

**Ultrasystems Western Constructors, Inc. and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.** Cases 31-CA-17516, 31-CA-17571, 31-CA-17906 (formerly 20-CA-22467), and 31-CA-17907 (formerly 20-CA-22468)

February 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On April 26, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs and the Respondent<sup>1</sup> filed exceptions and a brief in support. Thereafter, the General Counsel and the Charging Party filed briefs in opposition to the Respondent's exceptions, and the Respondent filed a brief in opposition to the General Counsel's and the Charging Party's exceptions.

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>2</sup> and con-

<sup>1</sup> The Respondent has requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

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

The Respondent has excepted to the judge's finding that the 13 applications submitted at Rocklin on their face evidenced the union background of the applicants. The Respondent contends, in effect, that it did not treat the applications from union members disparately from other applications, because it could not have determined from the applications that they were from union adherents. We disagree and find that the evidence of union background on the face of the applications (i.e., the listing of prior union jobs, of union membership, of pay at "[union] scale," and of membership in union apprenticeship programs) clearly indicates the union background of these applicants. Accordingly, we agree with the judge that the Respondent knew that the applicants at issue had union backgrounds.

In addition, the Respondent has excepted to the judge's factual finding that UA Local 447 Business Agent Haley dropped off all 13 applications at Rocklin on August 10. We find merit in this exception because Haley himself testified that he dropped off eight applications on that date. Because it is uncontradicted that Local 447 members dropped off the other five applications in furtherance of the Union's organizing drive and, because, as shown above, these five applications clearly evidenced union background as did the eight that Haley dropped off, we find that this factual error does not affect the judge's analysis of the Respondent's conduct after it received these applications.

Finally, the Respondent excepts to the judge's reliance on the alleged false date-stamping of Creeden's application and on the lan-

clusions<sup>3</sup> and to adopt the recommended Order as modified<sup>4</sup> and fully set out below.

1. This case presents the issue, inter alia, of whether a paid union organizer is a bona fide applicant for employment and, if so, whether an employer violates Section 8(a)(3) and (1) of the Act by refusing to consider him for hire because of his union affiliation. The facts are not in dispute. On August 22, 1988, William Creeden submitted an employment application to the Respondent at its Rocklin, California jobsite. Creeden noted on the application that he was currently employed by the International Union as a full-time organizer. He also stated that he had sufficiently high welding skills to warrant being tested. The Respondent did not consider his application for employment. The judge found that the only reason the Respondent rejected Creeden was because he was a union organizer. The judge then found, in accordance with Board precedent, that Creeden was a bona fide applicant for employment and that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider

gauge in the Respondent's contingency plan allegedly equating "source of infection" with union organizers. Because we find the meaning of these indicia equivocal, we do not rely on them, but agree with the judge, for the other reasons given by him, that the Respondent harbored union animus. We also find equivocal as evidence of animus the fact that Respondent's personnel manager, Kilroy, did not send letters to nine "apparently" qualified welders at Bakersfield. We agree with the judge, however, that animus can be discerned from Kilroy's "underhanded tactic[s]" in dealing with the Bakersfield applications.

<sup>3</sup> The Charging Party has excepted to the judge's conclusion that the Respondent violated Sec. 8(a)(3) by transferring employee Fred Abbott to Coalinga on August 22, 1988 (the judge inadvertently stated "1991"), without offering him the same opportunity to return to Rocklin which it offered to certain other employees. The Charging Party points out that this conclusion contradicts the judge's own finding that Abbott never went to Coalinga. We find merit in the Charging Party's exception. In this regard, we note that although the judge stated that the contradiction between Abbott's credited testimony that he was never offered a job at Coalinga and a company status report that indicated he was, "need not be resolved," the judge did in fact find that Abbott was "ROFed" from Rocklin and that "he never went to Coalinga." Because we agree with the judge that the Respondent's "device of ROFing" union adherents from Rocklin was unlawfully motivated, we also agree with him that the Respondent violated Sec. 8(a)(3) by "ROFing" Abbott from Rocklin, regardless of whether it then offered him a transfer to Coalinga as it had the other discriminatees.

<sup>4</sup> The Respondent has excepted to the failure of the notice to conform to the Order. In this regard, the Respondent points out that the judge included in the notice a provision that the Respondent notify in writing discriminatee-applicants that future applications would be considered in a nondiscriminatory manner, but omitted such a provision from his Order. We find merit in this exception and shall include such a provision in the Order consistent with the judge's findings and conclusions.

Additionally, the General Counsel has excepted to the judge's inadvertent omission of discriminatee Vern Cleveland's name from the "make whole" provisions of the Order and notice. We find merit in this exception and shall modify the Order and provide a new notice accordingly.

Creeden for hire “because of his union organizing propensities.”

We recently reexamined the issue of whether professional union organizers are “employees” within the meaning of Section 2(3) of the Act and, if so, whether it violates the Act to refuse to hire a paid union organizer. See *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Town & Country Electric*, 309 NLRB 1250 (1992). For the reasons set out in our extensive analysis of the issue in those cases, we have decided to adhere to Board precedent in this area of the law.<sup>5</sup> Accordingly, we shall continue to find that paid union organizers are employees within the meaning of Section 2(3) of the Act and we agree with the judge, for the reasons set out by him, that the Respondent violated Section 8(a)(3) and (1) by refusing to consider Creeden for hire.

2. The Respondent has excepted to the judge’s finding that it violated Section 8(a)(1) by disparately enforcing its no-solicitation/no-distribution rule. We find merit in this exception. In finding the violation, the judge relied on the fact that the Respondent permitted employees to take up collections during worktime for employees who had been injured on the job. As the Respondent points out, however, evidence was presented regarding only one such employee solicitation and in that instance Butters, the Respondent’s Rocklin project manager, testified without contradiction that he told the employee requesting permission to solicit that the Respondent could not approve the solicitation and that, if it were done, it would have to be done on the employee’s own time and not on working time. Because the judge failed to make findings of fact as to whether the solicitation was actually done on working time and, if so, whether the Respondent knew of it, we find that there is insufficient evidence to support a finding that the Respondent disparately enforced its no-solicitation/no-distribution rule. Consequently, we shall dismiss this allegation of the complaint. We agree, however, for the reasons stated by the judge, with his conclusion that this rule was overbroad.

3. The General Counsel has excepted to the judge’s failure to provide in the remedy portion of his decision that the Respondent reinstate the employees who were discharged or unlawfully laid off at Rocklin and to his failure to provide that the Respondent offer employment to the applicants whom it unlawfully refused to consider for hire. We find merit in this exception for the following reasons.

<sup>5</sup> In *Sunland*, we also adopted the finding that the respondent there did not violate Sec. 8(a)(3) and (1) by refusing to hire a professional union organizer during a strike called by the union. In this regard, we agreed with the judge that “an employer should not be required during a strike to hire a paid organizer whose role is ‘inherently and unmistakably inconsistent with employment behind a picket line.’” (Emphasis added.) We note that there is no strike involved in the present case.

