

Sunland Construction Co., Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO. Cases 15-CA-10927-2, 15-CA-11124 (formerly 26-CA-13617), 15-CA-11155-1, 15-CA-11155-2, 15-CA-11182, and 15-CA-11226 (formerly 26-CA-13805)

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On June 24, 1991, Administrative Law Judge Howard I. Grossman issued the attached decision. On July 15, 1991, the judge issued corrections to that decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party Union each filed a response to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, briefs, and oral argument,¹ and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union members who applied for work at its Bogalusa, Louisiana, Columbus, Mississippi, and Ashdown, Arkansas jobsites, because of their union support and activities.⁴ The judge additionally found

that the Respondent unlawfully refused to hire full-time paid union organizers or officers John Simoneaux, James Bueche, John Kelly, William Elrod, and Arvil Tucker.⁵ *H. B. Zachry Co.*, 289 NLRB 838, 839 (1988); *Willmar Electric Service*, 303 NLRB 245 (1991). The Respondent excepts, arguing, that under *H. B. Zachry Co.*, 886 F.2d 70 (4th Cir. 1989), denying enf. 289 NLRB 838, that these organizers and officers are not bona fide applicants because of their paid union status. We disagree.

In *Sunland Construction Co.*,⁶ and *Town & Country Electric*⁷ we reaffirmed that paid union organizers are Section 2(3) "employees," entitled to the Act's protections. In reaching this conclusion, we relied on the language of Section 2(3) and its legislative history, Supreme Court precedent interpreting this provision,⁸ and our own precedent.⁹ Further, we found no policy reasons requiring the exclusion of paid union organizers from the Act's protections. Applying the same analysis here, we similarly conclude that the Union's paid organizer- and officer-applicants are statutory employees who, as found by the judge, were unlawfully denied employment by the Respondent.¹⁰

2. The judge additionally found that the Respondent violated Section 8(a)(3) and (4) by refusing to hire, at its Bogalusa jobsite, union members who previously applied at its St. Francisville, Louisiana project. The Respondent excepts, contending that the St. Francisville applicants cannot be considered discriminatees because there is no evidence that they: applied at Bogalusa; knew that the Bogalusa, Colum-

¹On March 18, 1992, the Board heard oral argument in this case along with *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Town & Country Electric*, 309 NLRB 1250 (1992).

²The 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 findings 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 findings.

The judge incorrectly states in sec. II,D,2,(a), par. 2, of his decision that it was the "Respondent's" rather than the "Union's" New Orleans Local 37 that was in trusteeship. In sec. IV,A,1, par. 6, the judge states that "[o]n the following day, October 20, Elrod and three prior applicants—Charles Malcolm, Bobby Woodall, and Danny Parker—went to the jobsite." Elrod and the three others actually visited the jobsite on November 20. The G.C. Exhs. listed in fn. 81 of the judge's decision should read "63, 64, 66" rather than "53, 64, 66." Finally, in sec. IV,B,2,(b), par. 4 of the corrected decision, the judge incorrectly states that Elrod rather than Charlton "informed him as to what was happening and requested advice." We correct these errors and note that they do not affect the outcome of this case.

³The Respondent excepts to the judge's finding that applications from union members to work on the Bogalusa, Columbus, and Ashdown projects were properly authenticated. We adopt the judge's finding.

⁴In finding that the Respondent unlawfully refused to hire union applicants at the Ashdown jobsite, Member Devaney would not rely

on International Union Representative Elrod's testimony about conversations with Charlton, the Ashdown project superintendent.

⁵At all times relevant to this proceeding, Simoneaux was business manager and secretary-treasurer of Local 582, Bueche and Elrod were organizers for the International Union, Kelly was Local 582's assistant business manager, and Tucker was Local 69's business manager. All of these officers and organizers were full-time paid union employees when they applied with the Respondent.

The judge also named Thomas Lindsey and Barry Edwards as paid organizers whom the Respondent unlawfully refused to employ. Although the Respondent did hire Lindsey and Edwards, we agree with the judge that the Respondent discriminatorily discharged them in violation of Sec. 8(a)(3) and (1). Further, we note that unlike Edwards and the other paid organizers or officers, Lindsey's position as Local 582 vice president was unpaid, although the Union did pay his membership dues.

⁶309 NLRB 1224.

⁷309 NLRB 1250.

⁸See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971). See generally *Nationwide Insurance Co. v. Darden*, 112 S.Ct. 1344, 1349 (1992).

⁹See, e.g., *Oak Apparel*, 218 NLRB 701 (1975); *Willmar Electric Service*, 303 NLRB 245 (1991), enf. 986 F.2d 1327 (D.C. Cir. 1992).

¹⁰Because, as discussed below, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (4) by unlawfully refusing to hire St. Francisville applicants, we find that St. Francisville paid union organizer-applicants William Creeden and Anthony Yakomowicz were also unlawfully refused employment in this case.

bus, or Ashdown jobs existed; or were aware that applying would have been futile. For the following reasons, as well as those stated by the judge, we reject these arguments and find that the Respondent violated Section 8(a)(3) and (4) by refusing to hire the St. Francisville applicants.

Initially, we note that a customary prerequisite to an unlawful refusal-to-hire allegation is evidence that the alleged discriminatee has sought work with the respondent. Actual application is not required, however, where applying would be futile. In the circumstances of this case, we agree with the judge that it would have been futile for St. Francisville applicants to reapply at the Respondent's Bogalusa, Columbus, or Ashdown jobsites. Thus, apart from refusing to employ any of the Union's batched applicants at St. Francisville, the Respondent displayed considerable antiunion animus to employees it hired on that project. For example, the Respondent interrogated St. Francisville employees about the Union, threatened employees, unlawfully discharged two workers, and refused to rehire unfair labor practice strikers. *Sunland Construction*, supra. Additionally, the Respondent informed its St. Francisville employees that: union organizers would not be rehired; applications would not be used in hiring because they were a union organizing tool; and vacancies would be filled exclusively by non-union applicants. Id.

During the unfair labor practice hearing in *Sunland Construction*, the Respondent reinforced the futility of St. Francisville applicants reapplying when its project superintendent told supervisors that the Respondent would do whatever necessary to keep known union organizers (i.e., the St. Francisville applicants) off the Bogalusa job. Similarly, on the Bogalusa project, statements like that of the Respondent's supervisor, Smith, that he would not hire any union applicants because he did not want them to start a union or cause trouble, irrefutably indicated the futility of St. Francisville applicants reapplying.

Second, contrary to the Respondent's arguments, we agree with the judge that St. Francisville applicants knew of the Bogalusa job. Union witnesses testified without contradiction that unemployment was high among Local 582 members during the Bogalusa project. Because of this unemployment, and apparently to foster the Union's organizational goals, Local 582 officers informed their members of the Bogalusa job, transported a busload of member applicants on the 70-mile trip to Bogalusa, and permitted members to make numerous long-distance telephone calls to Bogalusa from the Union's Baton Rouge office. In these circumstances, and particularly since many of the same union officers and organizers who encouraged union members to apply at St. Francisville repeated these efforts at Bogalusa, we agree with the judge that the Bo-

galusa job generally was known to the St. Francisville applicants.

In the circumstances of this case, we additionally find sufficient evidence that the St. Francisville union applicants knew it would be futile to reapply at Bogalusa. Thus, no batched union applicant was hired at St. Francisville, and those who reapplied at Bogalusa similarly were denied employment. And, at the time the Bogalusa job commenced, unfair labor practice charges were being litigated against the Respondent in *Sunland Construction*, accusing the Respondent of widespread antiunion activities. Further, when union representatives (and applicants) Simoneaux, Creeden, and Bueche sought employment at Bogalusa in April 1989, Supervisor Molton informed them that no individuals listed on the St. Francisville complaint would be hired.

Finally, even if some St. Francisville union applicants did not know of the Bogalusa job, or that reapplying would be futile, we nonetheless find that they would be Section 8(a)(3) and (4) discriminatees because of the Respondent's written policy of permanently retaining applications for consideration on future jobs. In these circumstances, we agree with the judge that it would have been unnecessary as well as futile for the St. Francisville union applicants to reapply at Bogalusa.

Accordingly, under all of these facts, as well as those relied on by the judge, we find that the Respondent violated Section 8(a)(3) and (4) by refusing to hire the St. Francisville union applicants.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sunland Construction Co., Inc., Bogalusa, Louisiana, Columbus, Mississippi, and Ashdown, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Max Hochanadel, Esq., for the General Counsel.

Frederic Gover, Esq. (Canterbury, Stuber, Elder & Gooch), of Dallas, Texas, for the Respondent.

Michael T. Manley, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. This proceeding pertains to alleged unfair labor practices at three different jobsites at different times. It follows a former proceeding concerning events at another jobsite, as to which an administrative law judge has issued a decision finding that the Respondent herein committed unfair labor practices.

The charge in Case 15-CA-10927-2 was filed on July 12, 1989, by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO (the Union), with two amended charges thereafter. Complaint

issued on August 24, 1989, and an amended complaint on February 26, 1990. As further amended at the hearing, it alleges that Sunland Construction Co., Inc. (Respondent, Sunland, or the Company), discriminatorily refused to hire or consider for hiring approximately 56 applicants for employment on January 25, 1989,¹ and approximately 130 on January 30, 1989,² because, with respect to the latter group of employees,³ they were listed in a consolidated complaint in other cases,⁴ and, with respect to both groups of employees, because they assisted the Union and engaged in other concerted, protected activity. The complaint alleges that such conduct violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). Although the complaint does not specify the location of the alleged discrimination, the evidence adduced at the hearing pertains to activity at the Gaylord Container jobsite at Bogalusa, Louisiana (Bogalusa jobsite).

The Union filed the charge in Case 15-CA-11124 (formerly Case 26-CA-13617) on January 2, 1990, and complaint issued on February 28, 1990. As amended at the hearing, it alleges that Respondent, on about August 31, 1989, at a jobsite located at Columbus, Mississippi, shown by the evidence to involve the Weyerhaeuser Company (Columbus jobsite), unlawfully told employees that it would not hire employees who were members of or organizers for the Union, threatened employees with discharge because they were engaging in union activities, promulgated and enforced a rule prohibiting the wearing of badges other than company employee badges, and discriminatorily discharged and thereafter refused to employ employees Thomas Lindsey and Barry Edwards because of their union activities.

The Union filed additional charges pertaining to the Columbus jobsite in Case 15-CA-11155, 1-2 on February 23, 1990, and in Case 15-CA-11182 on March 26, 1990. A consolidated complaint issued April 4, 1990, and, as amended at the hearing, alleges that Respondent discriminatorily refused to hire or to consider hiring approximately 19 applicants for employment on various dates in August and September 1989,⁵ thus violating Section 8(a)(1) and (3) of the Act.

The Union filed the charge in Case 15-CA-11226 (formerly Case 26-CA-13805) on April 6, 1990, and complaint issued on May 7, 1990. As amended at the hearing, it alleges that Respondent, on various dates in October and November 1989, discriminatorily refused to hire or consider hiring approximately 59 applicants for employment,⁶ because of their activity on behalf of the Union and other concerted, protected activity. This conduct is alleged to be violative of Section 8(a)(1) and (3) of the Act. The evidence adduced at the

hearing pertains to events at the Nakoosa Edward Paper Co. jobsite at Ashdown, Arkansas, where Respondent was performing work (Ashdown jobsite).

These cases were consolidated for hearing and were heard before me on July 9 through July 11, 1990, in Baton Rouge, Louisiana, on October 15 through 17, 1990, in New Orleans, Louisiana, on December 10 through 12, 1990, in Baton Rouge, Louisiana, and again at the last location on January 14 through 16, 1991. The record was closed at the January 16, 1991 hearing.

On May 13, 1991, I reopened the record pursuant to a joint motion filed by the General Counsel and the Charging Party, conducted additional hearing,⁷ and received evidence concerning exhibits which, according to the General Counsel and the Charging Party, had been inadvertently omitted from exhibits previously introduced into evidence.⁸

The parties submitted briefs after the initial close of the hearing, and again on the issues presented by the reopened hearing. In addition, I granted Respondent's motion to file a supplemental brief arguing against the Charging Party's request for extraordinary relief set forth in its initial brief, with a provision for response thereafter from the other parties. Respondent and the Charging Party submitted such supplemental briefs, while the General Counsel filed a request to take notice.

On the entire record, including consideration of all the briefs and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with offices and places of business in Houston, Texas; St. Francisville, Louisiana; Bogalusa, Louisiana; Columbus, Mississippi; and Ashdown, Arkansas, at which it has been engaged as a mechanical contractor in the repair of industrial boilers. During the 12-month period ending July 31, 1989, Respondent performed services valued at in excess of \$50,000 for customers located in States other than the State of Delaware. During the same period of time, Respondent purchased and received at its Louisiana jobsites goods and materials valued at in excess of \$50,000 directly from points outside the State of Louisi-

⁷ The May 13 hearing was conducted on the telephone in order to save time and expense.

⁸ Respondent objected to reopening the record on the ground that the omitted exhibits were not newly discovered or previously unavailable evidence, citing *Polis Wallcovering Co.*, 262 NLRB 1336 (1982). I rejected this argument on the ground that the rule cited in *Polis* is Sec. 102.48 of the Board's Rules, which pertains to various procedures "after the Board decision or order." However, where there has been no Board, or, for that matter, administrative law judge, decision, the matter is covered by Sec. 102.35 of the Board's Rules, which gives an administrative law judge authority to reopen hearings. Relying on a case involving similar circumstances, where the Board with judicial approval confirmed the reopening of a record and a supplemental hearing, I granted the joint motion. *Electrical Workers IBEW Local 648 (Foothill Electrical Corp.)*, 182 NLRB 66 (1970), enfd. 440 F.2d 1184 (6th Cir. 1971). The court quoted the trial examiner's rationale for the reopening. At the reopened hearing herein, Respondent's counsel stated that the matter had been "rectified" by the opportunity to cross-examine the union witness authenticating the documents.

¹ App. A.

² App. B.

³ App. B.

⁴ Cases 15-CA-10618-1, 15-CA-10618-2, and 15-CA-10618-3. Administrative Law Judge Joel A. Harmatz' decision on these charges, finding that Respondent committed certain unfair labor practices, issued on September 5, 1989, and is currently on appeal before the Board. *Sunland Construction Co.* The consolidated complaint in that case, which issued on August 31, 1988, names as alleged discriminatees all the individuals listed on Appendix B, herein. This case pertained to events at a jobsite at St. Francisville, Louisiana.

⁵ App. C.

⁶ App. D.

ana. During the 12-month period ending March 31, 1990, Respondent purchased and received at its Columbus, Mississippi jobsite goods and materials valued at in excess of \$50,000 directly from points outside the State of Mississippi. During the 12-month period preceding the issuance of the complaint in Case 15-CA-11226, Respondent purchased and received at its Ashdown, Arkansas facility goods and materials valued at in excess of \$50,000 directly from points located outside the State of Arkansas. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES AT BOGALUSA

A. *The St. Francisville Decision*

Judge Harmatz concluded that Respondent had violated Section 8(a)(1) at the St. Francisville jobsite in early 1988 by (1) threatening to discharge employees because they engaged in union activity or expressed an intent to wear union insignia, by instructing them not to engage in union activities, and by coercively interrogating them concerning such activities (attributed to Night-Shift Superintendent Joe Molton); (2) by statements that Project Superintendent A. B. (Bucky) Williford had said that four union organizers⁹ would not be hired on future jobs, and that the Company would not hire from employment applications submitted that day because they were in furtherance of union organization (attributed to Quality Control Inspector Tommy Smith); (3) by a threat of discharge if an employee put on a union button, and a statement that the Company would never be union (attributed to Rigging Supervisor David Williford); and by Supervisors Ron Jordan and William Bayless telling employees that vacancies would be filled solely by nonunion employees.

