

Packaging Techniques, Inc. and Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board. Case 15-CA-12717

July 26, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The judge in this case¹ has found that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule and violated Section 8(a)(3) and (1) of the Act by refusing to rehire Ruby Lee Chambers because of her past support for the Union. The only exceptions, filed by the General Counsel, concern the judge's finding that January 11, 1994, was the initial date of the violation and his further finding that the backpay period for Chambers should end on July 31.

The Board has considered the decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings and conclusions, except as discussed below, and to adopt the recommended Order.

1. Chambers filed an employment application on November 22, 1993, having previously worked for the Respondent during 1991-1992. It is now uncontested that the Respondent refused until November 1,² to rehire Chambers because of her support for the Union. The judge found that the initial date of discrimination against her was January 11, the first record instance of a hiring after Chambers had submitted her employment application.

The General Counsel had contended that a violation, and the beginning of backpay liability, should date from the time Chambers filed her application. The judge found, however, that "because the charge was filed on July 1, 1994, the November commencement date is rejected as it would precede the Act's [Section] 10(b) limitation period." We find no need to rely on the judge's 10(b) analysis in rejecting the General Counsel's exceptions on this point. The General Counsel did not sufficiently allege any violation prior to January 1994, nor was the issue of an earlier date litigated fully at the hearing. We therefore affirm the judge's finding that January 11 was the initial date of violation.

2. Although the Respondent did not rehire Chambers until November 1, the judge recommended tolling its backpay liability to Chambers as of July 31, the date on which she last inquired about the status of her em-

¹ On April 19, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

² All dates herein are in 1994 unless otherwise indicated.

ployment application. In accord with the General Counsel's exceptions, we disagree.³ The traditional backpay remedy for an unlawful refusal to hire continues to run until a valid offer for employment is made and accepted or rejected. *Original Oyster House*, 281 NLRB 1153, 1154 (1986). A discriminatee is under no general obligation to make repeated inquiries of the wrongdoing employer about job availability in order to preserve the continuing right to receive backpay in the absence of a valid offer of employment. Accordingly, we shall modify the judge's remedy to provide that the backpay period for Chambers should end on the November 1 date of her reemployment.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Packaging Techniques, Inc., Monroe, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

³ Contrary to the judge's statement in fn. 6, we find that the General Counsel did not concede that the discrimination ended on July 31.

⁴ The Respondent will have the opportunity at the compliance stage to show that the backpay period for Chambers should terminate at an earlier date for lawful reasons unrelated to the circumstances of its prior discriminatory refusal to rehire her.

Charles R. Rogers, Esq., for the General Counsel.
David C. Hagan, Esq. (Clark, Paul, Hoover & Mallard),
of Atlanta, Georgia, and *James A. Zellinger, Esq.*, of Mon-
roe, Louisiana, for the Respondent.
Robert K. Sweeney, Esq. (Franz & Franz), of St. Louis, Mis-
souri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was tried at Monroe, Louisiana, on February 21-22, 1995. A charge was filed by the Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board (the Union), on July 1, 1994.¹ A first amended charge was filed by the Union on August 17. A complaint and notice of hearing issued on August 29. The primary issues are whether Respondent violated Section 8(a)(1) of the Act by maintaining a no-solicitation rule and whether it unlawfully refused to reemploy Ruby Lee Chambers in violation of Section 8(a)(3) of the Act.²

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs

¹ All dates are 1994 unless otherwise indicated.

² Certain changes were made to the pleadings during the hearing. Ms. Chambers' name and that of N. Edward Hakim, Respondent's alleged president, were corrected and the complaint was amended accordingly. The Respondent amended its answer to admit the supervisory status of Artiv "Sam" Anderson.

filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the packaging and sale of baby products in Monroe, Louisiana. Respondent annually sells and ships goods valued in excess of \$50,000 from its Monroe facility directly to points and places outside the State of Louisiana. The Respondent admits, and I find, that at all times material the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUBPOENA ISSUES

Counsel for the General Counsel served three subpoenas on Respondent's agents. One, directed to the custodian of documents, is a six-page subpoena duces tecum. The other two, subpoena ad testificandums, are addressed to N. Edward Hakim, alleged owner-president of Respondent, and supervisor, Michael Henagan. Except to the limited extent noted below, there was no compliance with any of the subpoenas.

