blank what wages he expected to be paid but reflected under professional organizations that he belonged to the local union.

Chester Odom prepared an employment application on December 2, which was apparently delivered by Business Manager Pickin to the jobsite on December 16, 1991. Odom testified he has 21 years of experience. He said he never visited the Company's jobsite nor did anything other than make application for employment with the Company. On his application, he twice reflects he has been with the Union for 21 years. Odom left blank that portion of his application related to what wages he expected to be paid.

Ronald A. Parish testified he prepared an application on November 20, 1991, and a second application at the jobsite some 2 months later. Parish testified on direct examination that the secretary that he gave the application to said if the Company needed him, they would call him. However, on cross-examination, he testified the secretary never said anything about contacting him but rather that the secretary was eating lunch and very little was said between them. On his original application, Parish reflected he had completed an apprenticeship program and that he expected to be paid \$15.25 per hour. He listed the Union under professional organizations.

Timothy W. Quail's employment application, which is dated December 11, 1991, was taken to the Company by Business Manager Pickin on December 16, 1991. Quail testified that in March he went to the jobsite and filled out another application which he left with a secretary. Quail said his latest application was made after the Company had hired certain union members in mid-March 1992. Quail testified he has 10 years of experience and that he last worked for \$13 or less per hour in 1988 or 1989. On his original application for employment, Quail indicated he had completed an apprenticeship program of the Union and listed his employer from 1982 to 1991 as the Union at a pay rate of \$15.50 per hour. Quail left blank that part of his application related to the wages he expected to be paid.

Roger D. Ramsey testified he prepared an employment application at the union hall on January 7, 1992, and left it at the hall. Apparently, Business Manager Pickin delivered the application to the Company on January 8, 1992. Ramsey testified that the employment references on his application were all unionized employers and that he has 24 years of experience as an electrician. Ramsey left blank the wages he expected to be paid but listed, as a professional organization, that he belonged to the Union. Ramsey also listed Business Manager Pickin as a reference on his employment application.

John F. Roger, whose application is dated November 15, 1991, testified he submitted it in person to the Company. Roger testified he returned to the jobsite on February 24, 1992, and spoke with an unidentified person who assured him his application was still on file. Roger testified he has 20 years of experience. Roger left blank that portion of his application relating to what wages he expected to be paid; however, he indicated he had completed an apprenticeship program of the Union and reflected under professional organizations that he belonged to the Union. In his employment references, he reflected he had made between \$18.65 and \$19.11 per hour on his prior jobs.

Mark E. Rosenberger testified he has 9 years of experience and made application for employment with the Company on February 25, 1992. He testified the employment references on his application are all union employers. Rosenberger said he first applied for employment with the Company at the job site on November 19, 1991. He said that at that time, he simply filled out the application, left it with the Company, and nothing was said to him about hiring prospects. No copy of this purported application was offered or received in evidence. On his 1992 application, he reflected he expected to be paid \$13 per hour and indicated he had completed the Union's apprenticeship program and was a member of the local union.

James L. Simmons testified he applied at the jobsite on November 19, 1991, and gave his job application to Superintendent Oliver. On the application, he indicated he expected to be paid \$15.25 per hour and that he had completed an apprenticeship training program. He listed under professional organizations that he was a member of the Union. For all the employment references on his application, he reflects he was paid at the rate of \$15.25 per hour. Simmons was hired by the Company on March 16, 1992, at a pay rate of \$13 per hour.

Daniel M. Stenquist prepared his employment application on December 2, and it was taken to the Company by Business Manager Pickin on December 16, 1991. Stenquist testified the employment references on his application are all unionized employers. Stenquist testified he has 4-1/2 years of electrical experience. He reflected on his application that he expected to be paid \$15.25 per hour. Stenquist also reflected he had completed an apprenticeship program.

William D. Wilson testified he prepared an application dated November 12, 1991, and submitted it to a secretary at the jobsite. Wilson testified he has 17 years of experience and that it has been 2 or 3 years since he earned \$13 or less per hour. On the application, Wilson reflected he had completed the Union's apprenticeship program and that he expected to be paid \$12 to \$13 per hour. Wilson testified the employment references on his application were all unionized employers.