The decision further concludes that Respondent violated Section 8(a)(3) of the Act by discharging two employees because of their union activity, by issuing a reprimand to an employee because of such activity, by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work; and by refusing to hire applicants for employment on the basis of applications submitted by the Union in March and April 1988.

B. *Alleged Statements by Albert B. (Bucky) Williford Outside the Hearing Room at St. Francisville*

1. Summary of the evidence

Albert B. (Bucky) Williford was Respondent's manager of construction operations. At the Bogalusa jobsite, he appointed "upper supervision"—Aubrey Ward (project manager) and Tommy A. Smith (quality control inspector)—and gave them general hiring instructions. Respondent admitted at the hearing that he was a supervisor within the meaning of the Act.

One of Respondent's witnesses at the St. Francisville hearing was Night-Shift Superintendent Joe Molton. He had been employed by Respondent at various times over a 3-year pe-

⁹One of the four organizers was Thomas Lindsey, an alleged discriminatee herein.

riod, usually in managerial positions such as project superintendent. He later declined an offer to serve in a similar capacity at another project, and accepted other employment.

Molton was also a member of a Boilermakers local in Denver. The local filed charges against Molton in February 1989 for working for a nonunion contractor, showing nonunion employees expertise of the boilermaker trade, and working in a jurisdiction without the business manager's permission. After a "trial," Molton was assessed a fine. However, the charges were dropped upon Molton's agreement to cooperate with the Union in the current proceeding. Thereafter, Molton submitted an affidavit to the Board, and testified for the General Counsel in the instant case on October 15, 1990. He agreed that his willingness to testify was occasioned by the dropping of the charges against him, but asserted that this did not affect the truthfulness of his testimony.

The St. Francisville hearing was conducted on January 30 and 31 and February 1 and 2, 1989. Molton described a conversation which took place in Williford's motel room one evening after the day's testimony. Present in the room were Supervisors David Williford and Tommy Smith and Office Manager Scott Stokes, in addition to Albert Williford and Molton. According to Molton, Albert Williford had a "list of the people who had complaints against Sunland." The witness was shown one of the complaints in the current proceeding, and stated that the list held by Williford was "very similar" to the exhibit which Molton was shown. The list contained names of individuals, and every one in Williford's motel room had a copy. Molton characterized this as a "shit list." According to Molton, Williford said, "We need to do whatever it takes to keep these known organizers off the Bogalusa job."

Williford testified about this matter subsequent to Molton's testimony. Prior to doing so, Respondent's counsel showed him a copy of the transcript pertaining to Molton's prior testimony. At the outset of the hearing, Respondent had requested and had been granted sequestration of witnesses.

Williford denied possession of a list of people that were not to be hired at the Bogalusa jobsite. However, he stated that he and his other managers had copies of the St. Francisville complaint. Williford also denied the statement attributed to him by Molton in the motel room. However, he agreed that he had a meeting of "faithful" supervisors in his room while the hearing was taking place, and that they talked about the trial and about "hiring."

Quality Control Inspector Tommy Smith testified at the St. Francisville hearing. He also testified about the issues raised by Molton's testimony in the current proceeding. Smith denied that he saw a copy of the St. Francisville complaint or a list of employees involved in that proceeding. He first denied hearing the term "shit list," but then agreed that he had heard it, but not from Williford.

2. Factual analysis

Respondent argues that Molton should not be credited because his testimony was given in return for the Union's dropping its charges against him.¹⁰ The Charging Party and the General Counsel moved to strike portions of the testimonies of Williford and Smith, on the ground that Respondent had

¹⁰R. Br. pp. 28-29.

shown them copies of the transcript pertaining to the testimonies of prior witnesses.¹¹

Molton's testimony was partially corroborated by Williford's acknowledgment that he and his managers had copies of the St. Francisville complaint, and that he met with them in his motel room and discussed "hiring." Smith's denial that he had a copy of the complaint is inconsistent with Williford's admission that his managers did have copies, and Smith's admission that he had heard the term "shit list" tends to corroborate Molton.

Although Molton agreed that he would not have testified absent the Union's dropping the charges against him, his demeanor was that of a truthful witness. Although he was a former employee at the time of his testimony, Respondent still had "potential influence" over his future employment by means of references. *Airport Distributors*, 280 NLRB 1144, 1147 (1986). Accordingly, Molton's testimony against Respondent was against his own self-interest.

Whether counsel's showing copies of prior testimony to his witnesses constitutes a violation of the sequestration rule has occasioned considerable discussion.¹² The statement attributed to Williford is not alleged in the complaint as an independent unfair labor practice. The General Counsel relies on it as evidence of union animus.

Since the Board's procedure does not require the pleading of evidence, it may be argued that Respondent had no opportunity to prepare a defense against this evidence. On the other hand, the sequestration rule was invoked at Respondent's request. The Board has stated that "[t]he less a witness hears of another's testimony, the more likely he is to declare his own unbiased knowledge, even though the witnesses have talked among themselves before the hearing and have discussed their testimony with counsel." *Unga Painting Corp.*, 237 NLRB 1306 (1978). If a later witness is given the written testimony of a prior witness, the danger that his testimony on the same subject will be influenced by such reading is at least as great as it would be upon hearing the prior testimony. If this practice is permitted as a matter of course, the sequestration rule would in effect be eviscerated. For this reason I consider the showing of testimony as herein to be a violation of the rule.

As indicated, the General Counsel and the Charging Party moved that Williford's testimony in response to Molton's be stricken. I am unaware of any Board authority in support of such action. The preferred course, it would seem, is to consider the violation of the rule as reducing the probative weight of later testimony possibly influenced by the rule's violation. Accordingly, I shall follow this principle in assessing Williford's testimony, and deny the motion to strike.

Based on Williford's partial corroboration of Molton, the inconsistency between Smith's testimony and that of both Williford and Molton with regard to possession by managers of lists of employees, the fact that Williford read Molton's testimony before testifying himself, and the fact that Molton appeared to be a more credible witness, I find that, during the St. Francisville hearing, a meeting was held in Williford's motel room. Several managers had copies of the

complaint with respect to that proceeding, which contained names of numerous discriminatees. Williford told the managers that Respondent had to do "whatever it takes to keep these known organizers off the Bogalusa job."

C. Respondent's Training Seminar in January 1989

Respondent held an office management training seminar in Houston, Texas, in late January 1989. One of the subjects discussed was the qualifications of and procedure for hiring new employees.¹³ Joe Molton attended the seminar. He testified that Ronald W. Colley, then personnel manager, told persons in attendance at the seminar that the managers had to be "very selective" in the hiring of employees at "targeted projects." Molton's testimony is uncontradicted and is credited.

D. The Applications at the Bogalusa Jobsite

1. Background

John M. Simoneaux, business manager of the Union's Local 582, in Baton Rouge, Louisiana, testified that he became aware in late 1988 that the Company had won the job at the Bogalusa jobsite. Respondent appointed Aubrey Ward as project manager, and he moved to Bogalusa in January 1989.¹⁴ Shortly before that time, according to Ward, Williford informed him that Boilermakers who had applied for employment at the St. Francisville jobsite would attempt to file applications at Bogalusa. Accordingly, Ward affirmed, he was "alert to the possibility."

As indicated, the complaint alleges numerous applications at the Bogalusa jobsite. Respondent admits the authenticity of some of these, but disputes others.

2. The applications mailed by Union Organizer Bueche on January 23, 1989

a. Summary of the evidence

Union Organizer James K. Bueche testified twice in this proceeding, the first time on July 9, 1990, and again on May 23, 1991, at the reopened hearing. During his original testimony, Bueche testified concerning certain employment applications which he mailed to Respondent's Houston headquarters. Respondent objected that these were not adequately authenticated. At the reopened hearing, Bueche testified about copies of three applications which had he failed to include in one of the General Counsel's exhibits.¹⁵ Respondent agreed that these applications had been signed by the purported applicants, but argued that the evidence was insufficient to establish that they had been mailed to Respondent and, accordingly, that the three individuals who signed the applications were not in fact applicants.

Bueche testified that Respondent's New Orleans Local 37 was under trusteeship at time of the relevant events herein, and that a special meeting of the members was called for January 21, 1989. Bueche was an assistant trustee. He identi-

¹³Testimony of Human Resources Manager Ronald W. Colley; G.C. Exhs. 5-7.

¹⁴Although Ward stated at one point that the date was January 1988, I conclude that this was an inadvertent error.

¹⁵Applications of Lawrence F. Chapoton (G.C. Exh. 74); George W. Berthaut (G.C. Exh. 75); and Charles R. Morgan (G.C. Exh. 76).

¹¹The Charging Party repeated this argument in its brief, as to Williford's reading Molton's testimony. C.P. Br. pp. 88-95.

¹²See *Seattle Seahawks*, 292 NLRB 899 (1989), and authorities cited therein.

fied a roster signed by members who attended this meeting, which contains the signatures of the three individuals whose applications had been omitted from the General Counsel's exhibit.¹⁶

Bueche affirmed that, at this meeting, he gave Sunland employment applications to members looking for work. He testified that he knew the members personally, and saw most of them fill out the applications, although some took them home and later returned a completed application to Bueche.

Bueche testified that he made copies of the applications and mailed the originals to company headquarters in Houston. He kept the copies in a manila envelope. During his original testimony, Bueche identified one of the General Counsel's exhibits as copies of the applications which he mailed.¹⁷ In his affidavit accompanying the joint motion to reopen the record, Bueche averred that he "assembled" the exhibit. At the reopened hearing, he stated that he put together the group of exhibits and transmitted them to Union Agent William Creeden, who in turn transmitted them to the Board.

After the close of the hearing, Bueche was informed by counsel for the General Counsel that three applications were missing. He thereupon searched the Sunland manila envelope and discovered copies of the three missing applications. At the reopened hearing, Bueche testified that he had previously mailed the originals of these applications together with the other applications. A return receipt card indicates Respondent's receipt of this mailing on January 25.¹⁸ Copies of 18 applications were received in evidence at the initial hearing. They are dated January 21 and 23 or are undated. All indicate referral by the Union.¹⁹

At the May 13, 1991 reopened hearing, the General Counsel produced copies of the three omitted applications. Two of the allegedly omitted applications are dated January 21²⁰

¹⁶G.C. Exh. 80. Respondent objects to receipt of G.C. Exh. 80 on the ground that it contains the signatures of other asserted applicants, which evidence the General Counsel should have adduced at the original hearing. The Company argues that it has conceded the authenticity of Chapoton's, Berthaut's, and Morgan's signatures, and contests only the asserted mailing of the applications. Accordingly, receipt of the roster would go beyond the limits of the reopened hearing, Respondent argues.

Bueche testified that he talked to Berthaut at the January 21 meeting. G.C. Exh. 80 constitutes documentary evidence in support of Bueche's testimony as to the meeting at which he distributed application blanks, and is related to his mailing of the applications, including the three disputed herein, to Houston. In addition, it constitutes evidence that the three alleged discriminatees were present at the meeting. Accordingly, I overrule Respondent's objection and receive G.C. Exh. 80, but will consider it only as it relates to the disputed issue of the mailing of the three applications.

¹⁷G.C. Exh. 4.

¹⁸G.C. Exh. 4.

¹⁹Michael Jones (G.C. Exh. 4); Sebrin Strother (G.C. Exh. 4); Junior Taylor (G.C. Exh. 4(b)); Gene Lazaro (G.C. Exh. 4(c)); Frank Gilbert (G.C. Exh. 4(d)); Frederick Pohlman (G.C. Exh. 4(e)); Stanley Dupuy (G.C. Exh. 4(f)); John Kennair (G.C. Exh. 4(g)); Rodney Martin (G.C. Exh. 4(h)); Albert Theilman (G.C. Exh. 4(i)); Raymond Bahan (G.C. Exh. 4(j)); William Bradley (G.C. Exh. 4(k)); Edmond Albares (G.C. Exh. 4(a)); Darrell Leo (G.C. Exh. 4(m)); Leander Humphrey (G.C. Exh. 4(n)); Larry Jones (G.C. Exh. 4(o)); Carrol Meredith (G.C. Exh. 4(p)); and James K. Bueche (G.C. Exh. 4(q)).

²⁰Applications of Lawrence F. Chapoton (G.C. Exh. 74) and George W. Berthaut (G.C. Exh. 76).

and one is dated January 23.²¹ All three contain the statement that the applicant was referred by the Union.

b. *Factual analysis*

On the basis of the return receipt card and Bueche's testimony, I conclude that he did mail the originals of various employment applications to Respondent's Houston headquarters on about January 23, 1989. The significant issue is whether this group included the original applications of Chapoton, Berthaut, and Morgan. It is obvious that these individuals did submit applications to Bueche, since otherwise there would have been no source for the copies which the General Counsel has produced. The similar dating and statements of union affiliation link the three disputed applications with the others. Bueche's testimony that he found copies, not originals, in the manila envelope, is undisputed. The whereabouts of the three original applications is unexplained—unless they were in fact included in the envelope mailed to Houston. I find that Bueche did include them, and I receive General Counsel's Exhibits 74, 75, and 76. I also conclude that Respondent received these together with the other applications.²²

3. The personally authenticated applications

On January 25, 1989, Union Representatives Simoneaux, Bueche, and John Kelly took a busload of 30–35 union members to the Bogalusa jobsite and obtained application forms. They went to the union hall, filled out the forms, and returned to the jobsite to submit them.

Nine witnesses identified applications that they submitted at the Bogalusa jobsite on January 25.²³

4. Evidence of other individual applications and additional mailing to Houston

Raymond G. Pumphrey, then Respondent's timekeeper trainee at the Bogalusa jobsite,²⁴ testified that a busload of applicants showed up on the morning of January 25 and asked to submit applications. Pumphrey gave them the forms, and later received the completed applications. He put them in a "stack." As indicated, nine of the applicants personally authenticated their applications.

Union Representative Simoneaux testified that some of these individuals submitted applications at the jobsite on January 25, and that others did so at different times. Charles E. Greaud testified that he gave his application to Simoneaux for transmittal to Respondent, while Danny Blackwell affirmed that he gave his application to Assistant Business Manager John Kelly for the same purpose. Greaud identified a copy of his application.²⁵

²¹Application of Charles R. Morgan (G.C. Exh. 75).

²²Supra, fn. 19.

²³William Harrell (G.C. Exh. 16); John Overton (G.C. Exh. 17); Francis Bozeman (G.C. Exh. 18); Greg Oden (G.C. Exh. 19); Frank Lea (G.C. Exh. 20); Charles Clardy (G.C. Exh. 21); William Lafeaux (G.C. Exh. 22); Jerry Himel (G.C. Exh. 23); and J. C. Berry (G.C. Exh. 24). Respondent does not dispute the authenticity of these applications. R. Br. p. 3.

²⁴Pumphrey was not employed by Respondent at the time of his testimony.

²⁵G.C. Exh. 25.