As to the employee-discriminatees who were unlawfully discharged from Rocklin, the judge, apparently applying a presumption against reinstatement, found that although reinstatement with backpay was the appropriate remedy, an order requiring reinstatement of the discriminatees would be “pointless” because the job had ended. Consequently, the judge ordered the Respondent to place the discriminatees on a preferential hiring list and to offer each employment on a nondiscriminatory basis when jobs came up for which each was qualified. In *Dean General Contractors*, 285 NLRB 573 (1987), however, the Board specifically considered and rejected any “precompliance presumption against reinstatement in the construction industry.”<sup>6</sup> Therefore, we agree with the General Counsel that resolution of the Respondent’s backpay and reinstatement obligations toward the employee-discriminatees at Rocklin should be left to compliance.

As to the applicants whom the Respondent unlawfully refused to consider for hire at Rocklin and Bakersfield, the General Counsel contends, for the reasons stated above, that the judge erred by not providing in his remedy that the Respondent offer them employment in positions for which they applied, the traditional remedy in the circumstances. For the reasons stated above, we agree that the traditional remedy is appropriate here. Consequently, we shall modify the Order to provide that the Respondent offer employment to the applicant-discriminatees.<sup>7</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Ultrasystems Western Constructors, Inc., Rocklin and Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance or creating the impression of surveillance of employee union activity.

(b) Maintaining a no-distribution/no-solicitation rule which forbids the distribution and solicitation of Section 7 protected material anywhere on its construction sites by employees during nonworktime.

(c) Threatening employees with loss of their jobs if they do not withdraw their union authorization cards;

<sup>6</sup> In holding that the Board should apply its traditional backpay and reinstatement remedy to the construction industry, the Board majority in *Dean* reasoned that:

although jobs in the construction industry are frequently of short duration at a single project, that is not always the case. The industry is also composed, to some extent, of “permanent and stable” work forces. Further, in either case it is not unusual for employers to carry over or request selected employees from job-site to jobsite. Determination of whether an employee may have been transferred or reassigned elsewhere is a factual question and, as such, is best resolved by a factual inquiry at compliance. *Id.* at 573–574 (footnotes omitted).

<sup>7</sup> Those individuals shall include, but are not limited to, the 14 applicants at Rocklin and the 52 applicants at Bakersfield.

telling employees that it will be more cooperative with respect to their future employment if they were to abandon their interest in union representation.

(d) Telling employees that the job will shut down if they select a union to represent them.

(e) Isolating employees because of their union activities.

(f) Maintaining any hiring policy which screens job applicants to uncover suspected union sympathizers and refusing to consider applicants for employment based on its conclusion that they are union sympathizers.

(g) Transferring employees to other sites or discharging them because of their union membership, sympathies, or background.

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

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

(a) Make whole all employee-applicants at Rocklin and Bakersfield for any losses they may have suffered by reason of the discriminatory refusal to consider them for employment in the manner described in the remedy section of this decision as modified. Offer all employee-applicants at Rocklin and Bakersfield employment in the positions for which they applied, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

(b) Make whole employees Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland for any losses they may have suffered by reason of the discrimination against them in the manner described in the remedy section of this decision. Further, offer the above-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Remove from its files any references to the discharges of Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland and notify them in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel action against them. *Sterling Sugars*, 261 NLRB 472 (1982).

(d) Notify in writing all those individuals who applied for employment at the Rocklin and Bakersfield projects in 1988 and who were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner.

(e) Preserve and, on request, make available to the National Labor Relations Board or its agents, for ex-

amination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to effectuate the backpay provisions of this Order.

(f) Post at its Rocklin and Bakersfield, California facilities copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event it is not feasible to post notices at those sites because the Respondent is no longer present, the Respondent shall mail notices to all the employees it employed at those projects and shall post them at its current projects.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>8</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT engage in surveillance or create the impression of surveillance of employee union activity.

WE WILL NOT threaten employees with loss of their jobs if they do not withdraw their union authorization cards; WE WILL NOT tell employees that we will be more cooperative with respect to their future employment if they abandon their interest in union representation.

WE WILL NOT tell employees that the job will shut down if they select a union to represent them.

WE WILL NOT maintain a no-distribution/no-solicitation rule which forbids the distribution and solicitation of Section 7 protected material anywhere on our construction sites by employees during nonworktime.

WE WILL NOT isolate employees because of their union activities.

WE WILL NOT maintain any hiring policy which screens job applicants to uncover suspected union sympathizers, and WE WILL NOT refuse to consider applicants for employment based on our conclusion that they are union sympathizers.

WE WILL NOT transfer employees to other sites or discharge them because of their union membership, sympathies, or background or their activities on behalf of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO or United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, together with interest, all employee-applicants at Rocklin and Bakersfield for any losses they may have suffered by reason of our discriminatory refusal to consider them for employment in 1988, and WE WILL offer them employment in positions for which they applied, or if nonexistent, to substantially equivalent positions.

WE WILL make whole, together with interest, employees Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland for any losses they may have suffered by reason of the discrimination against them, and WE WILL offer the above-named employees immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our files any references to the discharges of Fred Abbott, Jim Campbell, Fenner LaCroix, Donald Cauble, Ronald Cauble, and Vern Cleveland and notify them in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel action against them.

WE WILL notify in writing all those individuals who applied for employment at our Rocklin and Bakersfield projects in 1988 and who were unlawfully denied employment that any future job applications will be considered in a nondiscriminatory manner.

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.

*Alice J. Garfield*, for the General Counsel.

*David S. Durham, Joseph P. Ryan, and Eric Grover (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.

*Michael J. Stapp (Blake & Uhlig)*, of Kansas City, Kansas, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Bakersfield and San Francisco, California, on 13 trial days beginning January 30, 1990, and ending on March 21, 1990, on complaints issued by the Regional Directors for Regions 20 and 31 of the National Labor Relations Board on March 29 and July 21, 1989. The complaints are based on charges filed by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (Charging Party or Boilermakers) on January 30, and March 7, 1989 (some of which were subsequently amended). On October 5, 1989, the Acting General Counsel ordered the Region 20 cases transferred to Region 31 and consolidated them all into a single action. As consolidated, they allege that Ultrasystems Western Constructors, Inc. (Respondent) has committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

### Issues

The principal issue is whether Respondent has a policy of denying employment to applicants who work as construction industry boilermakers who are deemed likely to be sympathetic either to the Charging Party or to a sister construction union, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (UA) and who would likely seek to organize those of Respondent's employees who perform that type of work. In addition, Respondent is accused of discharging certain employees because of their membership in or activities on behalf of the Boilermakers and is accused of engaging in unlawful surveillance of union activists; threatening them with loss of employment or other reprisals; maintaining an overly broad no-solicitation/no-distribution rule; discriminatory enforcement of the rule; maintaining a policy of terminating, isolating and transferring employees who are believed to be union activists; imposing more onerous terms and conditions of employment by barring employees from the Rocklin parking lot during their lunchbreak in order to prevent them from engaging in lawful discussion of unions and promising future benefits (i.e., employment) to individuals to induce them to refrain from cooperating with the Union.