Raynard L. Wood testified he submitted his first application dated January 16, 1992, through Business Manager Pickin. Wood testified he submitted a second application in person on March 14, 1992, but has never been contacted or interviewed. Wood listed on his original application that he expected to be paid \$15.25 per hour, that he had completed the Union's apprenticeship program and listed Business Manager Pickin as a reference. Under professional organizations, Wood reflected he was a member of the Union. Wood's March 14, 1992 application was not offered or received in evidence.

### III. THE WRIGHT LINE TEST AND OTHER LEGAL PRINCIPLES

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

The classic elements commonly required to make out a prima facie case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus. As to the latter element, the Board, under certain circumstances, will infer animus in the absence of direct evidence. Such a finding may

be inferred from the record as a whole. See, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). In the *Fluor Daniel, Inc.*, case, which involved refusals to hire, the Board concluded that where all applicants who revealed some indicia of union membership on their applications were not contacted or called in for an interview or hired while applicants who uniformly displayed weak or nonexistent union ties were it was reasonable to infer it was not just coincidental and that such disparity, standing alone, was sufficient to support a prima facie case of discrimination.

It is well established that a failure to hire a job applicant because of his/her union sympathies or activities violates Section 8(a)(1) and (3) of the Act. The same principle applies when an employer, for the same reasons, fails to consider an applicant for employment. See, for example, *D.S.E. Concrete Forms*, 303 NLRB 890 (1991).

#### IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

##### A. *The General Counsel's Prima Facie Case*

Examining the instant facts, in light of the principles outlined above, I am persuaded Counsel for the General Counsel established a prima facie case.

##### 1. Company knowledge of the applicants' union affiliations or sentiments

Counsel for the General Counsel placed in evidence the applications of the 32 applicants named in the complaint. A review of those applications shows that applicants Bittinger, Campbell, Edwards, Fuller, Gaskill, Goddard, Hall, Howard, T. Jones, Jordan, Kiessling, J. Lewis, S. Lewis, Marlin, Morrisette, Odom, Parish, Quail, Ramsey, Roger, Rosenberger, Simmons, Wilson, and Wood each made specific references on their applications to the Union or one of its locals. Applicants Horton, Howell, Ingram, Moore, and Stenquist indicated on their applications they had completed a joint apprentice training course. Applicants Diehl, Gibson, and J. Jones testified the employment references listed on their applications were all known union employers. Based on the above, counsel for the General Counsel asserts the Company knew that all the named applicants were members of, were trained by, or supported the Union.

##### 2. Evidence of animus and motivation

First, counsel for the General Counsel points to the fact the Company did not hire any of the named applicants until March 1992, which was approximately 2 months after the Union had filed an unfair labor practice charge against the Company. Counsel for the General Counsel argues none of the alleged discriminatees was contacted and only five were hired in late March. Counsel for the General Counsel contends it was not just coincidental that all the applicants who displayed union affiliations were refused employment. Counsel for the General Counsel contends the above "blatant disparity" standing alone is sufficient to support a prima facie showing of discrimination.

Counsel for the General Counsel also asserts that the Company's motive in failing to hire the 32 named applicants is demonstrated by Superintendent Oliver's evaluation of applicant Marlin. As noted elsewhere in this decision, Marlin visited the jobsite and made application for employment on

December 14, 1991. While at the site, Marlin talked with Superintendent Oliver. The two of them discussed union membership with Marlin telling Oliver he was a member of IBEW Local 80 (a sister local of the one involved). Superintendent Oliver asked Marlin if he still worked with his tools, climbed ladders, and did things of that sort. Marlin indicated he did. Superintendent Oliver testified about his assessment of Marlin. He said he did not like Marlin's attitude, that it appeared Marlin "had politicked his way through life" that he talked a "big lot" but he didn't think Marlin had worked very much with his tools. Counsel for the General Counsel contends Superintendent Oliver's reference to Marlin's (and other other applicants') "attitude" was nothing more than a euphemism masking his antiunion hostility.

Counsel for the General Counsel points to the significant years of experience and credentials the 32 named applicants listed on their applications and asserts the Company could not have refused to offer them employment based on their qualifications. It is noted that applicants Diehl, Fuller, Gibson, Goddard, Howard, Ingram, J. Jones, Jordan, Kiessling, J. Lewis, S. Lewis, Marlin, Morrisette, Odom, Quail, Ramsey, Roger, Wilson, and Wood each listed over 10 years' experience as electricians on their applications. The remaining applicants listed an average experience factor of approximately 6 years as electricians.