Greg Oden was one of the riders on the bus and, as indicated, personally authenticated his application at the hearing. On cross-examination, Oden also testified that various individuals whose names appear in the complaint were riders on the bus.²⁶ Union Representative Simoneaux recalled several of the union members on the bus.²⁷

Union Representative Simoneaux attempted to hand Sunland Superintendent Tommy Smith copies of the New Orleans applications previously mailed to the Company's Houston headquarters, and other applications received from applicants who could not make the trip to the Bogalusa jobsite. Smith refused to accept these applications, and told Simoneaux to mail them to Houston. Simoneaux testified that he received a group of applications and mailed them to Houston on about January 27. He identified a list of 17 names as the applicants on this list.²⁸ One of the names is that of Steve L. Grey. During the course of this proceeding, the General Counsel caused a subpoena to be served on Respondent requiring the production of certain documents. One of the documents received pursuant to the subpoena was an employment application from Steve L. Grey. It is dated January 24, 1989, and is similar in appearance to the other employment applications in this proceeding.²⁹ Simoneaux identified this application as one of the applications he mailed to the Company on about January 27. A return receipt card evidences Respondent's receipt of this mailing.³⁰

Simoneaux testified that other individuals submitted applications at Bogalusa. Pursuant to the subpoena described above, Respondent produced other employment applications from its files. Personnel Manager Colley testified that they were part of the "job files" and that he had no reason to believe that they were other than what they seemed to be. These documents purport to be employment applications dated January 25, 1989, or shortly prior thereto.³¹

²⁶ Jerry Moore, James K. Bueche, Bob Redden, Albert Grey, Mike Guitreau, and John Kelly. After first stating his belief that Simoneaux rode on the bus, Oden corrected this to affirm that Simoneaux met the riders at the jobsite. Simoneaux testified that Bueche was not on the bus, but rode with Simoneaux in a pickup truck.

²⁷ Darrell Castleberry, Brian Champagne, Russell Decou, Charles Deville, David Ellis, Jack Garza, John Kelly, John J. Leveron, Jerry Moore, Arthur Richardson, and Donald Sutton. Simoneaux testified that "David Schoolmaker [phonetic]" was on the bus. I correct the name "Schoolmaker" to "Schoonmaker," at Tr. 383, L. 4, and conclude that Simoneaux was referring to Eddie Schoonmaker.

²⁸ Joseph C. Berry, Danny K. Blackwell, Mark D. Castleberry, Charles O. Clardy, David A. Ellis, Phillip I. Garner, Jr., Charles I. Gods, Charles E. Greud, Steve L. Grey, William D. Hammons, III, David E. Ivy, Frank G. Lea, Joel P. Moak, John B. Overton, Donovan M. Sutton, Jr., Herman Trahan, and Billy W. Walley. G.C. Exh. 2.

²⁹ G.C. Exh. 26.

³⁰ C.P. Exh. 3.

³¹ J. K. Bueche (G.C. Exh. 31-325 and G.C. Exh. 4Q); Brian Champagne (G.C. Exh. 31-331); David Ellis (G.C. Exh. 331); David Ivy (G.C. Exh. 31-338); John Kelly (G.C. Exh. 31-340); Earl Moak (G.C. Exh. 31-323); Mark Castleberry (G.C. Exh. 31-330); Eddie Schoonmaker (G.C. Exh. 31-333); T. W. Eastwood (G.C. Exh. 31-324); Jack Garza (G.C. Exh. 31-336A); Walter Jones (G.C. Exh. 31-340); Johnny J. Leveron (G.C. Exh. 31-341); Joel Moak (G.C. Exh. 31-320); A. R. Richardson (G.C. Exh. 31-343); Gary Stokes (G.C. Exh. 31-335A); William Walley (G.C. Exh. 31-344); Charles D. Deville (G.C. Exh. 31-336); William D. Hammons, (G.C. Exh.

5. Indicia of union affiliation

Most of the applications submitted personally indicate membership in one of the Union's locals, or state that the applicant was a volunteer union organizer. Several of the applications list Simoneaux or Bueche as references. The latter identified themselves at the Bogalusa jobsite as union representatives and brought many applicants with them.

Some of the applications listed prior work experience with companies employing union employees. Although this was not stated on the applications, Sunland Manager of Human Relations Colley testified that an individual experienced in the construction industry would know which companies were union, and would be able to make an inference as to union affiliation on the basis of a work record with such companies. This was corroborated by Sunland Superintendent Tommy Smith.

The return receipt card for union representative Bueche's mailing of applications to Houston, signed by a Sunland representative, shows on the reverse side that it was mailed by "J. K. Bueche."³²

6. Summary, legal analysis, and conclusions

As indicated, the evidence of the submission of the applications consists of personal authentication by the applicants; documentary evidence of a mailing of applications to Respondent's Houston headquarters just before the January 25 visit to the jobsite, with a return receipt card; testimonies about applications submitted at the jobsite; testimony that applications from listed individuals were mailed on January 27, corroborated by a return receipt card and the application of one of the listed individuals recovered from Respondent's files; and copies of other applications from those files purporting to be employment applications at about the same time as the visit to the Bogalusa jobsite. There is evidence of union affiliation by the applicants.

The amended complaint in Case 15-CA-10927-2 names the alleged discriminatees in two groups—those allegedly discriminated against because of their union activities,³³ and those subjected to the same action because they were listed in the St. Francisville complaint.³⁴ All the alleged discriminatees in the former group are included in the lists of individuals named above. In addition, 16 alleged discriminatees in the St. Francisville complaint appear in the lists of applications given above.³⁵

31-321); Don Sutton (G.C. Exh. 31-334); Robert W. Travis (G.C. Exh. 31-322); Leroy White (G.C. Exh. 31-345); Darryl Castleberry (G.C. Exh. 31-328, 329); Russell J. Decou (G.E. Exh. 31-332, 335); and Jerry Moore, G.C. Exh. 31-342.

³² G.C. Exh. 4. As indicated C.P. Exh. 3 manifests receipt by Sunland of Simoneaux's mailing of applications to Houston. The reverse side of this card is not visible in the exhibit file.

³³ App. A.

³⁴ App. B.

³⁵ App. B. James K. Bueche, Charles O. Clardy, L. J. (Jack) Garza, Darryl Castleberry, Joel R. Moak, Eddie H. Schoonmaker, Robert W. Travis, John B. Overton, Steve Grey, Arthur R. Richardson, Mark D. Castleberry, Johnny J. Leveron, Russell J. Decou, David A. Ellis, and Tommy Eastwood. In addition, the St. Francisville complaint lists a "Charles I. Godson," whereas the G.C. Exh. 2 herein lists a "Charles I. Godso" as the applicant on an ap-

Continued

Respondent objected to receipt of the applications, except those which were personally authenticated at the hearing by the applicant. With respect to Bueche's mailing on January 23, Respondent argues that he "did not observe everyone either filling out or signing the documents."³⁶ As I have concluded, Chapoton's, Berthaut's, and Morgan's applications were included in this mailing. However, at the reopened hearing, contrary to its position during the initial hearing, Respondent did not question that the three applicants had in fact signed the applications, but, rather, denied that they had been mailed to Houston. The Company's argument that Bueche did not personally see "everyone" signing the documents is irrelevant. He testified that he knew the applicants personally, and that they either signed applications at the union hall or completed them at home and returned them to Bueche. This is sufficient authentication that it was the indicated applicant who in fact signed the document. As shown, a return receipt card manifests Respondent's receipt of this mailing.

With respect to the applications mailed to Houston by Simoneaux on January 27, the Company argues that he "did not testify as to how he came to acquire these applications, from whom, or when."³⁷ On the contrary, Simoneaux testified that he mailed the applications on about January 27, and the identities of the applicants are shown by the list he prepared.³⁸ Its accuracy is indicated by the fact that one of the applications on the list, that of Steve L. Grey, was actually obtained from Respondent's records.

The evidence also shows that Simoneaux was active in the submission of employment applications by union members to Sunland at this time, and Charles E. Greaud testified that he gave his application to Simoneaux for transmission to Respondent. I conclude from Simoneaux's testimony that he "received" various applications that he meant they were obtained from the union members who applied at Bogalusa.

Respondent objects to receipt of the applications which the General Counsel obtained by subpoena from Respondent on the ground that they were received "through" the testimony of Respondent's Human Resources Manager Colley.³⁹ As noted, Simoneaux testified that other individuals filed applications at Bogalusa, and Colley admitted that the applications came from the Company's job files and were what they purported to be. They purport to be job applications, and I conclude that they are.

The Company argues that Simoneaux and Oden were not entirely consistent in their recollections of the individuals who were on the bus to Bogalusa on January 25.⁴⁰ This argument has no merit. The Company also contends that some of the applicants testified that they submitted applications in person, whereas Simoneaux stated that he mailed their applications to Houston.⁴¹ This argument is also without merit, since more than one application may have been filed, or the recall of one of the witnesses may have been faulty.

plication mailed to Houston. I conclude that they are the same person, and that the correct last name is "Godson."

³⁶ R. Br. p. 4.

³⁷ Ibid.

³⁸ G.C. Exh. 2.

³⁹ Id., at p. 5.

⁴⁰ Ibid.

⁴¹ Id., at 9.

Respondent cites various cases in support of its argument, including *Stop N' Go, Inc.*,⁴² 279 NLRB 344 (1986), and *Maximum Precision Metal Products*, 236 NLRB 1417 (1978). These cases have nothing to do with employment applications. Instead, they concern union authorization cards submitted in connection with an alleged 8(a)(5) violation. In both cases the evidence in support of the cards was inadequate.

The issue before me under Rule 901(a) of the Federal Rules of Evidence is whether there is prima facie evidence, circumstantial or direct, that the documents are what they purport to be. *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1302 (9th Cir. 1978), enf. 228 NLRB 165 (1978). As in the case at bar, *Alexander Dawson* involved in part the authenticity of applications by applicants who themselves did not testify. The Court of Appeals for the Ninth Circuit noted:

The ALJ's finding was based on the similarity of the challenged applications to those filed by applicants who testified and authenticated their own applications. He also noted that the company did not present any evidence to contradict this prima facie evidence of authenticity and did not attempt to prove the applications were fraudulently prepared. [at 1302.]

The same factors are present in this case. The contested applications are similar to those which were personally authenticated, there is direct and persuasive circumstantial evidence, and the Company's arguments against their authenticity are invalid for the reasons given above. I reaffirm my prior ruling receiving all these applications.

D. Statements Attributed to Tommy Smith at the Bogalusa jobsite

Raymond Pumphrey, the Company's timekeeper trainee at the Bogalusa jobsite, described Tommy Smith as the superintendent of the job. Respondent admitted at the hearing that Smith was a supervisor within the meaning of the Act, and I so find.

Union Organizer Simoneaux testified without contradiction that, after the applicants had submitted their applications, Smith stepped onto a porch and told them that he did not need any employees at that time, but that he would get back with them in about 30 days.

Pumphrey testified that he had a conversation with Smith later on the same day that the union applicants submitted their applications. He asked Smith whether the Company was going to hire any of the applicants. Pumphrey first affirmed that Smith answered "No," saying that he didn't want "any trouble." Later, after reviewing his pretrial affidavit, Pumphrey testified that Smith said he would not hire any of the applicants because he did not want them starting a union or causing any trouble.

Smith testified he had a conversation with Pumphrey about the applicants, but did not remember the statements attributed to him by Pumphrey. Smith also admitted reading the transcript pertaining to Pumphrey's testimony before testifying himself.⁴³

⁴² Id at 7.

⁴³ The General Counsel and the Charging Party move to strike Smith's testimony because of his prior reading of the transcript per-

I credit Pumphrey's testimony that Superintendent Smith told him on the afternoon of January 25 that Respondent would not hire any of the applicants because Smith did not want them to come in and start a union or cause trouble. I also credit Simoneaux's account of Smith's speech to the applicants.

E. Statements Attributed to Aubrey Ward and Joe Molton

1. Aubrey Ward

As indicated, Aubrey Ward was the project manager at the Bogalusa jobsite. He was the highest company official at that job. Respondent admitted at the hearing that he was a supervisor within the meaning of the Act, and I so find.

Ward hired Scott Jones at Bogalusa in February 1989. Jones was not a member of the Union at the time. He left the job several months later. In mid-March, according to Jones, Ward asked him whether he knew any heliarc welders, and Jones replied that he did not. Jones had a chance meeting a few days later with Adrian Phillips, a friend, who introduced him to Union Official James K. Bueche. Jones later approached Project Manager Ward and told him of the availability of Bueche and Phillips as welders. According to Jones, Ward rejected the offer, saying that the two were union representatives.

Ward testified that, prior to his appearance as a witness, he read the transcript of the testimony of a witness he assumed was Scott Jones. Nonetheless, he contended that he did not know "the name Scott Jones." Ward also agreed that he read the prior testimony of Raymond Pumphrey.

Ward denied that he ever asked Jones for the names of potential employees, or that he refused to accept some that Jones had suggested. He contended that he did not ask for referrals from other employees.

Jones was the more believable witness, and I credit his testimony.⁴⁴

2. Joe Molton

Molton was Sunland's superintendent for a new project at St. Francisville, and Respondent admitted at the hearing that he was a supervisor.

Molton had a conversation with Union Representatives Simoneaux and Bueche in Baton Rouge on April 21, 1989. The testimonies of all three are consistent and establish that Bueche asked Molton for a job at the new St. Francisville project. Molton replied that Bucky (Williford) would fire Molton if he hired Bueche. He added that any of the individuals who had filed charges in connection with the prior St. Francisville job were on a "shit list." Molton did agree to hire Bueche's son at the second St. Francisville project on receipt of assurances from Bueche that his son did not have a union book.

Molton had a second conversation with Simoneaux and Bueche about a week later at the same place, and their testimonies are again consistent. International Representative

taining to Pumphrey's testimony. I deny the motion. See discussion in sec. B(2), *supra*.

⁴⁴The General Counsel and the Charging Party move to strike Ward's testimony because of his reading of prior testimony of other witnesses. I deny the motion for the reasons given above, sec. B(2).

William Creeden and Management Representative William Tidwell were also present. Simoneaux and Bueche asked Molton whether he could get them hired at Bogalusa. Creeden added a list of persons he would like to have hired at the jobsite, and talked with Molton about the "complaint list," as Molton characterized it. Molton answered that Creeden knew as well as Molton that the Company was not going "to hire any of those people on that shit list." The Bogalusa job, and another one at Columbus, Arkansas, were "targeted jobs." Molton stated to the Union representatives: "There is no way in hell that I can get you all hired in down there. You all were on that previous charge." Molton specifically mentioned four union organizers at the first St. Francisville job—Kenneth Davis, Thomas Lindsey, Willie Covington, and David Felter.

III. THE ALLEGED UNFAIR LABOR PRACTICES
AT COLUMBUS

A. The Employment Applications

1. The applications of Lindsey, Covington, Redmond, Durning, and Hammons

As at Bogalusa, Respondent admits the authenticity of some applications and denies others.

Union Organizer Thomas Lindsey testified that he called the Columbus jobsite on June 30, 1989. A lady replied, "Sunland, Charlie speaking." Lindsey asked this individual, later identified as Charlie Zent, whether the Company was hiring boilermakers or welders. She replied affirmatively, and told Lindsey to come to the jobsite and file an application on July 5.

Lindsey went there on that date, together with Willie Covington and David Redmond. They walked in together, and Charlie Zent informed him that the Company was hiring. She gave them employment application forms, which they filled out together, Lindsey assisting Redmond with his application. All three applications showed the union affiliation of the applicant.⁴⁵ After making copies, the applicants returned the applications to Zent. She looked at them, and then said that the Company was not hiring at the moment. There were about 15 other applicants in the trailer, and one of them informed Lindsey that he had been hired. After leaving the trailer, the applicants had a conversation with Ricky Hanna, who was identified by Lindsey as a pipefitter foreman at the Columbus jobsite. Hanna asked whether they wanted to work, and said that the Company was hiring welders and fitters. On receiving an expression of interest from the three applicants, Hanna said that he would go into the trailer to get his supervisor's permission to hire them. He returned about 15 minutes later and said that the Company was not hiring anybody that day. Lindsey's testimony is uncontradicted and is credited.⁴⁶

Jerome Durning and his foster-brother, William D. Hammons, filed applications on the same day, July 5, 1989.⁴⁷ According to Durning, they drove to the jobsite in a 1985 Ford Crown Victoria, with union stickers on the front and back bumpers. After they filed and left the trailer, ac-

⁴⁵G.C. Exhs. 36, 37, 38.