A. The Subpoena Duces Tecum

The Respondent filed a written petition to revoke the subpoena duces tecum.³ Government counsel ultimately deleted some requests for documents sought in this subpoena. I then heard argument on the petition to revoke and ruled on the need to produce the remaining materials. I granted the Respondent's petition to revoke as to some parts of the subpoena. The remainder of the documents sought were found relevant and producible.

After my rulings, Respondent refused to comply with the subpoena except for its selective production of Ruby Lee Chambers' personnel file. Respondent stated that the General Counsel would have to get enforcement of the subpoena to obtain any other documents. Counsel for the General Counsel stated that the Government would likely seek enforcement of the subpoena duces tecum. (Subsequently, counsel for the General Counsel informed all parties that he would not file a subpoena enforcement action. Rather, he would ask that adverse inferences be made against Respondent for its failure to comply with the subpoenas).

When the enforcement issue was raised, Respondent's counsel stated that he would be calling only a single witness. Respondent was allowed to proceed with its witness, supervisor, Artiv "Sam" Anderson. During Anderson's testimony counsel for the General Counsel objected to certain lines of questioning. The objections were based on the witness testifying to matters covered by the subpoena duces tecum but not produced by Respondent. I sustained most of the objec-

³The Respondent did not ask to make its petition to revoke a part of the record. Board's Rules and Regulations, Sec. 102.31(b).

tions made in this regard. *Bannon Mills*, 146 NLRB 611, 613 fn. 4, 633-634 (1964).⁴

B. The Subpoena to N. Edward Hakim

A subpoena ad testificandum was served by the Board's Regional Office on N. Edward Hakim, alleged president of the Respondent. When called to testify on the first day of the hearing Hakim was not present. Testimony concerning service was received from counsel for the General Counsel who testified he left the subpoena with a receptionist at Respondent's place of business. Respondent's counsel handling the trial on that day, James Zellinger, represented that to his knowledge Hakim had not been served, and would not appear. I found that service of the Hakim subpoena was valid. Board's Rules and Regulations, Section 102.113; *Control Services*, 303 NLRB 481, 483 fn. 13 (1991).

After my ruling, Attorney Zellinger stated he would see if Hakim would appear voluntarily on the second day of the trial. On that morning, Respondent was represented by different counsel, David C. Hagaman. He stated that Hakim would appear only on condition that his testimony be limited to certain areas of inquiry. This was unacceptable to counsel for the General Counsel. Hakim never presented himself to testify.

C. The Subpoena to Supervisor Henagan

Early on the morning of the last day of the hearing, a subpoena ad testificandum from counsel for the General Counsel was served on Respondent's supervisor, Michael Henagan. Supervisor Anderson had testified he is the plant manager. The subpoena was left at Respondent's place of business in Monroe, Louisiana. Although called to testify, Henagan did not respond to the subpoena at any time during the hearing.

When Henagan was called to testify, Respondent's counsel stated he was going to request the subpoena be revoked. However, since the subpoena had only been served that morning, Respondent wanted the full 5 days mentioned in the Board's Rules and Regulations to file a written petition. To avoid unnecessary delay in the hearing I denied that request. Respondent's counsel then orally argued for revocation. After hearing Respondent's argument and the testimony of union agent, Michael Hoagland, who had served the subpoena, I found that the subpoena was proper and that Henagan should be present to testify. Board's Rules and Regulations, Sections 102.31 & 102.113; *Control Services*, supra.

