

D. L. Baker, Inc., t/a Baker Electric and Local Union No. 26, International Brotherhood of Electrical Workers. Cases 5-CA-24131 and 5-CA-24190

May 8, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On December 21, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² to modify his remedy, and to adopt the recommended Order.

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

In sec. II,B,7, par. 11, of his decision, the judge states that Sheriff testified about events in "December 1993." The correct date is "December 1976." In addition, various references in the decision to "Cheese Factory" should read "Cheesecake Factory." These inadvertent errors do not affect our decision.

² For the reasons stated by the judge, we find that the Respondent violated Sec. 8(a)(3) and (1) by terminating employee Michael Tangy. We reject the Respondent's argument that under *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625, 628-629 (8th Cir. 1994), cert. granted 115 S.Ct. 933 (Jan. 23, 1995), Tangy is not a bona fide employee entitled to the protections of the Act. In *Town & Country*, the Eighth Circuit reversed the Board and found that certain applicants for employment were not bona fide "employees" because they were: (1) encouraged by the union to apply with and to organize the employer's employees; (2) subsidized by the union; and, most importantly, (3) were subject to the union's salting resolution requiring them, among other things, to leave the employer on the union's request. Here, however, Tangy secured his own employment with the Respondent and, thereafter, was contacted by the Union about organizing the Respondent's employees. In addition, Tangy was not paid by the Union and there is no evidence of a broad salting resolution in effect, similar to that in *Town & Country*. Accordingly, we find that *Town & Country Electric, Inc. v. NLRB* is not applicable.

We also reject the Respondent's argument that under *James Luterbach Construction Co.*, 315 NLRB 976 (1994), it is not bound to the current NECA-Union Inside Wireman master agreement because it only committed itself to the agreement in effect when it signed Letter of Assent-A. In *Luterbach*, the Board made clear that "there can be cases where the employer has expressly given continuing consent to bargain a successor contract on a multiemployer

The Respondent excepts to the judge's finding that it is bound by the October 29, 1976 Letter of Assent-A, arguing that the Letter of Assent-A was signed by "D. L. Baker, Elec. Contractor," rather than by the Respondent, "D. L. Baker, Inc." We agree with the judge's findings and rely particularly on the following facts.

When Daniel Baker began his electrical business in 1976 he apparently began operations under the name D. L. Baker, Electrical Contractor. In July 1976, however, Baker incorporated his business as D. L. Baker, Inc., listing his wife, Holly Baker, as president in the articles of incorporation.

Although Baker continued, at least occasionally, to advertise his business as D. L. Baker, Electrical Contractor, there is no evidence that after July 1976 he operated in any legal form other than Respondent corporation. There is also no evidence or claim that Holly Baker served as president of any other company.

On October 29, 1976, Daniel Baker agreed to execute the Letter of Assent-A, and Holly Baker signed it and the benefit fund agreement as president. Although "D. L. Baker, Electrical Contractor" was listed as the employing entity on the Letter of Assent-A,³ the Bakers did not claim that they operated different legal entities, or that Holly Baker was committing Daniel Baker, individually, rather than the Respondent corporation, to the Union's master agreement. Moreover, when the Union contacted Daniel Baker in 1976 and early 1977 to determine whether he needed referrals from the Union's hiring hall, Baker did not claim that the Letter of Assent-A did not bind the Respondent. Rather, he promised to use the Union's hiring hall when and if he needed electricians. Finally, in his pre-hearing affidavit, Baker indicated that the Letter of Assent-A bound the Respondent, stating that "My ex-wife who was the president of the *company at the time*, had signed the letter of assent A in 1976." (Emphasis added.)

Accordingly, on these bases and those found by the judge, we reject the Respondent's argument that it is not a party to, or bound by, the Letter of Assent-A and benefit fund agreement.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged employee Michael

basis." Id. at fn. 11, citing *Kephart Plumbing*, 285 NLRB 612 (1987); *Reliable Electric Co.*, 286 NLRB 834, 836 (1987). Here, as in *Reliable Electric*, the Respondent affirmatively bound itself to successor agreements, including the current master contract, by the express terms of the Letter of Assent-A.