### I. JURISDICTION

Respondent admits it is, and has been at all material times, a California corporation headquartered in Irvine, California, but nationally engaged in the construction of power plants and related piping, electrical work, and boiler construction, and during the course and conduct of its business operations it annually purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside California. Accordingly, it admits it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

Respondent admits the Union is now and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. Introduction

Respondent is a large contractor which builds both for itself and for other project owners certain types of industrial plants including steam-generated electric power plants. In 1988<sup>1</sup> it had among its active projects, the construction of several such plants in California. Three of these are brought under scrutiny by these consolidated complaints. The first, in sequence, was the one located in Rocklin. The second and third (which will be referred to as the second because of their close proximity and the fact that they were built simultaneously under the direction of one individual) were near Bakersfield. Separately they were known as the Poso and Jasmine plants. As will be seen, it is unnecessary to distinguish between the two. Both the Rocklin and Bakersfield projects ended in 1989.

Respondent is a member of the Associated Builders and Contractors (ABC) and regards itself as "merit" shop; its employees are not represented by any labor organization. Because of its size, and because its projects are widespread, it has become an organizing target of the Boilermakers. That labor union assigned two International representatives to attempt to organize Respondent. The first was Tony Yakemowicz, who was subsequently succeeded by Bill Creeden. The International organizers were aware of the Rocklin project and contacted the UA Local in Sacramento to seek to coordinate an organizing drive by the two unions. They jointly determined the best way to do that was to authorize union members to seek employment at the site and create a committee consisting of their own onsite members to try to organize the nonunion craftsmen which Respondent already employed. They obtained copies of Respondent's application forms and had UA and Boilermaker members fill them out and submit them. This happened for approximately 14 individuals at Rocklin in August.<sup>2</sup> The same tactic was

used by the Boilermakers Local in Los Angeles in November when Creeden submitted approximately 50 applications to Respondent's Bakersfield office.<sup>3</sup>

Yakemowicz also learned that Jerry Newsom had become Respondent's boiler superintendent at Rocklin. He knew Newsom personally and knew him to be a former Boilermaker member. In fact, Newsom has been in the boilermaking industry for over 25 years but has not recently been associated with the unionized portion of the industry. Respondent hired him from QPI, another nonunion industrial contractor where he had served as personnel manager. Through that employment Newsom had come to know Respondent's personnel manager John Kilroy. In February, Kilroy had hired Newsom to be the boiler superintendent at Rocklin.

In July, Yakemowicz asked Newsom if he would meet with him, and Newsom did so. A week or so later, Yakemowicz introduced Newsom to Creeden, who became Yakemowicz' successor in this organizing effort, as Yakemowicz was being sent to other duties. These meetings are not described in intimate detail but both Newsom and Creeden agree that the union officials informed Newsom they intended to organize Respondent's boilermakers; they asked him if he was opposed. Newsom replied that he would not get in their way. They asked him if he would document any misconduct Respondent might commit. Newsom agreed to do that, but there is no evidence he offered to or actively engaged in any organizing himself.

Even so, Respondent argues that Newsom was a supervisory union spy and/or organizer planted in the facility by the Union. Respondent also strongly argues that Newsom's testimony was false, based upon what it perceives to be a bias caused when Respondent discharged Newsom's son, Willie, from the Bakersfield job in November. Respondent wishes to turn this entire proceeding into a credibility conflict between Newsom and his assistant Larry Oliphant, the boiler general foreman, on the one side and Respondent's management on the other. Indeed, there is reason to think that these credibility questions must be resolved. Yet, a close analysis of the facts demonstrates that Respondent's own witnesses and documents either tend to corroborate Newsom and Oliphant and its management witnesses have serious credibility problems of their own. To the extent that this matter has been distilled to a swearing contest between Newsom/Oliphant and Respondent's management, in general terms I find in favor of Newsom/Oliphant. There may be areas of their testimony which is not corroborated, but so much of it is that the issue of Newsom's alleged bias becomes inconsequential. Probably the most compelling evidence is the testimony of Respondent's other managers as well as the job progress reports which consistently show that Respondent was having a difficult time finding qualified "tube welders"<sup>4</sup> throughout the lives of both projects. In the

The complaint also alleges that Respondent unlawfully refused to consider for employment a 14th person, Bill Creeden, the International organizer.

<sup>3</sup> Respondent maintained an office in the city of Bakersfield from which it managed both the Jasmine and Poso sites.

<sup>4</sup> As demonstrated throughout this proceeding, a so-called tube welder is a certified welder skilled in welding 2-inch or smaller piping with the tungsten inert gas technique (TIG). Welders having this

*Continued*

<sup>1</sup> All dates are 1988 unless stated otherwise.

<sup>2</sup> At Rocklin, the complaint alleges the following 13 employee-applicants were unlawfully screened:

Earl Athey, Jr.; Gregg Baker; Dennis Bertacchi; Richard Bertacchi; Terry Cuffe; Art Schmidt; Larry Gladden; Dale Gritzmacher; Larry Grubbs; Elton Hart; Roy Jones; Richard Mott; Aldino Sani, and others whose names are not known.

face of all this evidence Respondent unconvincingly argues that both projects were not in a "hiring mood" at the time the applications were presented, but were, instead, in a layoff mode.

#### B. *Jerry Newsom at Rocklin*

In late 1987, Newsom was approached by Kilroy who eventually offered Newsom the boiler superintendent's job at Rocklin. The two actually visited the site on February 8 and met with Project Manager Bill Butters. At that time, according to Newsom, but denied by Butters, Butters told Newsom he was aware that there was union organizing in the area and the Boilermakers Union was particularly active. He told Newsom that the Company did not wish any union people on the job. He then asked Newsom about his personal "following." A following is a group of individuals who "follow" experienced managerial personnel from job to job around the country. It is undisputed that employers such as Respondent who are nonunion, and without access to union hiring halls, find followings essential to their ability to perform the work. Kilroy hired Newsom, in part, because Newsom asserted that he had a reasonably substantial following of employees. Butters was interested in the size of Newsom's following.

It appears that one of the advantages of a following is, particularly if the employer is nonunion, that its members are a known quantity insofar as skills are concerned and are also known to be uninterested in union representation. Newsom says that Butters was particularly partial to the fact that Newsom's following was, like Newsom, from the South, particularly Louisiana. According to Newsom, whether it is objectively true or not, Butters held the belief that followings from the deep South are less likely to be interested in union representation. Newsom says Butters approved of the locations from where Newsom's following came.