I affirm my ruling requiring the Respondent to proceed forthwith to argue the revocation of the subpoena ad testificandum. The hearing was in its final day. A 5-day hiatus for the filing of a written petition to revoke would have caused an unreasonable delay in the hearing. As the produc-

⁴See also *Hedison Mfg. Co.*, 643 F.2d 32 (1st Cir. 1981); *NLRB v. C. H. Sprague & Co.*, 428 F.2d 938 (1st Cir. 1970); *NLRB v. American Art Industries*, 415 F.2d 1223 (5th Cir. 1969); *Control Services*, supra; *Today's Man*, 263 NLRB 332 (1982); *Louisiana Cement Co.*, 241 NLRB 536, 537 fn. 2 (1979); *Midland National Life Insurance Co.*, 244 NLRB 3, 6-7 (1979). Contra *NLRB v. International Medication Systems*, 640 F.2d 1110 (9th Cir. 1981), holding that the Board's only remedy for noncompliance with a subpoena was to seek its enforcement in Federal District Court.

tion of documents was not an issue, the matter was very straightforward.

While Section 102.31 of the Board's Rules and Regulations allows 5 days for the filing of a petition to revoke, the case law suggests a common sense application of the rule. *NLRB v. C. E. Strickland*, 220 F.Supp. 661, 665-666 (1962), affd. 321 F.2d 811, 813 (6th Cir. 1963) (subpoena may be made returnable in less than 5 days from service); *Upland Freight Line, Inc.*, 240 NLRB 333 fn. 1 (1979) (General Counsel not prejudiced by Respondent's oral argument to revoke subpoena duces tecum within 5 days of service); *Brennan's Restaurant*, 129 NLRB 52 fn. 2, 55-57 (1960) (trial examiner denied party 5 days to file petition and witness testified).

Additionally, the 5-day period needs to be reasonably balanced with the Board's Rules and Regulations, Section 102.35. That section gives the presiding administrative law judge the authority:

(6) To regulate the course of the hearing and

. . . .

(12) To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof.

Finally, Respondent has cited no prejudice because it did not have 5 days to file a written petition to revoke this subpoena. I, therefore, affirm my ruling that the issue of quashing the subpoena ad testificandum be orally argued contemporaneous with the calling of the witness to testify.

IV. SUPERVISORY ISSUE

The complaint alleges that N. Edward Hakim is owner-president of the Respondent corporation. It further alleges that Hakim is a supervisor and agent of the Respondent within the meaning of the Act. Respondent's answer denies these allegations. The evidence overwhelmingly shows Hakim is a supervisor and agent of Respondent as alleged.

According to Supervisor Anderson, Hakim comes to the Respondent's plant a couple of times a month but does not have anything to do with the Company. Anderson admitted at one point that she talks to him about problems and things going on in the plant in the absence of her immediate supervisor. (Tr. 169.) Later Anderson denied that she ever talks to N. Edward Hakim about work but rather just says "Hi" to him. (Tr. 314.)

Anderson is in charge of hiring for Respondent. In spite of this authority she acknowledges that Ruby Lee Chambers was hired without Anderson's approval. In fact, Chambers was hired, as recited below, after receiving a letter from N. Edward Hakim offering her reinstatement.

Because the weight of the evidence is to the contrary, and because Anderson was an extremely reluctant and inconsistent witness, I do not credit her denial of Hakim's substantial connection to the Respondent.

Attorney James A. Zellinger also testified about N. Edward Hakim's relationship to Respondent. In sum, he denied Hakim has any significant association with Respondent. Zellinger's demeanor while testifying was particularly revealing. He was evasive, equivocal, and defensive upon examination. Importantly, his testimonial denials fundamentally clash

with the documentary evidence from Respondent's own records:

1. Hakim is shown in the Respondent's 1991 articles of incorporation to be first director, corporate registered agent, and incorporator of the corporation. As president, N. Edward Hakim signed these articles of incorporation. (G.C. Exh. 7.)

2. On October 13, 1994, Attorney Zellinger, using the title assistant secretary, signed the Respondent's annual corporate report. This corporate filing lists Hakim as the sole director of Respondent. (G.C. Exh. 7.)