³ No company name was listed on the benefit fund agreement.

Tangy, will be ordered to offer him reinstatement and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of Tangy's discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the 8(a)(5) and (1) violations, we shall order the Respondent to comply with the exclusive hiring hall provisions and other terms and conditions of employment in the current NECA-Union Inside Wireman master agreement, and to offer full and immediate employment to those individuals on the Union's out-of-work list who, on and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994).⁴ In addition, we shall order the Respondent, for the period beginning August 7, 1993, to make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for any losses suffered as a result of its failure to abide by the applicable NECA-Union Inside Wireman master agreement as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993), and *Williams Pipeline Co.*, 315 NLRB 630 (1994). We shall further order the Respondent to make whole these employees and individuals by making all required fringe benefit contributions that have not been made since August 7, 1993, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),⁵ and by reimbursing the employees and individuals for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, above.⁶

⁴For the reasons stated in the concurring opinion in *J. E. Brown*, above, Member Cohen would not grant this general reinstatement order.

⁵To the extent that an employee or individual who is entitled to relief, as described above, has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's contributions during the period since August 7, 1993, the Respondent will reimburse the employee or individual, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. *Donovan & Associates*, 316 NLRB No. 34 fn. 2 (Jan. 27, 1995).

⁶Member Browning, based on the judge's findings that the Respondent raised several frivolous defenses, and distorted and misrepresented the evidence in its brief to the judge, would issue a notice to show cause why the Board should not order the Respondent

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, D. L. Baker, Inc., t/a Baker Electric, Vienna, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

to pay the litigation expenses of the General Counsel and the Charging Party. See *Tiidee Products, Inc.*, 194 NLRB 1234, 1236-1237 (1972).

Dean L. Burrell and Nathan W. Albright, Esqs., for the General Counsel.

J. Raymond Sparrow Jr., Esq. (Shumate, Kraftson & Sparrow), of Reston, Virginia, for the Respondent.

Brian A. Powers, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Arlington, Virginia, on October 3-4, 1994. A charge against D. L. Baker, Inc., t/a Baker Electric (the Respondent or Company) was filed in Case 5-CA-24131 on December 27, 1993¹ and in Case 5-CA-24190 on January 31, 1994 (amended Feb. 25). Complaints were issued February 7 and March 17, 1994, and consolidated May 19, 1994.

The Company, operating as a nonunion electrical contractor, hired both union and nonunion electricians. On December 1 union employee Michael Tangy met at lunch with several nonunion electricians and campaigned for the Union in the presence of Foreman Jeffrey Cummings. Tangy told the employees that if they were interested in the benefits of union membership to meet him at his truck at quitting time for more information.

After working until 3 p.m., Tangy met two of the electricians at his truck and gave each of them an authorization card and a union contact book. Cummings came up, "out of breath," and said he was glad that he caught Tangy to save Tangy a ride in the next morning. As Tangy credibly testified, Cummings explained that during his daily reports to President/Owner Daniel L. Baker, "he had inadvertently mentioned our lunchtime conversation [about the Union] and that the owner became furious and directed him to tell me to find another job."

Soon after Tangy's discharge the Union found, in its dormant files of about 300 inactive contractors, Section 8(f) prehire agreements that Baker had failed to honor.

The primary issues are whether the Company, (a) unlawfully discharged Tangy for supporting the Union, (b) coerced employees by interrogating them and informing them that Tangy was discharged for union activity, and (c) unlawfully refused to recognize the Union and failed and refused to honor the 8(f) prehire agreements in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

¹All dates are in 1993 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged as an electrical contractor in the construction industry from its office in Vienna, Virginia. It admits in a questionnaire on commerce dated January 27, 1994 (G.C. Exh. 3), that in the last 12 months its gross amount of purchases of materials or services directly from outside the State exceeded \$50,000 and its gross revenue from all sales or performance of services equaled or exceeded a million dollars. I find that it is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act and that the Union, Local Union No. 12, International Brotherhood of Electrical Workers, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Discharge of Michael Tangy

1. Campaigning for the Union

Michael Tangy had been a member of the Union for 16 years and had been granted journeyman electrician licenses in Virginia, District of Columbia, and Maryland. During a shortage of union work, he had been employed on several nonunion jobs and had experience performing school renovation work. (Tr. 20, 55; G.C. Exh. 5.)