After their discussion, Butters agreed to put Newsom in charge of the boiler at Rocklin and introduced him to the other superintendents. These included Dickey Dukes, head of the structural iron group; Bruce Hasty, superintendent over the piping department; Ed Cummings, superintendent of electrical; and John Wilson, the head engineer.

According to Newsom, on February 15, the date Butters actually accepted him, Butters told him that Respondent's internal organization differed from other companies in that Respondent had created a so-called iron department. Under the auspices of this single department were individuals who performed both structural steel erection as well as mechanical work related to the boiler. The boiler not only contains a combustor, a vessel, and related exhaust ventilation, it also requires the assembly of an enormous amount of pipe. Ac-

skill are often known as Heliarc welders (after a trade name), TIG welders or simply tube welders. These individuals must weld the smaller diameter pipes utilized in high-pressure applications such as the pressurized steam tubes needed to operate the turbine. Such welders are commonly obligated, as they were here, to pass an on-site welding test. Respondent's own project notes constantly refer to the fact that such welders were in short supply and that the pass rate on the test was extremely low. Furthermore, in Bakersfield, at any rate, in appears that there were two similar projects being constructed simultaneously by a competitor. The competitor also required tube welders thereby further reducing Respondent's ability to obtain welders of that skill level.

According to Newsom, Butters told him that Respondent had merged these two normally separate divisions as a device to elude union organizing.<sup>5</sup>

Newsom also hired Larry Oliphant to be his general foreman. Oliphant was part of Newsom's own following but had a following of his own. According to Newsom, Butters was quite satisfied with this, as approximately 65 percent of the crew came from Newsom's following and the other 35 percent came from the followings of individuals such as Oliphant.

Newsom testified that Butters and he had several conversations with respect to Newsom's authority to hire. During these conversations Butters told Newsom to "stay away from" local area individuals because they would make the Company more vulnerable to union organizing whereas persons who came from the followings would not;<sup>6</sup> if one is from the South, he said, they were more likely to return to the South after the job is over, satisfied with the wages. Newsom says Butters told him to screen the applications in circumstances where applicants were unknown and look for a union background or indicia of a union background. These included a wage comparison (Respondent and its nonunion competitors generally pay craftsmen about \$14.50 per hour, whereas union scale is significantly higher, in the \$17-\$22 range), active/recent union membership, apprenticeship background,<sup>7</sup> and the names of known unionized previous employers. According to Newsom, Butters told him to file applications which came from such individuals in a separate file folder.

Butters denies this testimony saying Respondent was a "merit shop" and that union considerations were not a concern. He specifically denies ever directing Newsom to perform any screening such as Newsom has described and says no separate files were maintained. Both he and Kilroy (as well as Bakersfield Project Manager Bill Massey) say Respondent's hiring processes are neutral with respect to union membership. However, that neutrality seems to be compromised by its own conduct and by the fact that Respondent maintains a so-called contingency plan which gives specific directions to management with respect to how to respond to a union organizing campaign. The contingency plan even refers to union organizers as a "source of infection" and recommends that any employee organizers discovered on the job be removed from contact with other employees. Accordingly, Respondent's officials' claim of neutrality must be discounted.

#### C. *Union Organizing at Rocklin*

The Boilermakers had collected 13 applications from various of its members and UA members who worked out of the either the Sacramento or Marysville UA locals. On August 10, UA Representative Bill Haley delivered those applications to the guard at the Rocklin jobsite. After the guard

<sup>5</sup> The piping department also overlapped the boiler.

<sup>6</sup> In both Rocklin and Bakersfield Respondent sought to hire only unskilled labor from local sources, particularly the state unemployment office.

<sup>7</sup> There are few, if any, construction industry apprenticeship programs operated without the co-sponsorship of one of the AFL-CIO construction unions. However, that background might be a plus if a once-apprenticed individual has left the union behind, for his skills would be good, but his interest in the Union would be low.

delivered them to Butters, Butters told some of his superintendents that he had received a group of applications from union men. He told the superintendents not to touch them, saying that he would take care of them after talking with Kilroy. Pipe Superintendent Bruce Hasty, who was very familiar with the application files maintained in the company office at the jobsite, said he had never seen those applications until they were shown to him while testifying. The General Counsel observes, correctly, that this is direct evidence of Butters' separating those files from the others and consequent screening of applicants. Each of these applications, together with some others, show the applicant to be either a union member or to have other union background. They were also shown to be sufficiently skilled welders who would warrant being hired or at least being offered the welder's test. Yet Hasty says he never even saw those applications. Since he was looking to hire pipefitters and/or welders, the removal of these applications from his view suggests that Newsom's testimony is correct, that someone in Respondent's office was segregating the applicants' files deemed to show excessive union connection. Hasty never had the opportunity to offer employment to any of these 13 and those who had claimed welding skills were not given the chance to demonstrate their ability.

As noted, Butters had told Newsom not to hire individuals with excessive union background. Early in July, Newsom wanted to hire Fred Abbott, a boilermaker-fitter. Because Newsom knew Abbott's abilities and wanted him on the job, and also knew Abbott had an extensive union background, he wanted to avoid Butters' veto. Accordingly, he made sure that Abbott, on his application form, lowered his previous wage rates to suggest nonunion employment and suggested Abbott not mention that he was an active member of the UA local in nearby Marysville. Instead, Abbott wrote that he was former member of a Boilermakers local. Abbott was hired and classified as an "ironworker." Similarly, operating at the behest of either Yakemowicz or Creeden, the Cauble brothers and Vern Cleveland were hired as "ironworkers" after omitting information about their current membership in UA locals.

On August 16, according to Newsom, he learned from an employee, not organizer Creeden, that the Union was going to conduct an organizing meeting at a pizza parlour in nearby Roseville. He reported the scheduled meeting to Butters. That evening the meeting was conducted by Creeden and two UA representatives, Bill Haley and Jimmy Thompson. Respondent's employees who attended the meeting were Abbott, Vern Cleveland, Alex Wells, Ron and Don Cauble (who are twins), Jim Campbell, Fenner "Catfish" LaCroix, and others. Creeden and the other two union officials solicited authorization cards from these individuals and asked them to handbill and distribute material, as well as talk to coworkers. The material which they distributed included a standard array of union pen holders, stickers, and buttons.

On the following day, August 17, Butters told Newsom he had learned LaCroix had attended the meeting and demanded that Newsom discharge him. Butters also instructed Newsom to continue to talk to the employees about the meeting to find out more about their union sympathies. Newsom does not appear to have done this, because before he could, Creeden sent Butters a mailgram officially announcing the organizing activity and listing the names of individuals who

had agreed to be on the organizing committee. These were Abbott, Wells, Vern Cleveland, and Don Cauble. Butters immediately telefaxed a copy of the mailgram to Kilroy at company headquarters, simultaneously telling Newsom:

These sons-of-bitches, I want them off this job, and I want them off now. I want them isolated. Get them out of—get them away from the rest of the crew. Do whatever you got to do to keep them from gathering up . . . .