3. Ed Hakim signed an October 31, 1994 letter offering Ruby Lee Chambers reinstatement to her former job. The letter has a printed letterhead bearing Respondent's name. Hakim signed the letter as president of Respondent. (G.C. Exh. 9.)

4. On August 4, 1994, Hakim submitted an affidavit to the Regional Office in response to the instant charges. He stated the Respondent's "company policy" and position on matters concerning this case. Included with his affidavit were relevant corporate documents. Attorney Zellinger signed the cover letter transmitting the affidavit to the investigating Board agent. (G.C. Exh. 8.)

Considering the compelling evidence to the contrary, I find that Attorney Zellinger is not credible when he denies that Hakim is significantly associated with Respondent.

Employee Ruth Maye Davis testified she has observed Hakim showing strangers around the plant. She testified he "chews out" the Respondent's supervisors for shoddy work. The supervisors, in turn, have reported Hakim's displeasure in employee meetings with the admonition to improve production.

In consideration of Hakim's status with Respondent, I have also weighed the Respondent's withholding of relevant evidence. Respondent did not have Hakim or Henagan testify in support of the Company's case. They did not appear in response to the Regional Office's subpoena. Respondent did not produce evidence called for by the Government's subpoena duces tecum—part of which dealt with Hakim's supervisory and agent status. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. I find that the testimony of Hakim, Henagan, and the evidence contained in company records would have been contrary to Respondent's denials that Hakim is its supervisor and agent. *International Automated Machines*, 285 NLRB 1122, 1122-1123 (1987).

I find, that N. Edward Hakim is the president of the Respondent. I additionally find that at all times material he was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

V. ALLEGED UNFAIR LABOR PRACTICES

A. No-solicitation rule

The complaint alleges that since January 1, 1994, Respondent has maintained the following no-solicitation rule: "No solicitation allowed on company premises."

Respondent's answer denies the maintenance of the no-solicitation rule. However, in his opening statement, Respondent's counsel, Zellinger, admitted that Respondent posted,

and continued to maintain such a rule. *United States v. Blood*, 806 F.2d 1218 (4th Cir. 1986) (“A clear and unambiguous admission of fact made by a party’s attorney in an opening statement in a civil or criminal case is binding upon the party.”) Additionally, a letter to a Board agent dated August 4, 1994, and signed by Zellinger was introduced into evidence by the Government. The letter mentions a no-solicitation rule and attaches a copy that is identical to the above-quoted language. (G.C. Exh. 3.) Respondent’s brief admits: “Standing alone, without restrictions, the poster is overly broad.”

I find that the Respondent has posted and maintained the quoted no-solicitation rule in its plant as alleged. The rule by its unrestricted breadth necessarily incorporates a ban against all union solicitations. Respondent offered no evidence of any special circumstances that require this sweeping rule. I find the unlimited prohibition of union solicitation in the plant violates Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962).

B. Ruby Lee Chambers

The Government asserts that as of January 1, 1994, Respondent refused to reemploy Ruby Lee Chambers because of her union activities. Respondent denies the union motivation and argues that Chambers was not hired because (1) there was a company policy against rehiring former employees, and (2) Chambers did not keep her company employment application current. I find that the Respondent’s refusal to rehire Chambers violated the Act.

1. Background and knowledge of Chambers’ union activity

Chambers started work for Respondent in 1991 after she and other employees were transferred from working for Contract Manufacturing, an associated company. Although the company name changed, the work and supervision remained the same. Her supervisor at both companies was Artiv “Sam” Anderson. The transfer took place in approximately August 1991. In May 1992 Chambers quit work in order to assist her 16-year-old daughter raise her newborn baby. When Chambers quit she had no discussions with the Respondent about returning to work at a later time.