In early September the Company employed him at \$13 an hour (substantially below the Union's \$21.45 rate) to install conduit and lights in the Company's school work in Fairfax County. (Tr. 21, 58-59; G.C. Exhs. 5, 16 p. 12.) President Baker, who employed both union and nonunion electricians, disclaimed any discrimination in hiring employees (Tr. 166, 233-235).

Tangy worked at the West Springfield Elementary School about 3 weeks (Tr. 21), until he was needed at the Weyanoke Elementary School where the work was behind schedule. Baker transferred him to Weyanoke "to assist the job being run and hopefully brought back onto schedule" (Tr. 218). Baker admitted at the trial that Foreman Cummings later told him that Cummings felt that Tangy was "essential to me because he knows more about the job than anyone else here" (Tr. 222).

In early November Union Organizer Charles Graham talked to Tangy at work about organizing the nonunion electricians and invited him to attend an organizing class at the union hall. Tangy took the course and began campaigning on the job to get union support. He concealed his union activity from the Company until December 1, when he invited several nonunion employees to meet with him at the 12 to 12:30 lunch break for more information about the Union. (Tr. 22-27, 46-48, 67-70, 174-178.)

Tangy proceeded with the meeting about 12:10 p.m., even though Foreman Cummings had come into the room by then (Tr. 27-28, 48, 84-85).

With Cummings listening, Tangy told the electricians present that he had talked to some union officials who were interested in organizing them. He described union wages and schooling, medical, and journeyman-upgrade benefits. Cummings spoke up and said he had worked 23 years straight for one nonunion contractor and "never missed a day," whereas "his experience with unions" was that union journeymen "were usually out of work a lot" and unions "don't offer everything that they promise." (Tr. 26, 28-29.)

Tangy responded that union companies "were starting to get their work back." He argued that at his age, 40, "I'm more productive due to my experience being in the trade that long, but I have less to show for it as far as wages and benefits. . . . I'm getting along in life and I'm looking at more things that I want to have at the end of my working career like a pension and some things to go along with it like the schooling." He added that if the employees were interested in the benefits of union membership, more information about the Union was in the union contact book. They could meet him at his truck at quitting time, look at the book, and ask him questions. (Tr. 29, 49, 87; G.C. Exh. 6.)

The electricians worked until 3 p.m., when Tangy met two of them at his truck in the parking lot. He gave each of them an authorization card to sign and a contact book. (Tr. 30-31, 86.)

2. His discharge

The two electricians at Tangy's truck on December 1 were looking at the contact books and signing the authorization cards, as Tangy further credibly testified, when Foreman Cummings came up, "out of breath," and "said that he was glad that he caught me to save me a ride in for the next day." Tangy asked what he meant and Cummings said that during his daily reports to Owner Baker (over the telephone), "he had inadvertently mentioned [his and Tangy's] lunch-time conversation and that the owner became furious and directed him to tell me to find another job"—meaning that "I was fired." (Tr. 31.)

Tangy responded that "it doesn't make any sense to me." Cummings explained that "the owner didn't want any part of [union talk] on his job" and that Cummings "wasn't really crazy about unions either." Cummings said he was "sorry that it had happened, and he wished me good luck," and that was it. (Tr. 32.)

The next morning, December 2, as Organizer Graham credibly testified (Tr. 179), he received a telephone call from Tangy who

said he got fired yesterday for handing out union literature and talking to the guys at lunchtime.

Q. Did he go into any further detail than that?

A. No, he just said that the foreman came out and said that he had called up Baker on the phone and told Baker that [Tangy] was talking about the Union and Baker said to get rid of him.