Counsel for the General Counsel points out, correctly so, that Superintendent Oliver indicated the wage rate sought by an applicant played a major consideration in whether to hire the applicant or not. Superintendent Oliver acknowledged unionized electricians were accustomed to making more (\$15.25 per hour) than the \$12 to \$13 per hour the Company was paying its electricians. Superintendent Oliver testified his past experience had been that if he hired someone for less money than the individual had been making, such an employee would become dissatisfied and quit as soon as a better paying job came along. Counsel for the General Counsel contends Superintendent Oliver cited no evidence to document his contentions in this regard. Furthermore, counsel for the General Counsel asserts the Company consistently ignored its \$13-per-hour maximum wage rate when it selected nonunion applicants for hire. Counsel for the General Counsel asserts the above further demonstrates the Company was unlawfully motivated in not selecting for hire the 32 applicants named in the complaint.

Finally, in support of a prima facie case, counsel for the General Counsel notes the Company declined to enter into a prehire agreement with the Union and notes Superintendent Oliver told Union Business Manager Pickin he could hire electricians off the street at a desired rate rather than paying the higher rates the unionized electricians expected. Counsel for the General Counsel also notes Superintendent Oliver did not offer to negotiate a lower wage rate for union members Pickin might refer to the jobsite.

I am persuaded counsel for the General Counsel's evidence, arguments, and contentions as outlined and/or alluded to above establishes a prima facie case. The Company, if it examined the applications of the 32 applicants named in the complaint, would have been aware that the vast majority of them were affiliated with or supported the Union or were trained in a program sponsored at least in part by the Union. Only five of the 32 applicants were ever offered employment with the Company and those five were only offered employ-

ment after the Union had filed a charge against the Company and the General Counsel had issued a complaint thereon. The person doing the hiring for the Company, Superintendent Oliver, had indicated he did not like the "attitude" of union supporter Marlin and certain other unnamed applicants. The experience and qualification levels of the 32 applicants were such that should have warranted some response from the Company. Thus, counsel for the General Counsel met his burden of establishing a prima facie case.

#### B. *The Company's Burden*

I am persuaded the Company demonstrated it would have taken the same action it did even in the absence of any protected concerted conduct on the part of any or all of the 32 applicants named in the complaint.

In meeting its burden, the Company demonstrated it sought to staff its Union Camp Paper Mill project with existing or former employees of the Company. Company President Heuval testified, and his testimony was not challenged on this point, that 43 of those who worked at the site during applicable times (November 1991 through March 1992) were existing or former employees of the Company.

The Company demonstrated it utilized various means to secure the remainder of its needed work force. For example, the Company ran newspaper advertisements seeking applicants from a multistate area. The Company also utilized the services of two employment agencies.

The Company demonstrated that applications, from whatever source, were all processed in the same manner. Superintendent Oliver separated and filed all applications according to the positions sought and wages expected by the applicants. Superintendent Oliver credibly testified he processed applications supplied by the Union in the same manner as those received from other sources. In agreement with the Company, I find the evidence fails to establish any unlawful motivation on the Company's part in the manner and method it utilized in receiving and filing the some 500 to 600 applications it received.

The Company demonstrated it followed a very informal, unstructured hiring procedure to select and hire those who were not existing or former employees and/or who were not supplied by the two employment agencies. Superintendent Oliver considered several factors in selecting which applicants he would hire. Oliver's first selection criteria was whether he knew an applicant and/or whether the applicant had ever worked for him before. Secondly, Oliver looked to see if the applicant knew someone he knew who could vouch for the applicant's potential as an employee. Thirdly, Oliver attempted to ascertain if the applicant would be willing to travel and/or work for the Company at some later time on some other project. Fourthly, Oliver looked at the rate of pay the applicant had been accustomed to making and noted how that would fit into the Company's average wage rate for the project in question. Fifthly, Oliver was influenced by whether the applicant showed up at the jobsite and sought an interview as well as the applicant's attitude toward work. Superintendent Oliver testified, and his testimony was not effectively challenged on this point, that no applicant was hired by merely dropping off an application at the jobsite without waiting for an interview. I am persuaded there is nothing about Superintendent Oliver's selection process, as outlined above, that would indicate it was unlawfully motivated.