During Chambers’ employment, a union election campaign took place at Respondent’s plant. Chambers was a visible supporter of the Union. She wore T-shirts and badges at work which announced her union allegiance. The Company admittedly knew of Chamber’s union activities. Supervisor Anderson, although reluctant to concede this knowledge, ultimately did so when confronted with her affidavit provided to the Regional Office during the investigation. She testified that she was aware that Chambers wore union buttons at work. *Coca Cola Bottling Co.*, 226 NLRB 894, 895, 899 (1976); *Ramada Inn*, 201 NLRB 431 fn. 3, 435 fn. 5 (1973).

The Union was certified in June 1992 to represent the employees and is currently the collective-bargaining representative at the Company. Negotiations for an initial contract are ongoing. According to counsel’s statements at the hearing there are pending decertification and unit clarification petitions in this unit. Respondent cited these petitions for its reluctance to let N. Edward Hakim testify in this proceeding.

2. Chambers’ efforts to be rehired

As her grandchild was maturing satisfactorily Chambers decided to return to work. As discussed below, Respondent concedes she filed an application in November 1993. In January 1994, Chambers went to Respondent’s plant and filled out another job application. Chambers states she submitted at least one other application around June. Chambers was unclear as to whether she turned in additional applications. However, she was certain she had turned in at least two in 1994.

Chambers also telephoned and visited the plant several times between January and July to see about being rehired. She was sometimes told there were no openings. On other occasions she was told that Hiring Supervisor Anderson was busy.

Chambers testified that on one occasion when she went to the plant she was told by Supervisor Anderson to see N. Edward Hakim. She met with Hakim in his office. He said he would discuss the matter with Anderson and that she would get back to Chambers. Anderson never contacted her. Chambers stopped applying for work with Respondent in July out of frustration over the lack of response she had received. N. Edward Hakim did not testify to controvert Chambers’ version of the circumstances surrounding her conversation with him. I draw an adverse inference from Respondent’s failure to call him as a witness. I conclude that had he testified his testimony would have been contrary to Respondent’s position that Hakim never spoke to Chambers about employment.

3. Respondent’s asserted reasons for not hiring Chambers

Initially, Supervisor Anderson testified the reason Chambers was not hired was because it would have violated company policy. That policy allegedly is that, other than maternity leave, former employees are not rehired. Anderson was questioned about an exception to the rule, Mary Beth Winn. She explained that Winn had been an exceptional employee and this was the reason she was rehired. Anderson considered Chambers to be only an average worker. There is no evidence that anyone other than Chambers and Winn ever sought to be rehired by Respondent. Anderson testified that the hiring policy is written. Respondent never produced such a document in its defense. I draw an adverse inference from the failure to introduce the alleged company hiring policy and conclude from its absence that Respondent does not have such a restrictive policy against rehiring former employees.

Totally inconsistent with Respondent’s hiring policy defense was Anderson’s subsequent testimony that the reason Chambers was not hired was because she did not keep her application current. Anderson stated she found only one application in Chambers’ personnel file. The application was dated November 1993. Applications are allegedly good for only 45 days. Anderson did not remember Chambers presenting any other written applications. As noted above Chambers testified she filed at least two other applications—one in January and another in June.

Supervisor Anderson did admit that Chambers had phoned her a couple of times about returning to work. Anderson placed these conversations in February or March. She told Chambers that she would need to come in and fill out an application if she wanted employment. Anderson did not ex-

plain why she did not tell Chambers that she was ineligible for employment because of the “policy” against rehiring. To the contrary she admits inviting Chambers to file job applications on the two occasions. Equally revealing is Anderson’s response to a question asked by counsel for the General Counsel—did she know of any reason why Chambers would not have been hired if she had applied for a job in January of 1994? Anderson replied, “No I don’t.” (Tr. 156.)