⁴⁶Respondent does not dispute the authenticity of the applications of Lindsey, Redman, or Covington. R. Br. p. 3.

⁴⁷G.C. Exhs. 34, 35.

ording to Durning, Hammons said that he wanted to return to the trailer to “put union on the papers.” Hammon’s application indicates union membership.⁴⁸

Durning remained seated in the automobile. As he was doing so, an individual whom Durning identified as the office manager—who had previously directed them into the trailer—came out with other persons and looked at the car in which Durning was sitting. I credit his uncontradicted testimony.⁴⁹

2. The applications mailed by Assistant Business Manager John Kelly

Assistant Business Manager Kelly testified that he received employment applications from five union members, which indicate union affiliation, and mailed them to the Columbus jobsite together with his own application. All are dated in early September, are similar in appearance to the other applications, and state that the applicant was a union organizer.⁵⁰ The return receipt card shows the Union as the sender, and Respondent’s receipt dated September 11, 1989.⁵¹

Respondent argues that Kelly’s testimony constitutes insufficient authentication of these applications.⁵² I reject this argument for the reasons explicated in section II(D), *supra*.

3. Applications submitted by International Organizer William Elrod

International Organizer Elrod testified that he personally applied for employment at Columbus on July 5, and submitted his application⁵³ to Respondent’s jobsite personnel manager, Don Kuntz.⁵⁴ All the jobs which Elrod listed in his employment history were union jobs. Kuntz commented favorably on Elrod’s work history, and said that he would put the application on file and let Elrod know if the Company needed anybody.

When Elrod left the trailer, he picked up several application forms. A few days later, he addressed a union meeting, distributed application forms, and suggested that members fill them out. Eight of the members did so, and returned the completed applications to Elrod.⁵⁵ They are similar in appearance to the other applications and state that the applicant was a volunteer union organizer. On September 12, Elrod returned to the jobsite with Union Business Manager E. S. Bridges. He obtained an interview with Kuntz, introduced

⁴⁸ G.C. Exh. 35.

⁴⁹ Respondent does not challenge the authenticity of Hammons’ or Durning’s applications. R. Br. p. 4.

⁵⁰ Farrell Alford, Joseph Faulk, Robert Burns, Larry Castille, Jeff McCrory, and John Kelly, G.C. Exhs. 45–50.

⁵¹ G.C. Exh. 44.

⁵² R. B. pp. 5–6.

⁵³ G.C. Exh. 58.

⁵⁴ Respondent’s manager of human resources, Ronald Colley, testified that Kuntz received applications, rejected those which he considered worthless, and took the remainder to the job superintendent with a statement that they were good applicants. In many instances, the superintendent acted on those recommendations. Colley agreed that Kuntz effectively recommended hiring, and I conclude that he was a supervisor within the meaning of the Act.

⁵⁵ G.C. Exhs. 59–59/7; Roy H. Chaney, Clarence Moore, Marlin Little, Jean Robertson, Robert B. Kelley, Jason Kobeck, Allen Barnett, and Robert Moore.

himself as a Boilermakers International representative and Bridges as a business agent, and handed Kuntz the applications. After causing them to be stamped, Kuntz said that the Company accepted all applications, and that he would file them. Elrod offered to supply the Company with boilermakers and pipefitters, but Kuntz replied that the Company was laying off employees.

Respondent argues that Elrod’s identification of these applications is inadequate because “there is no evidence that he observed their execution or even knew these applicants at all.”⁵⁶ On the contrary, Elrod’s testimony that he distributed application blanks to individuals at a union meeting, and received the completed forms back from such individuals constitutes *prima facie* evidence of the validity of the applications. Respondent has not submitted any evidence to the contrary.⁵⁷

4. Summary

It is undisputed that none of the foregoing applicants, except Thomas Lindsey, was hired at the Columbus jobsite. As indicated hereinafter, Lindsey late submitted a new application, together with Barry Edwards, and was fired a few days later.⁵⁸

B. *The Alleged 8(a)(3) and (1) Violations*

1. The hiring of Lindsey and Edwards

As set forth above, the complaints pertaining to the Columbus jobsite as amended at the hearing allege that Respondent discriminatorily refused to hire or consider hiring the applicants listed above, unlawfully discharged Thomas Lindsey and Barry Edwards, and thereafter refused to employ them. The complaints also allege that the Company violated Section 8(a)(1) of the Act by telling employees that it would not hire employees who were members of or organizers for the Union, by threatening employees with discharge because they were engaging in union activities, and by promulgating and enforcing a rule prohibiting the wearing of badges other than company employee badges.

Lindsey received a call from Charlie Zent on the morning of August 24, asking him whether he wanted to go to work at the Columbus jobsite the following Monday as a welder for Carl Aldridge. Lindsey replied affirmatively, and Zent told him to bring a friend. Lindsey called Barry Edwards, a Boilermakers International representative residing in North Carolina, and the latter agreed to apply with Lindsey at Columbus.⁵⁹ Edwards testified that he had previously submitted

⁵⁶ R. Br., p. 6.

⁵⁷ See sec. II(D), *supra*.

⁵⁸ The complaint in Cases 15–CA–11155–1, 15–CA–11155–2, and 15–CA–11182 does not list Lindsey as an employee who was discriminatorily denied employment. G.C. Exh. 1(z). However, the complaint in Case 15–CA–11124 alleges that Lindsey, together with Edwards, was unlawfully discharged. G.C. Exh. 1(gg) suffix B.

⁵⁹ Respondent considers it significant that Lindsey chose Edwards rather than some other boilermaker residing closer to the jobsite, and that Edwards flew to Birmingham and thereafter rented a car to get to Columbus rather than using his own vehicle. R. Br. pp. 48–49. Edwards testified that he had discretion on whether to use his own car or rent a vehicle, and that he utilized either means on occasion.

an application for work at Columbus in mid-August, indicating his union affiliation, but had not been hired.

Lindsey and Edwards arrived at the Columbus jobsite early in the morning on August 28. They spoke with Charlie Zent, who had a list with names on it including Lindsey's. Zent told Lindsey and Edwards that she could not find Lindsey's original application, and asked both of them to fill out new applications. They did so, and indicated thereon their union affiliation.⁶⁰

Lindsey and Edwards returned the completed applications to Zent, who escorted them into the office of Pipe Fitters Superintendent Carl Aldridge.⁶¹ According to the consistent and uncontradicted testimonies of Lindsey and Edwards, Aldridge told them that he would like to hire them, but that they had "one big strike" against them—they were "union and union organizers at that." "You are not going to put a picket line up against me?" Aldridge inquired. Edwards replied that he would not give up that right. Aldridge took Lindsey and Edwards to Personnel Manager Don Kuntz, who refused to accept the papers and told Aldridge to refer the matter to Project Superintendent Charles Elkins. Lindsey and Edwards were asked to stop outside the trailer. According to Edwards, the windows were shut but the door was opened intermittently. Edwards testified without contradiction that he overheard either Aldridge or Kuntz "raising the devil with Charlie [Zent]." Remarks overheard by Edwards were: "Who called those guys anyway? We don't want that kind of people on the job."

After Lindsey and Edwards had waited for about 2 hours, Charlie Zent came out and told them that they had to take a drug screening test. They did so, and were told that they had passed the test.

Lindsey testified that there were other job applicants who underwent the drug test at the same time that he and Edwards did so, and that some of these were working by the end of the day. Edwards and Lindsey were told to report back the next morning for a "tube [welding] test."

They arrived early the next morning and reported to the welding technician, named "Larry." He gave them "coupons" for a "two-inch tube" test, and they started preparing the equipment for testing. As they were doing this, Boilermakers Superintendent Raymond Hollis,⁶² Project Superintendent Charles Elkins, and another individual came up and spoke to Larry for a few moments. Larry then came and told the applicants that they had to take a "six-inch pipe" test instead of a "tube test." Larry said that they must be important, because the managers were "upset," and he had never seen anybody come from "the front" before to check on welders. Lindsey and Edwards finished the tests at about noon. Larry said that the tests "went good." Lindsey and Edwards were told that the test would be X-rayed that evening, and were instructed to report back the next morning.

The two were interviewed separately the following morning. Edwards went in first. Although he was uncertain whether he was interviewed by Aldridge or Kuntz, Lindsey's testimony establishes that it was Kuntz. The latter told Edwards that there was a "discrepancy" on his test. Edwards replied

that Larry had said the tests were good, and asked to see the "coupons." Kuntz said that it did not matter, and offered him a job as a rigger or fitter. Edwards accepted.

Lindsey was then called in by Kuntz, told that he had passed the 6-inch pipe test, and asked whether he wanted to take a 2-inch tube test. Lindsey inquired whether he would be paid for taking the test, and, on receiving a negative answer, declined on the ground that he had already passed a test.

2. The safety meeting

Charlie Zent gave Lindsey and Edwards company employee buttons, hardhats, and safety glasses. They attended an indoctrination and safety meeting run by Safety Supervisor Ron Moore and were given copies of the Company's safety rules, which contained the following provision:

45. Badges worn on employee person [sic], other than company employee badge, are not allowed.⁶³

Lindsey testified that he asked Moore whether the Company button which he was wearing was "unsafe." According to Lindsey, Moore replied, "No button you wear is unsafe." Edwards corroborated Lindsey.

Moore testified and denied that any employee ever asked him a question about the safety of buttons, although he acknowledged that he might have given advice on where to wear one. Asked on cross-examination why the wearing of a company button was safe, while another was unsafe, Moore replied: "I'm not going to attempt to explain it to you." Repeated questions on this subject resulted in equivocal answers, ending in the general position that Moore was not the author of the Company's rules. I credit Lindsey and Edwards, who were more reliable witnesses.

Lindsey and Edwards worked the remainder of the day. Edwards received praise from Rigger Foreman Fisher for pointing out safety hazards.

3. Lindsey's and Edwards' union activities and terminations

a. Summary of the evidence

Lindsey and Edwards returned to the jobsite the next morning about half an hour before the beginning time of 6 a.m. On this occasion, they wore Boilermakers organizing buttons in addition to their Sunland employee buttons, and began passing out union literature in the parking lot to incoming employees, including Boilermakers General Foreman Joe Yokum.⁶⁴ The latter asked, "What kind of goddamned garbage is this?" according to Edwards corroborated by Lindsey. Edwards replied that it was a union organizing document. Yokum responded: "You two son of a bitches are fired if you all punch through that "time alley."⁶⁵ Yokum

⁶³ G.C. Exh. 40. The rules also provide for discipline in the event of violation. Lindsey and Edwards signed receipts for copies of the rules.

⁶⁴ The pleadings establish that Yokum was a supervisor within the meaning of the Act. G.C. Exhs. 1(p), 1(u).

⁶⁵ The line of demarcation between working and nonworking areas was called a "time alley," where the timeclock was located, or

Continued

⁶⁰ G.C. Exhs. 39, 52.

⁶¹ The pleadings establish that Aldridge was a supervisor within the meaning of the Act. G.C. Exhs. 1(p), 1(u).

⁶² The pleadings establish that Hollis was a supervisor within the meaning of the Act. Ibid. G.C. Exhs. 1(p), 1(u).

went through the "time alley." According to Edwards, corroborated by Lindsey, Yokum was "raising the devil with all kinds of people that was coming in with papers [union literature]." He called them "stupid sons of a bitches," and said that they could be fired for that, that Lindsey and Edwards were already fired, and that there could be a picket line on the job in the morning. This lasted for about 10 minutes according to Edwards.

A few minutes before 6 a.m., Lindsey and Edwards returned the undelivered union literature to their car, went through the time alley, and punched the timeclock, still wearing both the Sunland and Boilermakers badges. Yokum was on the other side, and told them that they were fired and were to go to the front office and pick up their money. "Who are you?" asked Edwards. "I am your goddamned boss," Yokum replied.

Yokum then took Lindsey and Edwards to the office of Boilermakers Superintendent Raymond Hollis,⁶⁶ left them on the porch, went into the trailer, and emerged with Hollis and another supervisor. According to Edwards, corroborated by Lindsey, Hollis asked what it was all about, and Yokum told him that the two were "being terminated at the clock alley." Hollis pointed at Lindsey's Boilermakers badge and said that he had signed a paper to the effect that he could not wear such a badge. When Lindsey and Edwards said that they did not recall this, Hollis went into the office and returned with a copy of the work rules signed by the employees. He asked them to remove the Boilermakers badges. Edwards, with Yokum standing beside him, replied that it would not do any good to remove the badge since he had already been fired. Lindsey also refused. Hollis told the two that they had been terminated, and they were given termination notices. Lindsey's states that the reason was refusal to follow company policy and to remove an unauthorized badge,⁶⁷ while Edwards' gives no reason.⁶⁸ Edwards affirmed that he had a conversation with Yokum when the two were being processed out, in which Yokum said that the rigger foreman had stated that Edwards was a good worker.

Edwards testified that he saw other employees wearing badges, stickers, decals, or other insignia on their persons, with messages such as "Chiquita Bananas," "Harley-Davidson," "Let Those Who Ride Decide," and others.

The Company's safety rules require the wearing of hardhats and safety glasses "while on the construction site."⁶⁹ Boilermakers Superintendent Hollis transported Lindsey and Edwards to the toolroom during the processing. He was not wearing a hardhat or safety glasses. Edwards brought this to his attention, and Hollis replied that he was "in a truck." However, according to Edwards, when they arrived at the tool room, Hollis got out of the truck, still without a hard hat or safety glasses.

Respondent presented three witnesses on these events. Yokum testified that the Columbus job was his first with the Company, and that he had "heard" about union organizers causing trouble. Prior to the day of the terminations, Hollis informed Yokum that Lindsey and Edwards were organizers,

and told him to "keep an eye" on them. Yokum agreed that he saw Lindsey and Edwards distributing literature in the parking lot. He contended that he merely told them that they could not wear their Boilermakers badges when they came through the time alley. Yokum claimed that he did not remember whether they attempted to hand him any literature, but conceded that they might have done so. He could not remember whether he spoke to other employees who received the literature. Yokum denied that he was irritated or raised his voice. When Lindsey and Alley came through the time alley still wearing their Boilermakers badges, Yokum merely told them that they "could be" fired, and took them to Hollis.

Yokum testified that the rule against badges other than company badges "came out of corporate," and that he was sure that it was not concerned with safety. Employees do put various stickers on their hardhats. Yokum, who was still employed by Respondent at the time of the hearing, stated that he did not know of any other instance when an employee was discharged for refusing to remove an unauthorized badge.

Hollis testified that he knew Lindsey was a union organizer from the St. Francisville job, and that he, Hollis, had informed Yokum before the terminations that both employees were union organizers. He contended that he did not recall telling Yokum to "keep an eye on them." Hollis confirmed the substance of Lindsey's and Edwards' account of the terminations, except that it was another supervisor who discharged Edwards.

Hollis testified on direct examination that no employee had ever worn a badge other than a company badge and, accordingly, that none had ever been previously discharged for this reason. On cross-examination, Hollis conceded that he had been involved in the St. Francisville project, that he knew that Lindsey, Willie Covington, Kenneth Davis, and David Felter were union organizers on that job and that they wore Boilermaker badges the whole time they worked there. Accordingly, Hollis agreed, if there was any such rule at St. Francisville, it was not enforced. As noted, Yokum testified that the rule "came out of corporate."

Hollis further stated that a sticker over a hardhat involves safety because it could cover defects in the hat. He agreed that failure to wear a hardhat was more unsafe than the wearing of a button. Hollis also conceded that one of the discharged employees pointed out that he himself was not wearing a hardhat, and stated that he received a "safety violation" notice because of this. According to Hollis, the safety supervisor could have discharged him for this violation, but did not do so. Hollis contended that an entire rigging crew had quit over a T-shirt dispute and incorrect wearing of hardhats.