Counsel for the General Counsel's entire case falls apart simply on the fact no evidence was presented to demonstrate that any of the 32 named applicants ever specifically sought an interview with the Company.<sup>14</sup> The Company demonstrated Superintendent Oliver did not hire anyone without an application *and* interview. The Company also established that Superintendent Oliver did not telephone any applicant to come to the jobsite for an interview and he did not return applicant's telephone calls. The Company established applicants had to personally appear at the worksite and wait, in some instances hours, to be interviewed. No one was hired by just dropping off an application at the jobsite. I note that applicants Bittinger, Diehl, Edwards, Fuller, Gibson, Hall, Jordan, J. Lewis, S. Lewis, Odom, Ramsey, and Stenquist never visited the jobsite at any time. The Company's evidence is persuasive that its failure to hire certain of the 32 applicants may not be attributed to unlawfully motivated reasons on its part but rather to a failure of the applicants to follow the nondiscriminatory procedures for hiring utilized by the Company.

Even if I concluded the Company's evidence, as outlined above, did not rebut counsel for the General Counsel's case, I would nonetheless conclude it presented evidence that would rebut each of the elements of counsel for the General Counsel's prima facie case.

Turning to the various elements of counsel for the General Counsel's case, I conclude the Company rebutted the evidence that it knew the union sentiments of the 32 applicants in question. It is clear that *if* the Company had examined the applications of Bittinger, Campbell, Edwards, Fuller, Gaskill, Goddard, Hall, Horton, Howard, Howell, Ingram, T. Jones, Jordan, Kiessling, J. Lewis, S. Lewis, Marlin, Moore, Morrisette, Odom, Parish, Quail, Ramsey, Roger, Rosenberger, Simmons, Stenquist, Wilson, and Wood, it would have been aware of their union sentiments. Further examination, however, is necessary in deciding if the Company, by merely examining the applications of Diehl, Gibson, and J. Jones would have been aware of their union sentiments. The only evidence on their applications of their union sentiments was their prior employment references which they testified were all unionized employers. Applicant Diehl listed as prior employment references U. E. & C Catalytic, M. M. & R. Foley Co., and P & W Electric. No additional testimony or other evidence was presented to demonstrate that these were unionized employers nor was any evidence presented regarding the size of or how widely known these employers were. No evidence was presented regarding the number of electricians these employers employ. Diehl's application does reflect the three employers paid him in excess of \$15 per hour. Applicant Gibson listed as prior employment references Klate Holt Co. and Saunders Electric Co. which he indicated were located at Hampton, Virginia. Gibson listed his rate of pay (\$12.95 per hour) only for the Klate Holt Co. Applicant J. Jones listed as prior employment references Catalytic, Inc., Dyna Electric, Inc., and E. G. Middleton, Inc. No additional

<sup>14</sup>The lack of effort on the part of the applicants to be interviewed is perhaps best demonstrated by Union Business Manager Pickin's testimony regarding his and 14 out-of-work union members visit to the jobsite in mid-March 1992. Superintendent Oliver was not present when Pickin and the others arrived. Pickin waited for Oliver to show but the 14 out-of-work members were in a hurry to get home and did not wait.

testimony or other evidence was presented to demonstrate these were unionized employers nor was any evidence presented regarding the size of or how widely known these three electric employers are and/or what size electrical work force they employ. J. Jones did indicate he made in excess of \$15 per hour at each of the employers. Union Business Manager Pickin delivered Diehl's, Gibson's, and others applications to the jobsite on December 16, 1991. Pickin also delivered J. Jones' and others applications to the jobsite on January 8, 1992. There is no evidence, however, that Superintendent Oliver specifically noted that these three applications were among those Pickin left with him on those occasions.