Respondent had a clear need to hire employees. Respondent admitted that its work force of some 60 employees had very high turnover. While the Government had subpoenaed evidence of hires and hiring practices, Respondent refused to comply. However, Respondent had provided a summary list of hires during the investigation. (G.C. Exh. 4.) The list’s accuracy cannot be verified given the absence of the subpoenaed documents. Nonetheless the list is an admission that substantial hiring took place between January 1 and July 31, 1994. In this period Respondent admitted to hiring 27 employees. Chambers is an experienced employee whom Supervisor Anderson grudgingly conceded was at least an average worker. There was no reason offered by Respondent as to why she was not a welcome addition to its high turnover work force.

In November 1994, despite the “policy” against rehiring and her alleged lack of a current application, Chambers unexpectedly received a letter from president, N. Edward Hakim. The letter offered employment and gave her 5 days to respond. Chambers went to the plant with the letter. No one there seemed to know what to do with her and said they knew nothing of the job offer. Anderson took Chambers to Hakim’s office but he was not in. Chambers waited at the plant for a resolution of the matter. Later in the day she was finally told she could go to work. Chambers remains employed by the Respondent.

Chambers was a credible witness, whose efforts to return to work were partially corroborated by Anderson. Chambers appeared to be recalling events to the best of her recollection and willingly answered all questions. Chambers testified that she filed at least two applications in 1994, and had talked to both Anderson and Hakim about rehire. This is consistent with her genuine desire to return to work. In contrast, Anderson was not a credible witness. Her demeanor was that of one who was seeking to embellish the Company’s defense and hide the facts. Her shifting reasons for not hiring Chambers are not credible. To the extent that Anderson’s and Chambers’ versions of the hiring efforts conflict, I credit Chambers’ version.

4. Respondent’s union animus

There is direct evidence of Respondent’s union animus. Employee Ruth Davis testified that she attended two general employee meetings in 1992. These meetings were called by the Respondent at the plant. N. Edward Hakim spoke to the employees. He told them that he did not want the Union to represent them. Hakim stated he would not give the employees a raise if the Union came in and if they did not “like it, hit the door.” Davis’ testimony was uncontroverted. She was not cross-examined by Respondent and Hakim did not testify.

The Board will also consider a supervisor’s history of union animus. *Southern Maryland Hospital Center*, 288 NLRB 481 fn. 2 (1988). This assessment is made without

limiting evidence of animus to the immediate employer. *NLRB v. Hale Container Line*, 943 F.2d 394, 398–399 (4th Cir. 1991); *Crystal Springs Shirt Corp.*, 229 NLRB 4, 8 (1977).

Counsel for the General Counsel offers as additional evidence of Respondent’s union animus the fact that Hakim, through associated companies, has been adjudicated as committing unfair labor practices. *Mini-Togs, Inc.*, 304 NLRB 644 (1991), enf. as modified 980 F.2d 1027 (5th Cir. 1993). Although the case was enforced in 1993, the events giving rise to the court’s decision occurred in 1988. In *Mini-Togs* the company was found guilty of 8(a)(1) violations consisting of (1) threatening employees with layoff, or plant closure if they selected the union; (2) telling employees that other employees had been discharged because of their union activities; (3) imposing an overly broad no-solicitation rule; (4) unlawfully interrogating employees; and (5) soliciting employees to withdraw their union authorization cards. In addition, *Mini-Togs*, whose president was Ed Hakim, was found to have unlawfully discharged eight employees because of their union activities. The court of appeals noted that the union activities of some of the discriminatees were minimal. One of the discharges resulted from merely signing a union authorization card. Another was precipitated by a single instance of distributing a union flyer. The reasons given by the company for the discharges were found to be pretextual. The court specifically noted the “fierce anti-union sentiment of the company.” I find that the evidence of N. Edward Hakim’s prior unfair labor practices as determined by the Board and the Fifth Circuit Court of Appeals is additional relevant evidence of Respondent’s union animus.⁵

Counsel for the General Counsel and the Charging Party have cited other litigation against N. Edward Hakim and associated companies in support of a showing of union animus. There are currently pending the following cases:

1. A petition for adjudication in civil contempt against Monroe Manufacturing et al., and N. Edward Hakim, personally (Fifth Circuit Court of Appeals, No. 91-5057, dated January 12, 1995).