Safety Supervisor Ron Moore testified that Hollis reported to Moore that he had failed to wear a hardhat in a required area, and that Moore issued a safety violation notice to Hollis.

b. *Factual analysis*

Respondent argues that Lindsey and Edwards were "seasoned union organizers who obviously attempted to get hired at the Columbus site merely to be fired almost immediately, in order to file charges against Sunland. As a result, they are apt to make any comment imaginable in order to bolster their

"brass alley," referring to the practice of some contractors of giving brass identification numbers to employees.

⁶⁶ Hollis was a supervisor. *Supra*, fn. 62.

⁶⁷ G.C. Exh. 41.

⁶⁸ G.C. Exh. 53.

⁶⁹ G.C. Exh. 40.

case.”⁷⁰ There is no evidence to support this speculation. Lindsey testified without contradiction that he wanted to work at the Columbus project until it was completed, while Edwards affirmed that one of the ways to organize is to become hired and attempt to gain union adherents while employed.

On the other hand, Yokum and Hollis admitted that they read the transcripts of Lindsey’s and Edwards’ testimonies before giving their own. Yokum did not deny that Lindsey and Edwards attempted to give him union literature in the parking lot. The latter were believable witnesses, despite the Company’s attack on their credibility, and I accept their testimony that they did give Yokum union literature and that he asked: “What kind of goddamned garbage is this?” When Edwards replied that it was union organizing material, Yokum stated: “You two son of a bitches are fired if you all punch through that time alley.”

Yokum also failed to deny that he spoke to other employees who had received union literature from Lindsey and Edwards. I credit the testimonies of the latter that Yokum did so, called such employees “stupid son of a bitches,” and said that they could be fired for reading the literature, that Lindsey and Edwards were already fired, and that there could be a picket line on the job.

I credit Lindsey’s and Edwards’ testimonies that, when they walked through the time alley, Yokum said that he was their “goddamned boss,” and that they were fired and were to go to the front office to get their money. This is consistent with Edwards’ later statement to Hollis, with Yokum standing beside him, that he had already been fired.

Based on Safety Supervisor Moore’s inability to explain why a company badge was safe while others were unsafe, and Yokum’s admission that the “corporate” policy against badges other than company badges had nothing to do with safety, I conclude that Lindsey’s and Edwards’ wearing of Boilermakers badges had nothing to do with that subject. I accept Hollis’ admission that failure to wear a hardhat was more unsafe than the wearing of a badge.

I credit Edwards’ testimony that he saw employees at the jobsite with various stickers on their hardhats, and Hollis’ admission that such practice involved a safety factor. I note that union organizers wore Boilermakers badges at St. Francisville, that the “corporate” policy against such practice was not enforced there, and that Respondent’s witnesses were unable to cite any other instances of employee discharge for wearing a noncompany badge. It is undisputed that Hollis himself violated a safety rule by not wearing a hardhat while driving Lindsey and Edwards to the toolroom at the Columbus jobsite. His receipt of a “write-up” for this offense was mere window dressing.⁷¹

⁷⁰R. Br. p. 48. In support of this argument, Respondent cites *M & W Marine Ways*, 165 NLRB 191 (1967). This citation does not support the Company’s general attack on the credibility of union organizers. Although the Trial Examiner did not credit a union organizer, he spelled out various characteristics of the witness, not his status as an organizer, which led to the Trial Examiner’s conclusion. *Id.* at 193.

⁷¹I deny the General Counsel’s and the Charging Party’s motion to strike the testimonies of Yokum and Hollis because they read transcripts of Lindsey’s and Edwards’ testimonies before giving their own. Instead, I consider such reading as a factor diminishing their credibility. See discussion, sec. II.(B).(2), *supra*.

IV. THE ALLEGED UNFAIR LABOR PRACTICES AT ASHDOWN

A. *The applications*

1. Summary of the evidence

Arvil Tucker, the business manager for the Union’s Arkansas local (Local 69), obtained Sunland application forms from International Representative William Elrod. He testified that 80 of his members were then unemployed and that he gave application blanks to the members. Some filed them at the union hall, while some completed them at home. Tucker affirmed that he knew each member and his address, based on social visits and the fact that he referred them to jobs. He received back from these individuals 48 employment applications with Sunland and made a list.⁷² The list matches the applications. Each application shows that the applicant was a volunteer union organizer, and is similar to other applications in this case.

On October 13, Tucker went to the Ashdown jobsite and spoke with Boilermakers Superintendent Jimmy P. Land.⁷³ Tucker introduced himself as the Union’s business manager for Arkansas, and handed the applications to Land. He said that they were good boilermakers, that they had just finished a job similar to the one Land was about to start, and that he would appreciate Land’s hiring them. Land replied that he normally brought his own crew, but that he would consider each application. Some of these applications were later returned to the applicant together with a letter stating that the applicant must personally present himself for an interview and possible testing.⁷⁴

On November 15 1989, Business Manager Tucker, International Representative Elrod, another International representative, and 18 union members visited the jobsite. Tucker and the union members submitted employment applications, which Tucker identified. Tucker had previously submitted applications for nine of these individuals on October 13,⁷⁵ while the remaining applications were new.⁷⁶ Each of these applications contained indicia of union membership, usually a statement that the applicant was a volunteer union organizer.⁷⁷

Bobby Woodall missed the bus that took these applicants on November 15, but went to the jobsite himself on that date. He had prepared an application which stated that he was a volunteer union organizer,⁷⁸ and gave it to the woman at the reception desk. Woodall then went to the reception area, where he shook hands and engaged in conversation

⁷²G.C. Exhs. 54, 55–1 through 55–48. App. D, Rodney E. Allison through Thomas D. Wooten.

⁷³The pleadings establish that Land was a supervisor within the meaning of the Act. G.C. Exhs. 1(hh), 1(jj).

⁷⁴G.C. Exh. 56.

⁷⁵Rodney E. Allison, Donald Blackwell, Frank R. Brown, William R. Cason, Danny L. Castro, Donald Ray Hensely, Donnie R. Jones, Wayne E. Smith, Mark D. Tucker, and Thomas D. Wooten. G.C. Exhs. 57/1–3, 5–6, 11–12, 12, 18–19. 76 App. D, Ronald R. Brown through Arvil Tucker, inclusive. G.C. Exhs. 57/4, 7–10, 13, 15–17.

⁷⁶Two applications that did not contain this statement declared that the applicant was a graduate of a union apprenticeship training program (G.C. Exhs. 55/9, 55/13), while the third (G.C. Exh. 55/28) was included in the group of union applications.

⁷⁷G.C. Exh. 61.

⁷⁸G.C. Exh. 61.

with an individual whom he identified as the “project manager.” The woman who had taken his application showed it to this individual. According to Woodall, his “attitude changed.” The woman told Woodall that he had an incorrect date on his application. He offered to correct it or prepare a new application, but she went back to the office carrying his application. About 2 weeks later, Woodall received a letter from the Company referring to the application which had been “left” at the jobsite. No applications were then being taken, but Woodall was “encouraged” “to personally make” an application.⁷⁹

When Woodall left the trailer, a man was putting up a sign to the effect that the Company was not receiving any more applications.

Four days later, on October 19, Elrod submitted an application.⁸⁰ On the following day, October 20, Elrod and three prior applicants—Charles Malcom, Bobby Woodall, and Danny Parker—went to the jobsite. These three had new applications, which they attempted to submit. Each application stated that the applicant was a volunteer union organizer.⁸¹ Malcom testified that he attempted to submit his application at the personnel office, but that the woman who spoke to him stated that the Company was not receiving applications. Malcom told the woman that he had received a letter saying that he had to apply in person. She denied that she had sent any such letter, and Malcom then showed her the one he had received saying that he had to apply at a Sunland jobsite.⁸² The woman showed it to two other individuals, and returned with the statement that the Company was “still not hiring.” Malcom asked to sign a roster, and the woman replied that they did not have a roster. Malcom was corroborated by Woodall and Parker, who testified that there was a sign outside the trailer stating that the Company was not receiving applications until further notice.

2. Respondent’s position on the applications

The Company does not dispute the authenticity of five applications.⁸³ However, it challenges the remainder on the ground that Tucker “never testified as to how he received the applications, whether he observed them being filled out, or whether he could recognize or authenticate the signatures on them.” The Company also contends that its records show that some of the applicants were then employed, and that Tucker’s testimony that they were unemployed is inaccurate.⁸⁴ Neither argument has merit. Tucker’s testimony as to the circumstances of his receipt of the applications is sufficiently detailed to constitute prima facie evidence of their authenticity. That he may have been mistaken as to the employment status of some of them at the time—in the constantly changing job environment of the construction industry—does not detract from his identification of the applications.

⁷⁹ G.C. Exh. 62.

⁸⁰ G.C. Exh. 60.

⁸¹ G.C. Exhs. 53, 64, 66.

⁸² G.C. Exh. 56.

⁸³ Arvil Tucker, William Elrod, Bobby Woodall, Charles Malcom, and Danny Parker. R. Br. p. 3.

⁸⁴ Id. at 6.

B. Respondent’s Reaction to the Ashdown Applications

1. Summary of the evidence

a. Testimony of Human Resources Manager Colley

Evidence of Respondent’s reaction to the Ashdown applications is found principally in the testimonies of Respondent’s manager of human resources Ronald W. Colley, and International Representative William Elrod. Respondent objected to receipt of portions of the testimonies of both witnesses.

Colley testified that Respondent became aware that the Union had “targeted” the Ashdown job, as well as those at Bogalusa and Columbus. He further stated that Ashdown Project Superintendent Wayne Charlton⁸⁵ “advised him as to what was happening” after the receipt of the applications from union members, and requested advice.

As set forth above, Respondent sent letters to at least some of the applicants advising them as to Respondent’s application procedure. One of these letters, signed by Colley and dated October 27, 1989, is in evidence. The address is Respondent’s Houston headquarters, and the letter states that the Company had “received” the applicant’s application, and gave advice.⁸⁶

Colley testified that he and company counsel went to the Ashdown jobsite for the purpose of telling Charlton how the Company expected him to react to “any type of mass application procedures.” Respondent objected to further testimony from Colley on this subject on the ground that it was barred by the attorney-client privilege, which counsel asserted. Colley was then asked the “subject” of the meeting, but was directed to exclude from his answer anything said by him or by counsel. He replied: “How Sunland expected Mr. Charlton to react . . . to any type of union—or any type of mass application procedures.” After further colloquy among the parties and questioning of Colley, the General Counsel inquired as to what it was that Colley had asked counsel. Colley replied, “Essentially, how to proceed within the law on this subject.” I then sustained Respondent’s objection on the authority of *Patrick Cudahy*, 288 NLRB 968 (1988).⁸⁷

b. Testimony of International Representative William Elrod

Subsequent to Colley’s testimony, the General Counsel elicited testimony from International Representative Elrod with respect to conversations he had with Wayne Charlton. Respondent objected on the ground that the testimony violated the attorney-client privilege, and that it was hearsay.

Elrod affirmed that he had two conversations with Charlton, the first one on the telephone on November 30,

⁸⁵ The complaint in Case 26-CA-13805 (15-CA-11266), dated May 5, 1990, alleges that Charlton and other alleged supervisors “are now and have been at all material times herein” supervisors and agents of Respondent. The answer to the complaint admits the truth of this averment. G.C. Exhs. 1(hh), 1(jj).

⁸⁶ G.C. Exh. 56.

⁸⁷ The General Counsel and the Charging Party were provided at the hearing with copies of the Board’s decision in *Patrick Cudahy*, and were provided an opportunity to argue that it was inapplicable to the facts in this case. After my ruling sustaining Respondent’s objection, the parties were given time to request a special appeal to the Board on the ruling. None was filed.

1989, and the second in person on December 2, 1989. Elrod testified that Charlton had been discharged by Respondent prior to the first conversation.⁸⁸

Elrod testified that during the first conversation, he introduced himself as a union agent, and asked Charlton what Respondent had done with the applications submitted at Ashdown. Charlton replied that he spoke to Human Resources Manager Colley, and that the latter told him to send the applications to the central office in Houston.

The General Counsel asked, "What happened after that?" Elrod replied that Charlton said: "Shortly thereafter, Mr. Colley and Mr. Gover [company counsel] came to Ashdown, Arkansas, and went over how to get around hiring these applicants."

Company counsel objected at that point, and extensive argument took place at the hearing.⁸⁹ I overruled the objection and received the testimony conditionally, subject to persuasive argument to the contrary in the briefs.⁹⁰

After this extended colloquy, the General Counsel's questions and Elrod's answers, as relevant, are as follows:

Q. So you had a phone conversation with Mr. Charlton in which he was relating a meeting that was attended by himself, Mr. Gover and Mr. Colley?

A. That's correct.

Q. Now, did Mr. Charlton tell you whether or not after that meeting, applications were handled in a different fashion than they had been prior to that meeting?

A. Yes, they were.

Q. What did he say?

A. He said the first thing they had to do was to start filing every application, get a duplicate of it, an file it. Not to accept any more back by mail. They had to generate a computer read-out and had to bring in all the supervision off the job and have him write out beside it their name out beside the people they knew personally on the jobsite.

Q. After this phone conversation, did you in fact journey to meet with Mr. Charlton face to face?

A. Yes, sir. On 12/2. It was a Sunday. . . .

Q. Tell the Judge what he said in this conversation.

A. He basically said that till the meeting between Mr. Gover and Mr. Colley, that they had an open-door policy concerning hiring. That he knew of no hiring rules or regulations whatsoever. He had sent out applications . . . by mail and had them returned. He had opened them up and put them in a file, and he knew they accepted applications that away

He said prior to that it was an open-door policy and that once they generated the computer list and each supervisor went out and signed the ones they knew, from

then on he was restricted as to the applications that—I don't know really how to really phrase this. He felt like he was . . . hamstrung on the way he could hire people, from that point on.

Questioned by union counsel, Elrod testified:

Q. You used the term "hamstrung" and you talked about an "open-door policy." Did Mr. Charlton tell you what the change in the hiring policy was?

A. Yes sir, he did.

Q. What was that?

A. First of all, they had to start keeping a copy of every application. They had to have something about a contact form. I don't know what that is.

And they would have to monitor who was on the jobsite and for them to only hire people that were known to their supervision. I don't know the definition of "known to their supervision," but they had to be known to them on the jobsite.

Q. Was there any reference to hiring prior employees?

A. Yes. He said that part of their policy would be to hire prior employees and ones known to supervision.

Q. Did Mr. Charlton say whether or not he ever got that policy in writing?

A. He did not say it to me; no, sir.

2. Legal analysis

a. *The asserted attorney-client privilege*

(1) Positions of the parties

Respondent notes my ruling prohibiting questions to Colley concerning advice from counsel on "how to proceed in this matter," on the ground that this was protected by the privilege, and argues that Charlton, as a former employee, could not waive the privilege.⁹¹

The Charging Party argues that the Board's decision in *Patrick Cudahy*, supra, is inapposite. *Cudahy*, it is contended, involved the need for protection of privacy with respect to the development of bargaining strategies. The Charging Party argues that such concerns are not in issue in this proceeding. "What is at issue is advice from counsel as to how to avoid hiring union applicants in order to frustrate a union organizing campaign This is not simply advice as to how to take a 'hard bargaining' position at the table. This is advice as to how to accomplish what the Act forbids. Charging Party submits that, regardless of whether it is characterized as a crime or fraud, the attorney-client privilege was never intended to shield such unlawful conduct."⁹²

(2) Legal analysis

It is well established that the attorney-client privilege protects disclosure of communications, not the facts underlying those communications. The Supreme Court has stated:

⁸⁸ As indicated, the pleadings state that Charlton was the Ashdown project superintendent and a supervisor at "all material times herein." Supra, fn. 85.