To summarize the issue of the Company's knowledge of the union sentiments of the 32 named applicants, I conclude that if it had examined the applications in question, it would have been on notice that all except Diehl, Gibson, and J. Jones were to some degree affiliated or associated with the Union or were trained in a program sponsored, at least in part, by the Union. I conclude an examination of Diehl's, Gibson's, and J. Jones' applications would not have alerted the Company that they were in any manner associated with or held prouinion sentiments.<sup>15</sup> The evidence, however, is conclusive that the Company, and more specifically Superintendent Oliver, did not review the 500 plus applications filed with the Company. In that regard, Superintendent Oliver credibly testified he did not review *any* applications except to file them by positions sought and rates of pay expected by the applicants.<sup>16</sup> In that regard, I note the position

<sup>15</sup>In making my conclusions regarding Diehl's, Gibson's, and J. Jones' applications, I am not unmindful that the Board in *Fluor Daniel, Inc.*, supra at 972, adopted Administrative Law Judge Arline Pacht's decision in a refusal to hire case in which she noted "[m]any applicants provided a work history with employers known to hire union labor, and/or cited former rates of pay which were recognizably higher than wages typically offered by nonunion employers." (Id. at 975.) I am not persuaded that the Board in *Fluor Daniel, Inc.* intended, even implicitly, to hold an employer responsible for knowing which employment references on applications were unionized employers and which were nonunion employers. Nor am I persuaded that the Board in *Fluor Daniel, Inc.* held or intended for its holdings to be interpreted that "higher" rates of pay listed on employment references would automatically signal a unionized as opposed to a nonunionized employer. Furthermore, I note that even if it could be concluded that when an applicant reflected a prior employment wage rate in excess of \$15 per hour that such signaled a unionized employer it would not avail applicant Gibson because he reflected a prior employment wage rate of \$12.95 per hour.

<sup>16</sup>I credit Superintendent Oliver's testimony that he did not review or utilize the applications beyond that described above. In addition to his courtroom demeanor, other factors persuade me he testified truthfully regarding the extent of his use of employment applications. He testified he kept a very busy schedule during the time in question. The evidence demonstrates he not only served as the offsite manager for the Franklin, Virginia project but he also served as the Company's southeastern operations manager based in Savannah, Georgia. He said he spent approximately 3 days at each of these two locations. He testified he received 60 to 70 telephone calls daily from salespersons, temporary employment agencies, and others. He also testified that during the time the Company advertised in various newspapers approximately 30 to 40 applicants stopped by the construction site daily seeking employment. During this same time the Company received in excess of 500 job applications. Oliver testified he purchased over \$1 million in materials during this time and worked and/or coordinated with the two employment agencies utilized by the Company. Thus, I find very credible Superintendent Oli-

sought and rate of pay expected appears near the top front of an application whereas employment references and previous rates of pay as well as memberships in professional organizations, such as a union, are all on the reverse side of an application. In light of the fact no one reviewed the applications, I am persuaded counsel for the General Counsel failed to demonstrate that the Company or Superintendent Oliver knew which applicants, including the 32 named in the complaint, supported the Union.

The Company rebutted counsel for the General Counsel's evidence related to the element of antiunion animus and discriminatory motivation on its part. First, the Company demonstrated it had, through Superintendent Oliver, informed Union Business Manager Pickin that he should have his members submit applications with the Company. Oliver told Pickin he had no problem hiring union people.<sup>17</sup> Superintendent Oliver treated the applications Union Business Manager Pickin provided him no differently than any other applications submitted at the jobsite. It is undisputed that Superintendent Oliver and Union Business Manager Pickin have had an amicable relationship from their first meeting in November 1991 through the trial herein. Further evidence of a lack of union animus is demonstrated by the fact the Company, corporatewide, currently has approximately 47 IBEW members (or former members) on its payrolls.

With regard to Superintendent Oliver's statements to applicant Marlin and his comments to certain other unnamed applicants about their "attitude," the Company demonstrated his comments related to justifiable concerns and were not unlawfully motivated remarks. Superintendent Oliver's testimony regarding his conversation with applicant Marlin and his testimony about the importance of an applicant's "attitude" clearly suggests his comments were based on something other than antiunion considerations. Superintendent Oliver testified he did not like applicant Marlin's attitude because Marlin had "politicked his way through life" that "he talked a big lot" but "the attitude" he projected was that "he had not worked very much [with] his tools."<sup>18</sup> Superintendent Oliver testified about the attitude he looked for when he selected applicants for employment. Oliver testified:

The main thing is if a guy's got a good attitude . . . he'll do, you can show him something. If a guy's pretty smart, you ain't got to show him but a couple times and he can do things especially tasks that are repetitive. In the first part of a job, there's a lot of things going on that are repetitive work.