2. A 10(j) petition for injunctive relief filed against Monroe Manufacturing et al., and naming therein N. Edward Hakim as president, filed in the United States District Court for the Western District of Louisiana (dated February 27, 1995).

3. Numerous unfair labor practice charges that have been heard by Administrative Law Judge George F. McInerny, which are currently pending decision. (Case 15-CA-11539-2 et al.); and,

4. Several unfair labor practice cases scheduled for hearing on May 8, 1995 (Case 15-CA-12523 et al.).

As these actions have not been decided, I decline to consider them as evidence of animus or for any other purpose.

⁵ At the hearing Respondent’s Counsel Zellinger moved to strike counsel for the General Counsel’s opening statement because it made reference to other companies with which Hakim was associated. I reserved ruling on the motion in order to hear the evidence. Based on the record as a whole I find that the Government’s opening statement was proper. I, therefore, deny the Respondent’s motion to strike counsel for the General Counsel’s opening statement.

5. Conclusions as to Chambers

General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee[s] protected activities." *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

The General Counsel has met his burden of establishing a prima facie case of a discriminatory refusal to rehire Chambers based on her union activity. *Champion Rivet Co.*, 314 NLRB 1097 (1994). The Respondent has elected to leave the record substantially vacant of testimony and evidence supportive of its justification for not hiring Chambers. *Adair Standish Corp.*, 290 NLRB 317, 318-319 (1988). (Respondent did not meet its *Wright Line* burden, in part, because it failed to produce relevant personnel and business records.)

Furthermore, Respondent has provided shifting reasons for not hiring Chambers:

1. It would violate policy to hire a former employee.
2. Chambers failed to fill out applications.
3. There were no jobs available—a reason I credit as having been told to Chambers when she asked about work.

These diverse reasons are found to be pretextual. I infer that because of the false reasons advanced for not hiring Chambers, there was another motive which the Company wished to conceal. I conclude that reason was Chambers' known support for the Union. *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966). I find that such denial of employment violates Section 8(a)(3) of the Act. Thus, Chambers was discriminatorily denied employment as of January 10 (the date the first employee was hired in 1994 (G.C. Exh. 4), until July 31, 1994.⁶

⁶I note an argument might be made that the discrimination against Chambers extended beyond July to her hire date in November 1994. However, I inquired of counsel for the General Counsel about his opening statement representation that the period of discrimination

CONCLUSIONS OF LAW

1. By discriminatorily refusing to hire Ruby Lee Chambers from January 10, 1994, through July 31, 1994, because of her support of the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By maintaining its broad no-solicitation rule the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to rehire employee Ruby Lee Chambers, from January 10, 1994, until July 31, 1994, it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Packaging Techniques, Inc., Monroe, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire any employee for supporting Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board, or any other union.

(b) Maintaining an invalid no-solicitation rule.

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

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

(a) Make Ruby Lee Chambers whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

ended in July. He stated that Chambers lost interest in following up on her efforts after that date. The Respondent was not put on notice as to any other theory. The matter of futility beyond the July date was not fully litigated. Thus, I have determined the dates of discrimination to be as set forth above. Counsel for the General Counsel's brief urges that the backpay period start with Chambers' November 22, 1993 application. Because the charge was filed on July 1, 1994, the November commencement date is rejected as it would precede the Act's 10(b) limitation period.

⁷If 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.

(c) Post at its facility in Monroe, Louisiana, copies of the attached notice marked "Appendix"⁸ copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative. These shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to rehire or otherwise discriminate against any of you for supporting Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board, or any other union.

WE WILL NOT tell you that you cannot solicit in support of the Union on company premises.

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

WE WILL make Ruby Lee Chambers whole for any loss of earnings and other benefits resulting from our refusal to reemploy her between January 10, 1994, and July 31, 1994, less any net interim earnings, plus interest.

PACKAGING TECHNIQUES, INC.