⁸⁹ Respondent argued that the testimony violated the attorney-client privilege, and that Charlton was an ex-supervisor at the time of his asserted statement. The General Counsel contended that Respondent had waived the privilege by Charlton's statement to Elrod, and that the Company's second argument was frivolous. There was no motion to strike Elrod's last answer.

⁹⁰ Respondent was invited to request permission to file a special appeal from my ruling. None was filed.

⁹¹ Respondent cites *Commodity Future Trading Commission v. Weintraub*, 741 U.S. 343, 348-349 (1985), and *Chronicle Publishing Co. v. Hantzis*, 732 F.Supp. 270 (D. Mass. 1990), appeal dismissed 902 F.2d 1028 (1st Cir. 1990). R. Br. p. 32.

⁹² C.P. Br. pp. 86-87.

[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. . . . [*Upjohn Co. v. U.S.*, 449 U.S. 383, 396, 397 (1981).]⁹³

The testimony elicited from Elrod after Respondent's objection dealt with Charlton's statements as to matters within Charlton's own knowledge, not advice that he or Colley received from counsel. Even his first answer, in response to an innocuous question from the General Counsel—that Colley and company counsel "went over how to get around hiring these applicants"—does not specifically attribute that purpose to counsel or to Respondent's human resources manager. Elrod's testimony regarding Charlton's statements is thus significantly different from the testimony sought to be elicited from Colley on the advice he asked from counsel on how to proceed "within the law."

For this reason I conclude that Elrod's testimony concerning Charlton's statements to him is not barred by the attorney-client privilege.⁹⁴

b. *The hearsay issue*

Respondent further argues that Elrod's testimony concerning statements made to him by Charlton is inadmissible hearsay under the Federal Rules of Evidence.⁹⁵

The Act provides that a hearing for the purpose of taking evidence upon a complaint shall, "so far as practicable," be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

The Board's position on hearsay has been stated as follows:

Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. *NLRB v. Imperato Stevedoring Corporation*, 250 F.2d 297 (3rd Cir. 1957). The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance. *Georgetown Holiday Inn*, 235 NLRB 485, fn. 1 (1978). See, generally, *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978). *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980).⁹⁶

Elrod's testimony that Charlton told him that Colley had instructed Charlton to send the Ashdown applications to the Company's central office in Houston is corroborated by

⁹³ Accord: Wigmore, *Evidence*, § 2306 et seq. (McNaughton rev., 1961).

⁹⁴ Because of my conclusion, I consider it unnecessary to pass on Respondent's argument that Charlton could not waive the privilege, or the Charging Party's contention that *Patrick Cudahy* is inapplicable to the facts in this case.

⁹⁵ R. Br. pp. 33–38.

⁹⁶ Accord: *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554, fn. 15 (D.C. Cir. 1984), remanding on other grounds 266 NLRB 898 (1983).

Colley's letter to Charles Malcom from that address stating that the Company had "received" his application,⁹⁷ and by Colley's testimony that Elrod informed him as to what was happening and requested advice. Elrod's averment that Charlton told him Colley and company counsel came to Ashdown is corroborated by Colley's testimony. Elrod's further affirmation that Charlton told him that the purpose of the meeting was "how to get around hiring these applicants" is corroborated by Colley's testimony that the purpose was to tell Charlton how "react to any type of union or mass application procedures."

Elrod's testimony attributing to Charlton a description of more stringent hiring procedures after the visit of Colley and company counsel is corroborated by two of Respondent's witnesses. Thus, Colley was asked whether Respondent's new hiring policies applied to the Ashdown jobsite. He replied: "Possibly Ashdown would have had a portion that would have been governed by both." Randall Casey, the Company's boilermaker foreman at Ashdown, denied that Charlton gave him any specific hiring instructions. Instead, he was told to "man the job the best way he could." This tends to verify Charlton's statements to Elrod indicating that hiring policies were not stringent before the visit from Colley and company counsel, but were tightened up thereafter.

For the reasons given above, I deny Respondent's objections to receipt of Elrod's testimony concerning statements by Charlton.

c. *Factual conclusions*

I conclude that Respondent's hiring procedures were relatively lax at the beginning of the Ashdown job, without any specific hiring procedures. The Company had knowledge that the applications described above were from union members or sympathizers. These applications were sent from Ashdown to the Company's headquarters in Houston, and a sign was placed outside the Ashdown trailer stating that no applications were being received. The company manager of human resources and company counsel went to Ashdown for the purpose of instructing the project manager in ways to avoid hiring the union applicants. After this visit, Respondent instituted more stringent hiring procedures at Ashdown. None of the union applicants was hired.

V. RESPONDENT'S ADDITIONAL DEFENSES

A. *The Issue of the Bona Fides of the Applications*

1. Summary of the evidence

In addition to its challenge to the authenticity of some of the applications, considered above, Respondent also contends that the applicants did not really desire employment with the Company, and that their applications constituted an attempt to entrap Respondent into the commission of unfair labor practices. Accordingly, Respondent argues, the applications were not bona fide in nature.

There is testimony from 16 applicants who submitted applications at one of the jobsites that they were unemployed at the time, of their applications and would have accepted

⁹⁷ G.C. Exh. 56.

employment if it had been offered,⁹⁸ while one testified that he just finished a job.⁹⁹ Twelve applicants testified that they had either sought or obtained employment with a nonunion contractor in the past.¹⁰⁰ Union Representatives Simoneaux and Tucker stated that there was widespread unemployment among their memberships at the time of the applications.

There is evidence that a perceived duty to the Union would motivate an individual to accept a job regardless of his employment status at the time. Thus, Union Representative John Kelly testified that the Boilermakers constitution requires every member to assist in organizing he unorganized. Charles Greaud testified that, if the Union attempted to organize, "I am a union man. I would have done my part."

Many of the applications contained the legend, "Volunteer [or voluntary] Union organizer." Union Representative Elrod testified that the purpose of the legend was to give the employer knowledge of the union status of the applicant, so that, in the event of a discharge, the employer could not claim lack of knowledge. In addition, Elrod affirmed, the Union had "run into cases where they fired our people for sneaking around, and we don't sneak around."

On cross-examination, William Lafeaux was asked whether he put the legend on his application in order to make certain that Sunland did *not* hire him. Lafeaux denied this purpose, and stated that this legend gave the Company an opportunity to check with other contractors about him. He agreed that "some" contractors would not hire an applicant with a similar legend, but denied knowledge at the time of his application that Sunland would not do so. "I wanted to go to work," Lafeaux affirmed. "I needed a job."

Charles Greaud was also cross-examined about the same subject. He gave as the reason the fact that the Company would learn that he was a union organizer by checking his listing of other companies where he had worked. Thus, "Harmony Construction" would say, "He is a good boiler-maker, but he is also a union organizer." Greaud added: "If I wouldn't have put that on . . . they would have come back and said, 'Well, you tried to organize Harmony. You give them as a reference.' It is already down there. They already know. They didn't have to ask. . . . It is best that they know it in the front."

Many of the applicants testified that they put the legend on their applications at the suggestion of their business agent, but did not know the reason.¹⁰¹

Human Resources Manager Colley testified that he prepared summaries of the employment histories of the Ashdown applicants from records received from the Union pursuant to subpoena.¹⁰² Respondent argues: "A review . . . reveals that 17 of the 59 applicants [at Ashdown] were steadily employed prior to, on the date of, and well after the date

of their applications."¹⁰³ "A cursory review . . . proves that employment at Sunland was simply not desired."¹⁰⁴

A noncursory review indicates that most of the applicants started steady work in the last week of September about the same time that Tucker submitted their applications. A few had fairly steady work prior to that time,¹⁰⁵ but the remainder had either sporadic or no employment in the earlier part of September. In sum, of the 59 Ashdown applicants, only about 5 had worked with any regularity in the 3 weeks immediately preceding their applications at Ashdown. There is no evidence to show that any of the applicants who did work in the last week had knowledge at the time they signed their applications that they would be working elsewhere.

Only two union adherents, Lindsey and Edwards at the Columbus jobsite, were offered employment by Respondent. Both accepted.

2. Respondent's position

Respondent argues that only "employees" are entitled to the protection of the Act. Although an applicant for employment may be an "employee," this is not the case when he does not truly desire employment, but has some "ulterior motive." Thus, where an employee who merely seeks to entrap the employer into committing an unfair labor practice is denied employment, no unfair labor practice has been committed. The individual is not a "bona fide" applicant. The General Counsel has the burden of proving that the applicant is in good faith.

"It might be argued that a properly authenticated employment application carries with it a presumption of validity." However, this cannot be the case with respect to the applications authenticated by somebody else, since the General Counsel was offering the documents only to show that they were signed by the purported signatory. Since the documents were offered only to authenticate the signatures, there could be no "presumption" based on them that the applicant "was in fact seeking work." The fact that many applications were mailed is further evidence that such applicants did not want a job.

Even if the Employer has the burden of showing that the applicants were "not sincere," it has met this burden because the evidence shows that the applications were "a veiled attempt to trap Sunland into unfair labor practices." This is established by the fact that five applicants who testified admitted that they had never worked or applied for work on a nonunion project. Sunland was a "targeted" employer; and "it is surely inconceivable that a person who has never worked or even previously applied at a nonunion project was truly interested in an employment opportunity at such a project . . ." The placement of the term "voluntary union organizer" on the applications, and the fact that some were

⁹⁸ Harrell, Overton, Bozeman, Oden, Lea, Clardy, Lafeaux, Himel, Berry, Greaud, Blackwell, Durning, Hammons, Case, Woodall, and Parker.

⁹⁹ Malcom.

¹⁰⁰ Harrell, Overton, Oden, Clardy, Himel, Greaud, Blackwell, Durning, Cason, Woodall, Malcom, and Parker.

¹⁰¹ Respondent argues that the testimony from some of the applicants on this subject is "unbelievable." The only specific reference is to Lafeaux's testimony. R. Br. p. 18.

¹⁰² R. Exhs. 4-7.

¹⁰³ R. Br. p. 19. Respondent cites the cases of "Ashley, Barber, Branscum, Burkhart, Burks, Byrd, Carter, Edwards, Gay, Gorman, Green, Hamonds, Phillips, Tucker, Wiley, and Wooten." As there were some applicants with the same last name—including those listed—the actual reference in some instances is unclear.

¹⁰⁴ Ibid.

¹⁰⁵ Ashley, Byrd, Burks, Phillips, and Wiley.

already employed, further demonstrates that employment was not really desired.¹⁰⁶

3. Analysis and conclusions

Neither of the Company's cited authorities supports its position. In the original *Burns & Gillespie* decision,¹⁰⁷ the Board held that the employer had engaged in certain unfair labor practices. The court of appeals concluded that the trial examiner had erroneously excluded evidence that the applicants had been sent to the employer to "make out a . . . violation," that this constituted competent and material evidence, and remanded the case to the Board to reopen the proceedings and consider the evidence. The court did not decide that such evidence, if received and credited, would be determinative,¹⁰⁸ yet it is this decision on which the Respondent herein relies.

At the reopened hearing in *Burns & Gillespie*, the Board concluded that the additional evidence did not refute the claimants' statements of their need for work. "At both the original and reopened hearings, the Respondents failed to elicit any evidence to prove that the applicants were aware of or had knowingly participated in, any scheme to entrap the Respondents into a violation of the Act, or that they would not have accepted work if tendered to them."¹⁰⁹ This language suggests that it is the employer's burden to prove that an offer of employment would not have been accepted.

In *Iron Workers Local 600*,¹¹⁰ the Board reversed a trial examiner's finding that the alleged discriminatees had attempted to entrap the employer. All testified that they were either unemployed or working at a less desirable job, and would have accepted jobs if offered. Even if they had known or suspected that the employer had a discriminatory hiring policy, "such knowledge would not render their request for work mala fide where all evidence indicated that they would have accepted work if it had been tendered."¹¹¹

The Board has reached the same conclusion in subsequent cases. Thus, in *Lipsey, Inc.*, 172 NLRB 1535 (1968), the Board reversed a trial examiner's conclusion that a denial of employment was not an unfair labor practice because the applicants sought to "entrap" the employer. The Board stated:

We do not agree. While it is true that prior to applying for work Reece had been informed by the Union's business agent that the Respondent's project [at some unspecified date] would be picketed, and was asked to give them [the Union] 'some help down there' there is no evidence in the record to indicate Reece's application was not a legitimate request for employment and that he would not have accepted employment had it been tendered. The mere fact that an applicant would have supported the Union by honoring its picket line

¹⁰⁶R. Br. pp. 13-22. The Company cites *NLRB v. Burns*, 207 F.2d 434 (8th Cir. 1953), denying enf. 101 NLRB 1181 (1952), and *Iron Workers Local 600*, 134 NLRB 301 (1961).

¹⁰⁷101 NLRB 1181 (1952).

¹⁰⁸*NLRB v. Burns*, supra, fn. 107.

¹⁰⁹*Burns & Gillespie*, 113 NLRB 434, 435 (1955). Although this decision was reversed on appeal, the ground was that, in the court's opinion, there had been an unwarranted substitution of trial examiners. *NLRB v. Burns*, 238 F.2d 508 (8th Cir. 1956).

¹¹⁰Fn. 106, supra.

¹¹¹134 NLRB at 307

once one was established does not excuse Respondent's failure to consider his application in a nondiscriminatory manner. The right to honor a picket line is protected by Section 7 of the Act, [citation] and an Employer may not lawfully discriminate against a prospective employee because it suspects the employee may in the future engage in activities protected by the Act. [Id. at 1535.]

The Board has reached similar conclusions in other cases.¹¹²

Respondent's argument based on the "voluntary union organizer" legend on many applications has been considered by Administrative Law Judge Arline Pacht in a similar factual situation:

It is true that many noted on their applications that they were volunteer union organizers, but these comments were no more revealing of their union affiliation than many other indicia of union membership and support which appeared on these forms. In all probability, the union leaders suggested to the applicants that they add this comment as a way to test the Respondent's word that it was willing to hire union members. In any event, efforts to conceal the applicants' union affiliations would have been pointless and disingenuous. By frankly announcing that they were volunteer union organizers, they avoided giving Respondent grounds to accuse them subsequently of being union plants or infiltrators, rather than bona fide job applicants [citation]. [*Fluor Daniel, Inc.*, JD-233-90, slip op. at 17 (1990).]

This reasoning mirrors that of the union witnesses in this case who testified about the volunteer organizer legend.

Respondent's arguments based on the employment status of the applicant at the time of the applications have no merit. There is evidence in this record of unemployment among the applicants. Although there may have been exceptions, current employment in a construction job does not evidence lack of good faith if the employee applies for another job. Employment in the construction industry is volatile—construction projects begin, wind down, and end. One job may be more desirable than another. Respondent's position that the fact an individual is already employed constitutes evidence that his application for another job lacks good faith is contrary to the realities of employment in general and the construction industry in particular. The Company's view, if implemented, would tend to bind employees to particular jobs as in medieval times.¹¹³

¹¹²*Willmar Electric Service*, 303 NLRB 245 fn. 36 (1991); *Broadcast Employees NABET Local 16*, 258 NLRB 504, 508 (1981).

¹¹³During the proceeding, Respondent issued subpoenas duces tecum to Mississippi and Arkansas unemployment security agencies requiring the production of records of benefit payments and evidence of searches for work for approximately 188 alleged discriminatees. The state agencies filed motions to quash, based on the assertedly burdensome nature of the subpoenas, the lack of any relationship to the matter under a investigation, and state law enacted pursuant to regulations of the Secretary of Labor making such records confidential. I granted the motions to quash on the ground that the evidence sought—searches for work with other employers, and payment of unemployment benefits—was not related to the issue of whether the applicants' applications to Respondent were bona fide.