A second meeting was held at the pizza parlour that night. Creeden distributed additional union organizing material. In addition, plans were made to leaflet the location where the dirt road to the jobsite met the county paved road. Beginning August 18, shortly after 6 a.m., Creeden, supported by additional organizers from the UA, approached employees as they drove into the site. They held up signs and spoke to employees asking them to take the flyers. Also, Abbott, Vern Cleveland, both Caubles, Jim Campbell, and LaCroix distributed Boilermakers literature to others near the company office, a location known as the brass alley.

Later that morning, on Butters' instructions, those individuals whom Creeden had announced as being members of the organizing committee and those wearing union insignia were removed from their work on the boiler and sent approximately 150 yards away to work on the prefabricated smokestack which was lying horizontally in the laydown yard. These were Don Cauble, Vern Cleveland, Jeff Cleveland, Campbell, Wells, Scott Alsop, Mark Faulk, Stan Burger, Marvin Husser, Louis Meyers, and LaCroix.

According to Newsom, but denied by Butters, the construction schedule did not call for any work on the stack. Indeed, the stack was not actually erected until October or November. Moreover, of the individuals who were assigned to the stack, Cauble, Cleveland, Campbell, and Wells were tube welders. It appears not only from the testimony of Newsom and Oliphant, but that of Respondent's Massey (from Bakersfield), that the welding involved on the stack can be adequately performed by plate welders. A plate welder generally welds nontubular material. Butters said the reason he chose tube welders to weld on the stack was because it was a very important weld involving the lifting trunnions requiring a "full penetration weld." He wanted to be assured that the trunnions would be strong enough to hold those portions of the stack when they were later erected by crane.

Butters' testimony is most suspect here. First, it appears from the testimony of Creeden, also a long-time welder and who testified as an expert, that all welds, except tack welds, are "full penetration." Thus, to Creeden, the phrase "full penetration" means nothing. This testimony stands unopposed, even though Respondent had its own expert, Ralph Welo, the quality control chief, available to testify.

Therefore, Butters' explanation that the more highly skilled tube welders were required on the stack job is not credited. Instead, it seems more likely that Butters wanted these individuals to be removed from the boiler proper as part of the standing contingency plan to isolate union activists, thereby removing the "source of infection." Newsom's testimony is to that effect and he is corroborated by Oliphant.

Within 2 days, Butters instituted some additional procedures to protect Respondent. According to Newsom, all future hires were to be made through Hasty's pipe department and subject to Butters' or Kilroy's approval. Furthermore, one of Respondent's other projects located in Coalinga had a need for some sort of certified welders. It is not clear on the record exactly what skills were needed there, but a request had been made by the Coalinga superintendent through Kilroy to try to locate additional welders.<sup>8</sup> Newsom says Butters told him to send several individuals from his department to Coalinga, and that certain of those individuals would be brought back to Rocklin. These were several members of the DeWitt family (including Bobby Burroughs) as well as Abbott, Vern Cleveland, and Campbell, all members of the organizing committee. They were all to be carried on the books as "ROFs" (reductions of force). However, a side arrangement was made to bring back the DeWitts and Burroughs; they were to be rehired through Hasty's pipe department. In September that is what happened. Instead of being assigned directly to Hasty in the pipe department, they were returned to Newsom's supervision. Campbell and Cleveland went to Coalinga and worked for a period; then they were ROFed. Abbott stayed 2 more days at Rocklin; he never went to Coalinga. He was ROFed at Rocklin. Abbott credibly testified that he was never offered a job at Coalinga; a company status report says he was. For our purposes, the matter need not be resolved.

Butters denies responsibility for this incident. He says he simply told Newsom to select whomever he wanted to go to Coalinga. However, his testimony cannot be credited due to the mutually corroborating testimony of Newsom and Oliphant as well as the strange handling of the DeWitts and Burroughs, as contrasted with the selection of Abbott and the nonreturn of Cleveland and Campbell. All these individuals were tube welders and Respondent needed them. There was no business justification for giving some individuals a secret right to return to Rocklin while not giving that same right to others whose skills were equal. The only difference between these employees was that Cleveland and Campbell (as well as Abbott) had been listed on Creeden's telegram as being members of the union organizing committee. Again, this treatment is consistent with Respondent's desire to isolate and get rid of the union organizers.

#### D. August 22, 1988, at Rocklin

On Monday, August 22, union organizer Creeden decided to deliver a job application on his own behalf. He had previously filled it out on August 16 and had so dated it. On August 22, he gave it to a guard for delivery to the office. Structural Iron Superintendent Dickey Dukes later took it to the office where it eventually ended up in Butters' hands. Sometime after Respondent had possession of it, it was falsely stamped as having been received on August 16, the date Creeden had signed it; but Butters admits receiving it on August 22. Creeden had noted he was currently employed by the International Union as a full-time organizer. He also stated that he had sufficiently high welding skills to warrant being tested. Butters, together with the rest of the supervisory

<sup>8</sup>Coalinga is located roughly 200 miles southwest of Rocklin in a remote area in the west central San Joaquin Valley at the base of the Diablo Range.

staff were stunned by Creeden's nerve in filing such an application. Although some have attempted to deny it, there is much testimony that they all had a good laugh over it. Butters says he immediately telephoned Kilroy in Irvine to advise him of Creeden's tactic. He says Kilroy asked that the application be telefaxed to him immediately; Butters did so. This is quite strange testimony, for Kilroy says he already was in Rocklin on August 22.

Butters also advised Newsom, Oliphant, and the other superintendents to tell their crews that the heretofore laxly enforced rule against eating lunches in cars was now to be strictly enforced. Both Newsom and Oliphant testified they told their men, pursuant to those instructions, that they could no longer sit in their parked vehicles or leave the jobsite at lunchtime unless they had company permission. Butters told Newsom to tell the employees that they were subject to termination if they did not withdraw their union authorization cards and to remind them that if they did, Respondent would cooperate with them with respect to calling them for future work. Newsom says he carried out those instructions.

In addition, on a tour around the site, Butters admits he observed Abbott on a break giving material to another employee. He told Abbott that distribution of this material breached Respondent's no-solicitation rule. Butters does not say that the material was union related.<sup>9</sup>

The no-solicitation rule itself, found in General Counsel's Exhibit 6, states:

Soliciting or distributing literature on company property is prohibited during working hours.