I am persuaded Superintendent Oliver was concerned with having this "hard dollar job" turn a profit and was looking for those he perceived would make the best workers without regard to the workers' union sympathies. Thus, I conclude no unlawful motivation or antiunion animus may be inferred from Superintendent Oliver's references to applicant Marlin's and others' attitudes.

ver's testimony that he simply did not have the time nor did he in fact review applications except to file them.

<sup>17</sup>Superintendent Oliver hired prouinion applicants Freddie Herron in November 1991 and Mark Crawley in January 1992.

<sup>18</sup>Perhaps to some extent, Superintendent Oliver's assessment of applicant Marlin is supported by Marlin's own testimony that he sent well over 200 resumes to various employers without being hired.

The Company effectively rebutted counsel for the General Counsel's contention that the significant years of experience and other credentials listed by the 32 applicants in question should have warranted some kind of inquiry by the Company. There is no question but that the 32 applicants demonstrated an impressive work history. Such experience factors would clearly have warranted some type of response from the Company *if* the 32 applicants had sought and made themselves available for interviews. The Company established that all applications from whatever source or with whatever credentials listed were not reviewed beyond that necessary for filing purposes *unless* an applicant actively sought an interview. With no evidence that any of the 32 applicants in question specifically sought an interview with Superintendent Oliver, I cannot infer that unlawful animus or motivation played any part in the Company's not responding to the experience levels set forth on the 32 applications in question.

The Company effectively rebutted counsel for the General Counsel's contention that it ignored budgetary constraints when it selected nonunion applicants but automatically applied such constraints to eliminate union applicants or applicants that listed higher paying prior employment references. First, Superintendent Oliver credibly testified he interviewed *any* applicant that sought and made time for an interview regardless of the expected wage rate reflected on the application. Therefore, the listed wage rate expected by an applicant did not automatically bar an applicant from an interview. Secondly, of the 180 applications of those that were hired, only 5, namely, Robert Dodd, Billy Carswell, Eugene Richardson, Raleigh M. Holland, and Franklin D. Norris indicated on their applications that they expected wages ranging from \$14 to \$14.50 per hour and only 6, namely, Cecil Earl Lewis, Willie C. Pait, Billy J. Boutwell, James C. Long, Arthur B. Comer, and Albert F. Buppert indicated they expected wages ranging from \$13.25 to \$13.75 per hour. Contrary to counsel for the General Counsel's urging, I cannot conclude that this small percentage (less than 10 percent of those hired) demonstrates the Company consistently ignored its budgetary constraints when it selected nonunion applicants.

Certain other factors counsel for the General Counsel raised in establishing his *prima facie* case are addressed as follows. The fact the Company declined to enter into a prehire agreement with the Union does not establish an unlawful antiunion bias on the part of the Company.<sup>19</sup> Like-

<sup>19</sup> See *Tyger Construction Co.*, 296 NLRB 29, 30 fn. 1 (1989).

wise, Superintendent Oliver's telling Union Business Manager Pickin that he could hire electricians off the street at a desired wage rate does not establish unlawful bias against union applicants. Counsel for the General Counsel made much of the fact Superintendent Oliver did not offer to negotiate a lower pay rate with Union Business Manager Pickin for any union members Pickin might refer to the jobsite. No unlawful motivation attaches to such a failure inasmuch as the Company was under no legal obligation to do so. The Company's hiring five union applicants after a charge had been filed by the Union and a complaint issued does not warrant an inference it was unlawfully motivated in hiring the five. It appears the Company hired the five union applicants after the Union put in writing its applicants would work under the same terms and conditions as other electricians employed by the Company.

In light of all the above, I am persuaded the Company demonstrated it would have taken the same action it did even in the absence of any protected conduct on the part of any or all of the 32 applicants named in the complaint. Accordingly, I recommend the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. VOS Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1340 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company did not fail and refuse to hire the 32 applicants named in the complaint or any other applicants because of their union membership, sympathies, and/or activities in violation of Section 8(a)(1) and (3) of the Act.
4. The Company has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>20</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.