There is a fundamental contradiction in Respondent's assertions that the applicants had an ulterior purpose and that they would not have accepted employment. If the ulterior purpose was to organize the employees, then this purpose could best have been accomplished by the applicants' themselves becoming employees.

If the ulterior purpose was based on a belief that the Respondent would discriminatorily deny the applications, then the Company by its actions confirmed this belief. Respondent's position amounts to an argument that an employee's suspicion that an employer is unlawfully motivated constitutes a defense to an unfair labor practice charge. This has no support in Board law.

Nor does any such suspicion establish that the employees would have rejected offers if their suspicions had proved to be unfounded. The two who were offered jobs (Lindsey and Edwards) accepted them.

For these reasons, I reject Respondent's contention that the applications were not bona fide in nature.

B. *The Applications of the Union Organizers*

Respondent argues that Union Organizers Simoneaux, Bueche, Kelly, Elrod, and Tucker were not bona fide applicants because of their paid union status.¹¹⁴ Respondent relies on *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), denying enf. 289 NLRB 117 (1988). In that case, the court held that a paid union organizer was not a bona fide applicant for employment.¹¹⁵ The court emphasized stipulated evidence that Edwards, the same discriminatee as one of those herein, planned to remain concurrently employed and supervised by the union during his hours of work for Zachry and would have been performing services for that employer only because directed to do so by the union. Further, the union would have paid Edwards for the difference between his salary and his full union salary, for his health, life insurance, and pension benefits, and for daily transportation expenses and living expenses related to the Zachry job.

All the record herein shows is that Edwards was employed by the International at the time of his application with Sunland. None of the further aspects of his employment, or dual employment, described by the court in *Zachry* are present in this record. Nor are they present with respect to the other union organizers.

As the Board's underlying decision in *Zachry* shows, protection of the Act has been "specifically applied to full-time paid union organizers who, although their ulterior purpose may be to organize the unorganized, are merely applying for a job, just like any other employees, and are forbidden by

Respondent also issued subpoenas to two union trust funds requiring the production of employment records of over 200 individuals for a 16-month period. The trust funds filed a motion to revoke, alleging that the requested work was "astronomical," and would necessitate the hiring of additional personnel. I granted the motion to revoke on the ground that a record of an applicant's work and wages with other employers did not relate to the issue of whether his application to Respondent was bona fide.

Respondent now argues that it was denied due process because of my rulings. R. Br. 20, fn. 15. This argument has no merit for the reasons stated above and in my rulings.

¹¹⁴R. Br. p. 11.

¹¹⁵The applicant was Barry Edwards, herein alleged to have been discriminatorily discharged after having been hired by Sunland.

the Act to be judged on their union sympathies [authorities cited]." *H. B. Zachry Co.*, 289 NLRB 838, 839 (1988).

The Board has recently reaffirmed its position in *Zachry*, with an articulation of the reasons why the Fourth Circuit's decision in that case did not apply to the facts then being considered, because they were factually distinguishable from those of the organizer under consideration in that case. *Willmar Electric Service*, supra, fn. 112. The same distinction applies to Bueche, Simoneaux, Kelly, Elrod, Tucker, and Lindsey. Although Edwards was the organizer in the *Zachry* case and one of the organizers in this case, the same distinctions can also be made on the basis of the differences in the record evidence of Edwards' employment in *Zachry* and in this case. Of great significance is the fact that in this case the complaint alleges that Edwards was discriminatorily discharged after having been employed, whereas in *Zachry* he was alleged to have been unlawfully denied employment. By employing Edwards (and Lindsey) Respondent thereby waived any objection to their asserted "dual employment."

For these reasons, I reject Respondent's defense based on the fact that Lindsey and Edwards were union organizers.

C. *Respondent's Defense Based on its Hiring Practices*

The Company argues that its hiring policy was on a "descending order" of preferences: "(1) current or former Sunland employees with good records; (2) persons who have worked with Sunland supervision previously with good records; and (3) all other applicants."¹¹⁶ Citing various authorities,¹¹⁷ the Company argues that there is nothing inherently discriminatory in such a practice. "The only concern can be whether the hiring system, as written or as applied, uses union activity as a motivating basis for the employment hiring decision, and if there is no or insufficient evidence of this fact, no violation of the Act can be found."¹¹⁸

There is ample evidence in the record that the refusals to hire the applicants were based on their union activities—the statements of Supervisors Albert B. (Bucky) Williford, Tommy Smith, Aubrey Ward, Joe Molton, Don Kuntz, or Carl Aldridge (inside the Columbus trailer), Carl Aldridge in an interview with Lindsey and Edwards, and Joe Yokum. As I conclude hereinafter, Aldridge's statement that he could not hire union organizers, and Yokum's threat that employees reading union literature could be discharged, constituted violations of the Act. I additionally conclude that Respondent violated the Act by unlawfully enforcing a rule barring the wearing of union insignia. Further, as I also find hereinafter, the Company discriminatorily discharged Lindsey and Edwards. Finally, Respondent's unfair labor practices established by the St. Francisville decision, constitute evidence of continuing antiunion animus under established Board law. Accordingly, the basic premise of Respondent's argument—that there is insufficient evidence of discriminatory motivation—is not supported by the record.

¹¹⁶R. Br. p. 40.

¹¹⁷*Furnco Construction Corp.*, 174 NLRB 93 (1969); *General Cable Corp.*, 130 NLRB 301 (1961); and *Shawnee Industries*, 140 NLRB 1451 (1963), enf. as modified 333 F.2d 221 (10th Cir. 1964). The Board decision in *Shawnee* does not support Respondent's position.

¹¹⁸R. Br. p. 42.

Company Representative Colley testified that the new policy became effective on December 1, 1988. This was subsequent to the issuance of the complaint in the St. Francisville proceeding, and a few months before the hearing in that case. Despite the asserted effective date, Colley admitted that the new policy was applicable to only portions of the Columbus and Ashdown jobs. As I have found, it was subsequent to the filing of the Ashdown applications that Colley and company counsel went to Ashdown for the purpose of telling the project manager how to avoid hiring union applicants, and thereafter instituted more stringent hiring policies.

Respondent's records show that, despite its first hiring standard—prior Sunland employment—the great majority of employees at the three jobsites were not prior Sunland employees. Thus, Company Representative Colley identified employee lists for the three jobsites.¹¹⁹ Union Representative William Creeden testified that, prior to his working for the Union, he had been a computer programmer for 10 years, and had developed software in that field. Creeden testified that he prepared graphs based on Respondent's records. These graphs indicate that, at Ashdown, there were about 60 former employees in an employee complement of about 220; at Columbus, about 10 or 11 former employees in an employee complement of more than 85; and, at Bogalusa, less than 10 former employees in an employee complement of more than 105.¹²⁰ Creeden also developed graphs from the Company's records showing there were applications on file for more than half the employees at Ashdown and Bogalusa, and slightly less than half at Columbus.¹²¹

Respondent does not disagree with this analysis. In fact, it asserts that its employees "have no reasonable expectation of working on subsequent Sunland projects."¹²² Respondent apparently is looking ahead to backpay proceedings. In so doing, of course, it has abandoned the first preference in its hiring policy defense.

With respect to Respondent's asserted second preference level—knowledge of the applicant by a supervisor—the record shows that Respondent distributed "method of contact" forms allegedly showing that the applicant was known by a supervisor or another employee.¹²³ When asked whether Sunland's reviewing authority checked to determine the accuracy of an employee's claim that he had been contacted by a supervisor, Colley gave contradictory answers. He agreed that requests to supervisors to verify this information went unanswered in several instances.¹²⁴

¹¹⁹Bogalusa employees after January 25, 1989 (C.P. Exh. 6); Columbus employees after August 28, 1989 (C.P. Exh. 7); and Ashdown employees after October 13, 1989 (C.P. Exh. 8).

¹²⁰C.P. Exhs. 11A, 11B.

¹²¹C.P. Exhs. 10A, 10B. Supervisor Gene Gold testified that he did not use applications at Bogalusa, and hired 12 to 16 employees. Supervisor Randall Casey stated that the Ashdown job was "well manned" when he arrived, and that there was a high turnover. This evidence applies to only a small percentage of the total employee complement at the three jobsites in light of the statistical evidence shown above.

¹²²R. Br. p. 53.

¹²³G.C. Exhs. 68, 69.

¹²⁴C.P. Exh. 21. Colley noted the urgency of the request in one of the letters, stating to the supervisor that Sunland was "involved in charges concerning our hiring practices" (letter to Kenneth R. Weaver, April 10, 1990).

The evidence shows that the Company advertised for employees, and received resumes. Colley contended that this was merely a "labor survey," and that the responses were intended to provide a pool for its asserted third category of preference. The evidence shown above casts doubt on this explanation.

I conclude from the evidence of union animus, the timing of the institution of the hiring policy, and its content and contradictions noted above, that it was intended to provide a defense to unfair labor practice charges.

VI. LEGAL CONCLUSIONS

A. *The Alleged Violations of Section 8(a)(1)*

Supervisor Aldridge's statement to Lindsey and Edwards that he could not hire them because they were union organizers was obviously coercive and violative of Section 8(a)(1). The same is true of Supervisor Yokum's telling employees that they could be discharged for reading the union literature distributed by to them Lindsey and Edwards.

With respect to the rule concerning the wearing of insignia, the record shows that, although the Company's rule banned the wearing of badges other than company insignia, in practice the rule was overlooked. When Lindsey and Edwards put on their union badges, the rule was disparately enforced. It is well established that a blanket prohibition against the wearing of union insignia is violative of Section 8(a)(1).¹²⁵

B. *The Alleged Violations of Section 8(a)(3)*

1. The discharges of Lindsey and Edwards

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in Respondent's decision to discipline an employee. Once this is established, the burden shifts to Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.¹²⁶

In this proceeding, the General Counsel's prima facie case is very strong. Respondent argues that Lindsey and Edwards were discharged for "blatant insubordination" in refusing to remove their union insignia.¹²⁷ As indicated, the employees were within their lawful rights in wearing the insignia, and the Company's rule was disparately enforced in that other noncompany badges and decals were allowed. I conclude that the reason given was a mere pretext, and that Lindsey and Edwards were discharged in violation of Section 8(a)(3) and (1) of the Act. *Malta Construction Co.*, 276 NLRB 1494 (1985).

2. The failure to hire the applicants

The Board has approved of the following statement of a prima facie case establishing a discriminatory failure to hire:

¹²⁵*Asociacion Hospital Del Maestro v. NLRB*, 842 F.2d 575 (1st Cir. 1988), enfg. 283 NLRB 419 (1987).

¹²⁶*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

¹²⁷R. Br. p. 50.

Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. [*Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).]

All of these elements are present in this case, and Respondent has not presented a credible defense. Accordingly, I find that each applicant was denied employment because of his union sympathies and activities, in violation of Section 8(a)(3) and (1).

The General Counsel argues those individuals listed in the St. Francisville complaint¹²⁸ who failed to file applications at Bogalusa were also discriminatorily denied employment at the latter jobsite because filing would have been futile.¹²⁹

Simoneaux and Bueche took a busload of applicants to the Bogalusa jobsite. In addition, Simoneaux testified, he received and answered inquiries from members about whether the Company was hiring at Bogalusa. He made his telephone available for members to call long distance from his Baton Rouge office to the Bogalusa jobsite, about 70 miles away, and testified in detail about numerous calls to the jobsite from this phone during the first half of 1989. As indicated, Bueche spoke to members at the New Orleans local about the job, and caused them to sign applications. I conclude that there was general knowledge among the union members that Respondent had a job at Bogalusa.

As set forth above, Judge Harmatz found in the St. Francisville decision that Respondent violated the Act *inter alia* by telling employees that union organizers would not be hired on future jobs, that the Company would not hire from employment applications because they were in furtherance of union organization, and that vacancies would be filled solely by nonunion employees. Respondent argues that there is no evidence that employees had knowledge of these statements.¹³⁰ This argument is without merit.

During a recess in the St. Francisville hearing, Respondent's Manager of Construction Operations Williford told supervisors that the company had to do "whatever it takes to keep these known union organizers off the Bogalusa job." At the Bogalusa jobsite, Company Supervisor Tommy Smith refused to accept job applications handed to him by union representative Simoneaux, and said that they had to be mailed to Houston. Smith told timekeeper trainee Pumphrey at Bogalusa that he was not going to hire any union applicants because he did not want them to cause trouble or start a union. Supervisor Ward told an employee that he would not hire two individuals because they were union representatives. Supervisor Joe Molton told union representative Creeden, in response to a request for employment of certain individuals, that the Company was not going "to hire any of those people on that shit list," referring to the St. Francisville complaint.

Respondent's written policy provided that an application, once filed, would be kept in the Houston office permanently.

"Once an application is on file for an individual, he/she will not be required to complete the form again."¹³¹ The Company also required supervisors to conduct an "orientation" on "general work rules,"¹³² and to make certain that employees "understand Company policies and work rules."¹³³ Colley testified that these and other policy statements were incorporated into a "field office procedure manual." Under Respondent's policy, therefore, it would have been both futile and unnecessary for the other individuals listed in the St. Francisville complaint to have filed new applications. Accordingly, I shall consider them to have been bona fide applicants who were discriminatorily denied employment.¹³⁴

C. The Alleged Violations of Section 8(a)(4)

The charge in the St. Francisville case was filed by the Union, and there is no evidence that all of the alleged discriminatees testified in that proceeding. However, the Board has held with judicial approval that an 8(a)(4) violation is established where it was the Union which filed the charge and the employer, because of this fact, discriminated against employees. *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980), *enfd.* as modified 642 F.2d 255 (8th Cir. 1981).

The General Counsel has established a prima facie case in this proceeding that Respondent's refusal to employ the St. Francisville discriminatees was because of their participation in that proceeding. Respondent has not rebutted the prima facie case. Accordingly, I conclude, it violated Section 8(a)(4) and well as Section 8(a)(3) by refusing to employ those discriminatees.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Sunland Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act at its Columbus, Mississippi jobsite by telling employees that it could not hire them because they were union organizers, by telling employees that they could be discharged for reading union literature, and by promulgating and enforcing a rule prohibiting the wearing of badges other than company employee badges.

4. By discharging employees Thomas Lindsey and Barry Edwards on August 31, 1989, at its Columbus, Mississippi jobsite, because of their assistance to the foregoing labor or-

¹³¹ G.C. Exhs. 5, 7. Respondent argues that this practice was not carried out, because Colley testified that "there was no master list of applications in Houston." R. Br. pp. 44-45. Colley's actual testimony was that no copies of applications were sent to Houston, but that original applications were kept in the field. As indicated, the Ashdown applications were sent to Houston.

¹³² G.C. Exh. 8.

¹³³ G.C. Exh. 9.

¹³⁴ *Pipeline Local 38 (Hancock-Northwest)*, 247 NLRB 1250, 1251 (1980); *Mason City Dressed Beef*, 231 NLRB 735, 747-748 and *fn.* 3 (1977); *Alexander Dawson, Inc.*, *supra*, 228 NLRB at 179 (1977); and *Macomb Block & Supply*, 223 NLRB 1285, 1286 (1976).

¹²⁸ App. B.

¹²⁹ G.C. Br. p. 16.

¹³⁰ R. Br. p. 45.

ganization and other acts of mutual aid and protection, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. By refusing to employ the applicants listed on the attached Appendices A, B, C, and D at various times and jobsites, because of their assistance to the foregoing labor organization and other acts of mutual aid and protection, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

6. By refusing to employ the applicants listed on the attached Appendix B because of their participation in an unfair labor practice charge and proceeding against Respondent, the latter thereby violated Section 8(a)(4) and (1) of the Act.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged employees Thomas Lindsey and Barry Edwards, it is recommended that Respondent be ordered to offer each of them reinstatement to his former position, without prejudice to his seniority or other rights and privileges previously enjoyed. It is further recommended that each of them be made whole for any loss of earnings and other benefits he may have suffered from the date of his discharge to the date of Respondent's offer of reinstatement, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹³⁵

I shall further recommend that issues concerning the duration of the remedy, including whether Lindsey or Edwards would have been transferred to other jobsites, be left to the compliance stage of the proceeding, pursuant to *Dean General Contractors*, 285 NLRB 573 (1988), and *Elion Concrete*, 299 NLRB 1 (1990).