The rule is also posted at Respondent's entrance gate. Respondent does not seriously dispute the fact that the no-solicitation/no-distribution rule is overly broad and unlawful on its face. *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Neither does it seriously dispute the fact that Abbott had the right to distribute union literature to another individual while on his break. Furthermore, it is clear that Respondent permitted solicitation of other types, including collections for workers injured on the job, and that those collections occurred during working time. Therefore, the evidence is clear that even had it been lawful, Respondent disparately enforced the no-solicitation, no-distribution rule. *Funk Mfg. Co.*, 301 NLRB 111, 112 (1991); *Imco Container Co.*, 208 NLRB 874 (1974).

Also on August 22, according to LaCroix, Butters made some sort of special effort to observe him at work. He described it as "bird dogging." Butters denies making any unusual effort to oversee either Abbott's or LaCroix's work, saying he probably saw everyone work at one time or another as he made his routine rounds of the job. He says that he has no specific recollection of observing LaCroix and, except for the incident involving the distribution of some papers, he has no recollection of watching Abbott's work either.

The problem with Butters' testimony is that as soon as union organizing actually commenced, he began a personal surveillance of the entire situation. He directed Cost and Scheduling Manager Elmer Wilson to take photographs of

<sup>9</sup>Abbott denies that he distributed any union organizing material during worktime.

the individuals who were picketing and distributing union literature at the access road entrance. He accompanied Wilson on these photographic surveillances and also sat in a car a few feet away from the location where the literature was being given out. This gave him a good view of each employee taking literature and which employees were participating in the distribution. His curiosity about the employees' union activity was intense, even extending to copying auto license numbers. Accordingly, I am unable to credit Butters' testimony denying that he gave neither Abbott nor LaCroix any special attention. Their names had been listed on Creeden's telegram as union organizing committee members and they clearly had attracted Butters' notice. His contention that he didn't even know who LaCroix was is not worthy of belief.

On September 7, both Ron and Don Cauble, together with LaCroix, distributed union literature before work at the time gate. According to Newsom, that morning Butters told him to get rid of them. Later that afternoon, Newsom ROFed both Don Cauble and LaCroix. Newsom said he did not ROF Ron Cauble because he assumed that if one brother was laid off, the other would quit. However, Ron Cauble did not quit; two days later he was ROFed as well.

#### E. Bakersfield

As noted previously, Respondent's need for tube welders in Bakersfield was even greater than in Rocklin. It had two projects underway and was competing directly with other contractors building similar projects nearby. Respondent's project manager at Bakersfield during the time in question was Greg Bland; the boiler superintendent was Bill Massey. Massey and Bland had worked together for a number of years at a large nonunion contractor headquartered in Texas, Brown & Root.<sup>10</sup> Massey was known to have a large following, also from Texas and Louisiana. He had even brought along his own general foreman, Gene Witt. In October, while the Rocklin project was still underway and the boiler department there was still being run by Newsom, Bland and Massey complained to Kilroy that they were having a great deal of difficulty manning the Bakersfield projects. Kilroy knew the Rocklin job was beginning to wind down and thought it might be appropriate to bring Newsom to Bakersfield in the hope that his following would move there as well. Accordingly, Kilroy asked Newsom to come to Bakersfield and meet with both men. Newsom did so in early November. According to Newsom, one of the principal topics they discussed was the organizing campaign which had taken place in Rocklin. With Massey present, Bland told Newsom that it would be necessary to carefully screen all the applications to avoid a repeat of the problem which had occurred at Rocklin. Newsom agreed to do so. He says both he and Massey already knew what the screening procedures would be.

In late November, after a short vacation, Newsom began to work at Bakersfield. Both Massey and Newsom had the responsibility to hire workmen to perform the boiler tasks. They are in agreement that it was quite difficult to man these jobs with qualified tube welders who had no significant union background. According to Newsom, Massey told him he could hire some individuals with union backgrounds if

they altered their applications to give the false impression that they had little or none.

Indeed, Charles Thistle, a longtime Heliarc welder and former Boilermaker Union member, gave Massey an application on November 29. Massey told Thistle that although his application demonstrated that he possessed the skills necessary to perform the job, he was not allowed to hire anyone who had a union background. He told Thistle if he would fill out a new application, change the names of his past employers and lower the wages shown, Massey would consider hiring him. Massey went so far as to suggest to Thistle that he list specific nonunion contractors. He also told Thistle that he already had several union members working on the job who had agreed not to cause any trouble. According to Thistle, Massey told him that if the job were to go union, Respondent would shut it down. On the following day, Thistle brought in an altered application (G.C. Exh. 7). He took the welding test, passed and was hired.<sup>11</sup>

Earlier that year, approximately simultaneous with the organizing at Rocklin, Creeden had enlisted the aid of Boilermakers Local 92 in Los Angeles in his effort to organize Respondent. To this end he had gotten Local 92 officials, specifically Business Agent and Vice President Henry Brooks, to solicit Local 92's members to fill out Respondent's job application forms. Approximately 50 such applications were filled out during the late summer.

In December, through employees such as Thistle and others, Creeden learned that Respondent was seeking to hire individuals having the skills normally found in journeymen boilermakers. Those skills include rigging, fitting, and various levels of welding, including tube welding. This, of course, was exactly what Creeden was looking for. On December 9, Creeden and Brooks went to Respondent's Bakersfield office. Creeden asked the woman who greeted them whether Respondent was hiring. She asked what type of work he did; he said he was a "mechanic," i.e. a welder. She replied Respondent was hiring welders, to which Creeden responded, "Well, good, because I got fifty applications here for you of qualified Boilermakers," handing her the stack of applications. Brooks then handed her his business card and said if Respondent needed any qualified welders to please give him a call.<sup>12</sup>

<sup>11</sup> Respondent attacks Thistle's credibility saying his testimony was bought and paid for. It argues that Thistle gave his testimony after having arranged for the reinstatement of his Boilermakers retirement plan. Respondent overstates the situation. It appears true that Thistle has since reinstated his union membership, but unless the Union is violating Federal pension plan laws, Thistle was always entitled to his pension plan, at least to the extent that it had become vested. If a union official, such as Creeden, agreed to check into Thistle's entitlement under the plan, he was doing no more than providing information which Thistle could have obtained directly from the plan. If Creeden was able to persuade Thistle to give testimony it was not because of anything Thistle gained from the Union or the pension plan, it was because Creeden had persuaded him to come forth and describe what had happened. Creeden certainly did not, based on Thistle's testimony, buy favorable testimony.

<sup>12</sup> Creeden and Brooks turned in the applications of the 50 employees named in the complaint. They are:

Scott N. Abad	William H. Immken
John W. Anderson	Joe J. Iverson
Gary L. Ardery	William H. Lee

<sup>10</sup> Massey had not worked in California before.