I shall also recommend an expunction order concerning Respondent's records of its unlawful discharges of Lindsey and Edwards. Further, I shall recommend that Respondent be required to rescind its unlawful rule prohibiting the wearing of insignia other than company insignia.

It having been found that Respondent unlawfully refused to employ the individuals listed on attached Appendices A, B, C, and D, it is recommended that Respondent be ordered to offer them employment and make them whole for any losses of earnings they may have suffered as determined by the same procedures discussed above.

In its initial brief, the Charging Party requested extraordinary relief. Respondent challenges the Charging Party's standing to request such relief. However, the cases cited in Respondent's supplemental brief¹³⁶ deal in part with a charging party's attempt to change the complaint, or with dif-

ferences in the theory of the case, or are simply inapposite. They do not concern a party's attempt to request a particular remedy for an unfair labor practice. In this case, the Charging Party does not propose an amendment to the complaint or a theory of the case different from that of the General Counsel. Instead, the Union advocates a particular remedy. Although the General Counsel has not supported this view, neither has he opposed it. In *Gourmet Foods*, 270 NLRB 578 (1984), the General Counsel proposed a bargaining order based on his view that the Union had a majority status. Although the Board disagreed, it nonetheless considered the Charging Party's request for bargaining order without majority status. I conclude that the Union herein has standing to propose a particular remedy.

The first extraordinary remedy sought by the Charging Party is payment of organizational expenses. The parties have engaged in extended debate in their supplemental briefs on whether the appropriate standard for extraordinary relief is the test announced in *Heck's Inc.*, 215 NLRB 765 (1974), or in *J. P. Stevens & Co.*, 244 NLRB 407 (1979), enf. 668 F.2d 767 (4th Cir. 1982). In *Heck's*, the Board stated its intention "to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful,' where the defenses raised by the respondent are 'debatable' rather than 'frivolous'" (215 NLRB at 767).

In *J. P. Stevens*, Judge Harmatz' rationale for the recovery of organizational costs, approved by the Board and the reviewing court, stated:

[O]ne cannot lose sight of the fact that those [employee] rights have been threatened over the years by the efforts of J. P. Stevens to destroy the Union through persistent violations of the law, Board orders, court decrees, and contempt citations. No end appears to this unrelenting effort to exhaust the resources of this Union [Id. at 458.]

I consider it unnecessary to resolve the dispute of the parties as to the applicable standard, since I find that neither justifies the payment of organizational expenses in this case. The Charging Party argues that Respondent's defense based on the alleged lack of good faith in the filing of the applications was frivolous.¹³⁷ This argument was encompassed within Respondent's overall "entrapment" defense. Although the defense is erroneous for the reasons given above, it would be inappropriate to characterize it as "frivolous." See, e.g., Judge Harmatz' discussion of this issue.¹³⁸

Nor can it be validly argued that Respondent's record approximates in gravity that of *J. P. Stevens*. There has been only one decision against Respondent, and that is currently on appeal before the Board. Accordingly, I deny the Charging Party's application for organizational costs.

With respect to the Charging Party's request for a bargaining order, the complaint does not contain an allegation of violation of Section 8(a)(5), and there is no evidence of majority support for the Union. In *Gourmet Foods*, supra, the Board reviewed prior authority and reached the conclusion

¹³⁵ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

¹³⁶ *NLRB v. Quality C.A.T.V.*, 824 F.2d 542 (7th Cir. 1987), denied enf. of 278 NLRB 1282 (1986); *Rogers Cleaning Contractors*, 277 NLRB 482 (1985); *Sunbeam Plastics Corp.*, 144 NLRB 1010, 1011 fn. 1 (1963); *Koons Ford of Annapolis*, 282 NLRB 506 (1986).

¹³⁷ C.P. supplemental Br. p. 9.

¹³⁸ *Sunland Construction Co.*, 309 NLRB 1224 (1992).

that nonmajority bargaining orders are not within its remedial discretion. 270 NLRB at 585. The Charging Party disagrees with this decision.¹³⁹ I am bound by Board law, and therefore deny the Charging Party's request for a bargaining order.

However, I do conclude that Respondent, by its conduct in this and the prior proceeding, "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, I shall recommend a broad order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴⁰

ORDER

The Respondent, Sunland Construction Co., Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not hire them if they are union organizers, or that they can be discharged for reading union literature.

(b) Promulgating or enforcing a rule prohibiting the wearing of badges or insignia other than company employee badges.

(c) Discouraging membership in the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forger & Helpers, AFL-CIO, or any other labor organization by discharging employees or refusing to employ applicants for employment, because of their union or other protected concerted activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer Thomas Lindsey and Barry Edwards full reinstatement to their former positions, without prejudice to the seniority or rights and privileges of either of them, and make them whole for any loss of earnings either has suffered, in the manner described in the remedy section of this decision.

(b) Expunge from its books and records all record of its unlawful discharges of Thomas Lindsey and Barry Edwards, and inform each of them in writing that this has been done, and that evidence of such action will not be used as a basis for future personnel action against him.

(c) Offer employment to the discriminatees listed on Appendices A, B, C, and D hereof, and make them whole for

¹³⁹ C.P. supplemental brief.

¹⁴⁰ 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.

any loss of earnings they may have suffered because of Respondent's unlawful refusal to employ them, in the manner described in the remedy section of this decision.

(d) Rescind its rule prohibiting the wearing of badges or insignia other than company badges or insignia.

(e) Preserve and, on request, make available to the Board or its agents for copying, all payroll records, social security payment records, timecards, records of transfers of employees, project beginnings and closings, records of employee complements and dates of hiring, and all other records necessary to analyze the remedial action necessary under the terms of this Order and any further proceeding.

(f) Post at its Houston, Texas facility, and at each of its jobsites in the States of Louisiana, Mississippi, and Arkansas, copies of the attached notice marked "Appendix E."¹⁴¹ Copies of said notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted immediately on receipt and maintained for 60 consecutive days including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

¹⁴¹ 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 A

Bogalusa Applicants

J. K. Bueche	J. C. Berry
F. E. Bozeman	Mark Castleberry
Bryan Champagne	T. W. Eastwood
Dave Ellis	Jack Garza
Brad Harrell	Jerry Himmell
David Ivy	Walter Jones
John Kelley	Frank Lee
William Lefeaux	J. J. Leveron
Earl Moak	Joel Moak
Jerry Moore	Greg Oden
Eddie Schoonmaker	Don Sutton
Gary Stokes	Robert W. Travis
William Walley	Leroy White
Charles D. Deville	Daryl T. Castleberry
Charles O. Clardy	Russell J. Decou
William D. Hammonds	

At the hearing, the complaint was amended to add the following alleged discriminatees:

Danny Blackwell	Albert Thielman	James R. Guice	Marvin L. Guitreau
Charles Greaud	Raymond Bahan	Laron Herrington	Norris A. Medlen
W. D. Hammons, III	William R. Bradley	Horace E. Nowell	Adrian L. Phillips
Herman Trahan	Edmond J. Albares	Julius A. Prokop	William T. Robichaux
Michael Jones	Darrell Leo	Bobby G. Temple	Hiram C. Temple
Sebrin Stortler	Leander J. Humphrey	Leslie P. Westbrook	John A. Williams
Junior Taylor	Larry W. Jones	Robert M. Whiddon	Anthony J. Yakemowicz
Gene A. Lazaro	Carroll M. Meredith	Kenny R. Davis	David A. Felter
Frank Gilbert	James K. Bueche*	Thomas E. Lindsey	Scott E. Gibson
Fred W. Pohlmann, III	Charles Morgan	Charles R. Bowman, Jr.	Ricky Allen
Stan Dupuy	Lawrence F. Chapoton	Ben O'Quinn	Brooks Warren
John Kennair	George W. Berthaud	George R. Stalsby	James Mahaney
Rodney Martin		Michael Hill	Michael Larimore

* Apparently a duplicate of a name appearing in the amended complaint.

APPENDIX B

Bogalusa Applicants Named in St. Francisville Complaint

James K. Bueche	Arthur R. Richardson
Farrell O. Alford	Mark D. Castleberry
Charles O. Clardy	Leonard W. Efferson
Phillip I. Garner, Jr.	Willie Covington
L. J. Garza	Robert H. Hoch
Brian B. LeJeune	Johnny J. Leveron
Gayden M. Smith	Alfred E. Bacot
Gary W. Bond	Richard H. Buckley
Danny R. Bueche	Larry W. Castille
Darryl T. Castleberry	Russell J. Decou
Audry J. Duhon, Jr.	David A. Ellis
Dawson C. Fontenot	Lawrence A. Gonzales
Brent M. Matt	Elton Marcotte
Joseph D. Meyers	Van M. Mercier
Joel R. Moak	John A. Murphy
Chad W. Roddy	Terry P. Saltzman
Eddie H. Schoonmaker	Jayson L. Smith
Damon P. Thomas	Mitchell L. Wallace
W. H. Blades	W. D. Covington
Larry M. Cox	Tommy Eastwood
Sam Hodges	E. R. Hughes
J. L. McCrory	A. E. Ross
Robert W. Travis	Ivy Williams
Jerry C. Aguillard	William C. Brady
Voladia W. Brown	Robert L. Burns
Thomas L. Coon	Jerry W. Gautreaux
Kenneth P. Granier	James E. Guidry
Jerome C. Johnson	Jerry L. Johnson, Jr.
Lawrence W. Johnson	Paul D. Johnson
Joey P. Letulle	Percy K. Lott
Van N. Mercier	Roy T. Navarre
John B. Overton	Terry D. Smith
Raybon C. Steele	Curlin J. Terrio
Harold L. Whiddon	Bobby Hayden
Jules A. Castille, Jr.	Charles I. Godson
Norman L. Guitreau	Herman L. Hanna
James D. Major	Albert Meche, III
James J. Melancon	Alvin C. Street, Jr.
Rudolph J. Landry	Aljire J. Joseph
Glenn D. Burns	Larry M. Coy
William T. Creeden	Owen J. DeLaune
Linus J. Devillier	Jesse L. Edwards

James R. Guice	Marvin L. Guitreau
Laron Herrington	Norris A. Medlen
Horace E. Nowell	Adrian L. Phillips
Julius A. Prokop	William T. Robichaux
Bobby G. Temple	Hiram C. Temple
Leslie P. Westbrook	John A. Williams
Robert M. Whiddon	Anthony J. Yakemowicz
Kenny R. Davis	David A. Felter
Thomas E. Lindsey	Scott E. Gibson
Charles R. Bowman, Jr.	Ricky Allen
Ben O'Quinn	Brooks Warren
George R. Stalsby	James Mahaney
Michael Hill	Michael Larimore
J. J. Galltier	Eddie Van Osdell
Charles Reed	Terry Johnson
James D. Strange, Jr.	Wayne Ellis
Greg Outlaw	Elmer Keatts
Steve Grey	Andrew J. Bennett
J. L. Munn, Jr.	Donald Medlin, Jr.
Rickie D. Beavers	Andrew J. Burnett
Michael W. Golmon	Ted Vidrine
Eddie Guillory	Keith Wilson

APPENDIX C

Columbus Applicants

William D. Hammons	August 28, 1989
Jerome A. Durning	August 28, 1989
Willie Covington	August 28, 1989
David Redmond	August 28, 1989
Joseph Faulk	September 1, 1989
Alford Farrell	September 1, 1989
John Kelly	September 1, 1989
Jeff McCrory	September 5, 1989
Larry Castille	September 5, 1989
Roberts L. Burns	September 5, 1989
Roy H. Chaney	September 12, 1989
Clarence Moore	September 12, 1989
Marlin Little	September 12, 1989
Jean Robertson	September 12, 1989
Robert B. Kelley	September 12, 1989
Jason Kobeck	September 12, 1989
Allen Barnett	September 12, 1989
Robert Moore	September 12, 1989
William Elrod	September 26, 1989

APPENDIX D

Ashdown Applicants

Rodney E. Allison	October 13, 1989
Willie C. Ashby	October 13, 1989
Donald Blackwell	October 13, 1989
Thomas S. Bates	October 13, 1989
Terry L. Brady	October 13, 1989
Jerry Burks	October 13, 1989
Tommy Bussell	October 13, 1989
Dale Branscum	October 13, 1989
Thomas Bonzek	October 13, 1989
Frank R. Brown	October 13, 1989
Russell Byrd	October 13, 1989
James R. Burkhart	October 13, 1989
Delbert W. Barber	October 13, 1989

Mike Byrd	October 13, 1989
William R. Cason	October 13, 1989
Norman L. Carter	October 13, 1989
Danny L. Casto	October 13, 1989
Monte E. Crider	October 13, 1989
Darrell R. Durham	October 13, 1989
Curtis L. Edwards	October 13, 1989
Charles A. Gorman	October 13, 1989
Roger Dale Gorman	October 13, 1989
Laymond G. Green	October 13, 1989
Harold D. Gay	October 13, 1989
Michael D. Gay	October 13, 1989
Edward A. Hamonds	October 13, 1989
Donald Ray Hensley	October 13, 1989
Edgar S. Hensley	October 13, 1989
Bobbie J. Hay	October 13, 1989
Donnie R. Jones	October 13, 1989
Jerry L. Luker	October 13, 1989
Charles Malcom	October 13, 1989
Jerrell Mann, Jr.	October 13, 1989
Steve M. Phillips	October 13, 1989
Danny L. Parker	October 13, 1989
Wayne E. Smith	October 13, 1989
T. J. Vernon Stubbs	October 13, 1989
Garry R. Thomas	October 13, 1989
Mark D. Tucker	October 13, 1989
Wayne D. Vance	October 13, 1989
Jeff Wooten	October 13, 1989
William T. Windsol	October 13, 1989
John Odis White	October 13, 1989
Thomas W. Whittaker	October 13, 1989
Nickie Whittaker	October 13, 1989
Danny R. Wiley	October 13, 1989
James R. Wooten	October 13, 1989
Thomas D. Wooten	October 13, 1989
William R. Elrod	October 19, 1989
Ronald R. Brown	November 15, 1989
Charles R. Echols	November 15, 1989
Carl E. Edds	November 15, 1989
Martin V. Felkins	November 15, 1989
Thomas W. Hamilton	November 15, 1989
Tommy W. Self	November 15, 1989
Derrick W. Stevens	November 15, 1989
Eugene Thomas	November 15, 1989
Arvil Tucker	November 15, 1989
Bobby L. Woodall	November 20, 1989

APPENDIX E

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 tell employees that we will not hire them because they are union organizers, or that they will be discharged for reading union literature.

WE WILL NOT promulgate or enforce a rule prohibiting the wearing of insignia or badges other than company badges.

WE WILL NOT discourage membership in the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, or any other labor organization, by discharging or refusing to employ employees because of their union sympathies and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL offer reinstatement to Thomas Lindsey and Barry Edwards with their full rights and privileges, and make them whole for any loss of earnings, with interest, that they may have suffered because of our unlawful discharges of them.

WE WILL expunge from our records all references to our discharges of Lindsey and Edwards, and inform them in writing that this has been done and that evidence of such action will not be used as a basis for future personnel action against them.

WE WILL offer employment to applicants whom we unlawfully refused to employ and make them whole for any loss of earnings which they may have suffered, with interest.

WE WILL rescind our rule prohibiting the wearing of badges or insignia other than company badges.

SUNLAND CONSTRUCTION CO., INC.