*Continued*

Bland admitted that the applications were given to him and agreed each of the applications showed a strong union background. This concerned him and he immediately telephoned Kilroy in Irvine to inform him what had happened. As at Rocklin, Creeden also on that day sent telegrams to Respondent notifying it that Respondent was organizing Bakersfield.

On Monday, December 12, Kilroy came to Bakersfield to review the situation. He says he was only there to conduct a "mini" labor relations seminar among the supervisors. Nonetheless, he took the 50 applications back with him to Irvine. Bland had earlier told him he was dire need of tube welders and the job reports confirm it; yet Kilroy took the decision-making process away from the Bakersfield hierarchy at this point. Neither Bland nor Massey was permitted to make any decisions about hiring any of the 50.

Kilroy waited a month before he did anything about those applications. He then sent letters to 18. He explained he had carefully reviewed the applications for tube welders and had sent letters to the 18 he believed qualified. Curiously, he omitted nine clearly qualified welders, none of whom were sent letters. Two other members of the Boilermakers Union (Slim and Ellsworth) turned in applications independently; Kilroy sent letters to them as well. Kilroy said in the letter's conclusion, "Upon receipt of the requested information, and if in fact you have tube welding experience, arrangements will be made for your welding test." Each letter was accompanied by a second copy with a note for the applicant to mail the copy back with his response at the bottom.

As the General Counsel observes, this was hardly a request for qualified individuals to come in for a tube welding test. Instead, consistent with the 30-day delay responding to the filing of the applications, this stratagem added additional delay. Such a tactic, in the face of a crying need for tube welders, seems designed to discourage applicants rather than acquire them. Thus, although Kilroy testified his purpose in taking the 50 applications with him to Irvine was to give them better treatment than they might otherwise have re-

ceived because they were "stale,"<sup>13</sup> I regard it as sophisticated dissemblance. His conduct is quite inconsistent with his testimony.

Of the four applicants who did file responses to the letter, a Bakersfield official supposedly made phone calls to the telephone numbers which they gave. In three cases the official reported inability to reach the individual, supposedly because messages were unreturned, telephones were disconnected or there was no answer. The fourth, Magana, was supposedly scheduled for a welding test but did not report. None of this testimony is direct but is taken from notes written on the application forms. The upshot of all this is that none of the 18 (plus 2) or of the 50 (52) individuals was hired. In addition, Kilroy flatly ignored nine others who were arguably tube welders.

#### IV. ANALYSIS AND CONCLUSIONS

It is well settled that it is a violation of Section 8(a)(3) of the Act to refuse to hire an individual for employment if that refusal is based upon the applicant's union membership or union activity. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Moreover, the Board has held that the Act imposes upon each employer the duty to consider each request for employment in a lawful, nondiscriminatory manner. *Shawnee Industries*, 140 NLRB 1451, 1452-1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1969); See also *Alexander's Restaurant*, 228 NLRB 165 (1977); *KRI Constructors*, 290 NLRB 802 (1988).

I conclude that the evidence is clear that Respondent has in place an unlawful policy designed to screen from employment individuals whom it deems, rightly or wrongly, to be likely to engage in union activity. Moreover, although the practice of hiring from "followings" is not unlawful in itself, it is evidence of an affirmative preference for individuals known to be both competent and to be free of any union connection. Its other directives regarding how to respond to union organizing drives clearly evidences union animus. Some of it is subtle; some is not. The portion of its contingency plan referring to union organizers as an "infection" certainly suggests that unionism is a disease to be wiped out. Furthermore, the no-solicitation/no-distribution rule enforced at Rocklin clearly violated Section 8(a)(1); it was discriminatorily enforced as well. Not only was it unlawful on its face, for it prohibited union activity during non-working time, it was enforced against a known union adherent, Abbott, while not enforced against individuals soliciting on matters not related to union organizing.

Furthermore, at Rocklin there were numerous incidents of coercion designed to either discourage union activity, ferret out or isolate those who engaged in such activity. Its surveillance at the access road and its barring employees from eating in their cars did not have an innocent purpose. Neither did Butters' "bird dogging" Abbott and LaCroix nor did the threats of discharge if the employees did not withdraw their

Kenneth L. Barker	Benjamin B. Lujan
Mark S. Brinkley	Sam Magana
Michael L. Burnham	Michael L. Main
Andrew Chavez	Douglas J. Mandy
Charles L. Colbert	Alvin H. Manning
Tom K. Dalluge	SS # 570-48-0082
Wayne E. DeYoung	Alvin H. Manning
Clifford S. Dillard	SS # 527-25-8712
Dennis P. Dorsey	Arlen G. Miller
Dale E. Douvia	Earl F. Milligan
Luis J. Duran	Frank S. Nunez
James S. Durbin	Steven K. Ramsey
Larry D. Evans	Juan C. Rodriguez
David M. Flanders	Lynn H. Ruse
Daniel Gonzales	Francisco Saenz
Jonathan W. Greenwood	Ronald L. Sloniker
Lloyd B. Haines	Gregory W. Smith
Mark V. Harney	William D. Talburt
Gary W. Hatcher	Charles Taylor
Bobbie L. Holmes	Ward P. Tinney II
Danny D. Hutchings	Lloyd A. Watkins
Donald L. Hutchings	Anthony C. Yoder
Norman A. Immenschuh	Floyd R. Young

In addition, two other members of Boilermakers Local 92 filed applications independently. They were Robert Slim and Chris Ellsworth. Their names were added to the complaint during the hearing.

<sup>13</sup> Respondent's officials contend that those 50 were "stale" because they were over 2 months old. They say in the construction industry applications that old are not worth pursuing as the individuals have probably found other work. I permitted the General Counsel to call only a few of the 50. They testified, in essence, that they would have gone to work for Respondent at Bakersfield. I barred the remainder as cumulative. I do not regard the applications as "stale."

authorization cards and the followup carrot of future "cooperation" in employment upon their doing so. And, at Bakersfield, Massey told Thistle that the job would be shut down if it went union.

Moreover, Respondent's deceit in handling the union-connected applications at Rocklin and the false date stamp affixed to Creeden's application must also be considered evidence of animus. Honest motives need not be concealed.

At Bakersfield, Respondent's manner of dealing with the 50 or 52 applicants who came from the Union also demonstrates animus. It did not treat these individuals in the same fashion that its own policy says it should. Respondent operates what is known a "merit shop," which in theory treats all job applicants fairly, based solely on their abilities. That did not happen. Instead, Kilroy took the applications away from the individuals who normally make hiring decisions. He then performed his own selection process, stalling for 30 days before taking only meager action. Kilroy clearly was hoping to let the storm blow over. That is hardly evidence that Respondent was carefully evaluating each applicant's skills; instead it was an invidious way of avoiding those applicants altogether. Animus can be discerned from that underhanded tactic.

And, at Rocklin the device of ROFing individuals to send them to Coalinga and then on their way does not bear close scrutiny. If it was nondiscriminatory, given the need for skilled welders, Respondent would have permitted the union activists to return in the same fashion as it did the DeWitts and Burroughs. I conclude that this action was only a deception designed to rid itself of union activists at Rocklin.

The element of knowledge is present for each and every alleged discriminatee whether at Rocklin or at Bakersfield. In both cases the union advised Respondent that union organizing was underway and, in Rocklin, named the individuals who were who comprised the organizing committee. Furthermore, Butters, supported by Wilson, was engaged in continuous surveillance at the access road. It is quite clear that he knew who the individuals were who were the most likely to support the union. All of the elements of unlawful screening have been proven and Respondent's efforts to rebut are ineffective. This policy violates Section 8(a)(1) and (3) and affected the 13 Rocklin applicants and the 52 Bakersfield applicants. I also conclude that Respondent violated Section 8(a)(1) and (3) with respect to the individuals sent to Coalinga who were not offered a return to Rocklin.

The complaint, as amended at the hearing, alleges that Floyd DeWitt, David DeWitt, and Bobby Burroughs (the DeWitt Family) were unlawfully discriminated against in the same sense as Vern Cleveland, Fred Abbott, and Jim Campbell since they were in the group sent to Coalinga. I am unable to agree. There is no evidence that they were being mistreated in being sent to Coalinga.

It is true that the selection of the union committee members as candidates for Coalinga was discriminatory and it is equally true that the DeWitts were included in order to camouflage that illegal purpose. Even so, the DeWitts were provided the right to return to Rocklin and did so. They were not the victims of any unlawful plot against them. They were only unharmed pawns in a scheme to get rid of union organizers. Therefore, I cannot find them to have been discriminated against. In a very real sense they volunteered for duty in Coalinga. They do not even appear to have known that

they were being used as camouflage, nor is there evidence that any other employee knew it.

The complaint also alleges that Respondent violated Section 8(a)(3) and (1) by its refusal to hire Creeden. Creeden, of course, was a full-time organizer for the Boilermakers International Union. He filed an application at Rocklin for the specific purpose of seeing how Respondent would deal with it. As expected, Respondent rejected the application, and as with the rank and file applicants, I have no difficulty in finding that Creeden was rejected because he was a union organizer and for no other reason. Respondent's explanation that it did not hire individuals who already had full-time employment is pure nonsense. Respondent even made a deal in late August with another nonunion company, QPI, to send its full-time employees (who were tube welders<sup>14</sup>) to Rocklin for a while. Nonetheless, there is the obvious question regarding whether Creeden was a bona fide applicant for employment. While I am not convinced that he was, Board law appears to require that I conclude otherwise. *H. B. Zachry Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1989). In reviewing *Zachry*, I think that the court decision finding the professional organizer there not to be a bona fide employment applicant, makes a great deal of sense. However, I am bound to follow Board law<sup>15</sup> which holds in this instance that such an individual is a bona fide applicant for employment. I do think it is clear that Creeden possesses more than sufficient welding skills to have least warranted being tested; yet Respondent never gave him that chance. It is certainly conceivable that if hired he would have, as he testified, attempted to perform the work required and engaged in union organizing only during times when permitted. In that sense, I cannot say the Board's *Zachry* rule to be without reason. Accordingly, I find that Creeden was a bona fide applicant for employment who was discriminated against when Respondent denied him the opportunity to seek employment because of his union organizing propensities. That decision violated Section 8(a)(3) and (1).

#### V. THE REMEDY

Having found that Respondent has engaged in certain violations of Section 8(a)(1) and (3) of the Act, it will be ordered to cease and desist therefrom. In addition, it shall be ordered to take certain affirmative action, including reinstatement and backpay for those individuals who were discharged or unlawfully laid off from Rocklin. Because the jobs ended in 1989, an order requiring reinstatement of these employees would be pointless. Nonetheless, Respondent shall be directed to place each of these individuals on a preferential hiring list and advise each in writing that he is being so treated; further, Respondent shall offer each employment on a non-discriminatory basis when jobs come up for which each is qualified. It shall also include an order requiring Respondent to pay backpay to those individuals, determined in a compliance proceeding,<sup>16</sup> to have been denied employment at either Rocklin or Bakersfield because of their union background. Those individuals shall include, but are not limited to, the 14 applicants at Rocklin and the 52 applicants at Bakersfield.

<sup>14</sup> John Triplett, Steve Auman, and Doug York.

<sup>15</sup> *Iowa Beef Packers*, 144 NLRB 615 (1963).

<sup>16</sup> *KRI Constructors*, 290 NLRB 802, 813 (1988); *Apex Ventilating*, 186 NLRB 534 fn. 1 (1970).

Should any individual be entitled to backpay, it shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### CONCLUSIONS OF LAW

1. Respondent Ultrasystems Western Constructors, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. On August 18, 19, and 22 and September 1 and 2, 1988, Respondent acting through Butters, and Elmer Wilson engaged in surveillance and created the impression of surveillance of employee union activity in violation of Section 8(a)(1) of the Act.

4. Respondent has violated Section 8(a)(1) of the Act by maintaining a no-distribution/no-solicitation rule which forbids the distribution and solicitation of Section 7 protected material anywhere on its construction sites by employees during nonwork time.

5. During August 1988, Respondent violated Section 8(a)(1) by maintaining and enforcing the no-distribution/no-solicitation rule in a disparate manner when it prohibited union-related solicitation and distribution while simultaneously permitting solicitation not related to union activity.

6. Respondent violated Section 8(a)(1) of the Act by isolating employees because of their union activities.

7. Respondent violated Section 8(a)(1) of the Act on the dates set forth in the decision when it threatened employees with loss of their jobs if they did not withdraw their union authorization cards; it also violated that same section when Newsom, acting upon Butters' directive, told employees that Respondent would be more cooperative with respect to their future employment if they would abandon their interest in union representation.

8. On November 29, 1988, Respondent, acting through Massey violated Section 8(a)(1) of the Act when he told an employee that the job would shut down if the employees selected a union to represent them.

9. At all times material Respondent has violated Section 8(a)(3) and (1) of the Act by maintaining a hiring policy which through a pattern and practice screens job applicants to uncover suspected union sympathizers and by refusing to consider any applicant for employment based on its conclusion that he is likely to be a union sympathizer.

10. By transferring on August 22, 1991, employees Fred Abbott, Jim Campbell, and Vern Cleveland to Coalinga without offering them the same opportunity to return to Rocklin which was given to the DeWitts and Burroughs, Respondent violated Section 8(a)(3) and (1) of the Act.

11. On September 7, 1988, Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ronald Cauble and Fenner LaCroix; and on September 9 Respondent violated Section 8(a)(3) and (1) of the Act by discharging Donald Cauble.

12. Respondent did not commit any other violations of the Act.

[Recommended Order omitted from publication.]