Both Tangy and Graham, by their demeanor on the stand, impressed me favorably as being truthful witnesses, trying to recall accurately what had happened.

3. Fabricated defense

President Daniel L. Baker clearly made false statements in his January 27, 1994 pretrial affidavit, given in the presence of the company counsel (G.C. Exh. 19; Tr. 238). Baker swore in paragraph 10, page 3, of the affidavit:

Before we fired Tangy, I had no knowledge that he may have engaged in any type of union related activity. Cummings never said anything to me about Tangy making any comments about IBEW Local 26.

To the contrary, belying Baker's purported lack of knowledge of Tangy's union activity, Foreman Cummings admitted at the trial (Tr. 136-138):

Q. (By Mr. Burrell): And you were present at lunch on December 1, 1993 when Mr. Tangy was talking about the union; is that correct?

A. Yes.

. . . .

Q. And later that day you called Mr. Dan Baker; is that correct?

A. Yes, sir.

. . . .

Q. And Mr. Baker wanted to know who was talking about the union on the job; is that correct?

A. Yes, sir.

Q. And you did not want to tell Mr. Baker who was talking about the union; is that correct?

A. Yes, sir.

. . . .

Q. Mr. Baker—he asked you again and you told him that it was Mike Tangy; is that correct?

A. Yes.

Q. And you told Mr. Baker during that conversation that Tangy had been talking to the employees about the union; is that correct?

A. Yes, sir.

On further examination, however, Cummings appeared determined to avoid admitting that Baker told him to fire Tangy.

When *first* asked if Baker "told you to fire Mr. Tangy," Cummings claimed (Tr. 142) that Baker said, "I thought you fired him two weeks ago." When asked a *second* time, Cummings quoted Baker as saying (Tr. 143), "Well, if you took care of that we wouldn't have this problem." When Cummings gave an evasive answer the *third* time, repeating, "if I had taken care of it" (Tr. 143), I asked the witness, "Could you answer the question directly, please?" When he evaded the question the *sixth* and *ninth* times, I asked both times if he would please answer the question directly. (Tr. 144-145.)

I finally pointed out, "We're not making much progress if you try to evade the question." Then, the *10th* time, he answered, "Yes, sir" to whether he was "given a directive to fire Mr. Tangy to take care of it." He admitted that he fired Tangy "in a matter of minutes" after talking to Baker and that he had to run out to the parking lot "to catch him." (Tr. 145-146.)

Baker, in turn, gave testimony that belies Cummings' claim that Baker told him on December 1, "I thought you fired him two weeks ago," and "Well, if you took care of

[firing Tangy] that we wouldn't have this problem." In doing so, however, Baker clearly gave fabricated testimony.

Baker testified that Tangy had taken too long to install, as an "extra," a security switch about the third week in November. Baker claimed that Foreman Cummings had written out a ticket on it and that the school board "refused to pay for it because of the amount of hours that were involved in it." Baker claimed that he then (about the third week in November) told Cummings to "get rid" of Tangy, but Cummings said that Tangy "is still in the library extension" and "knows more about what is going on there than anybody I have on the job." Baker further claimed that Cummings asked, "can I keep him *through the extension* [emphasis added]?" and Baker answered, "Fine." (Tr. 225-226.)

Similarly on cross-examination, Baker claimed that yes, he made the decision to fire Tangy at the time of the security door device incident, but that Cummings told him, "No, I want to wait until the . . . *library extension* [emphasis added] is complete" (Tr. 239).

I note that in his pretrial affidavit (G.C. Exh. 19 p. 3) Baker claimed that Cummings wanted to keep Tangy until the completion of *the library* and Baker agreed that he could keep Tangy until *the library* was finished. I also note that at one point at the trial (Tr. 239), Baker falsely claimed that when Cummings telephoned him on December 1, he told Cummings, "Fire him, *the library* [emphasis added] is complete."

Obviously, if this testimony were true, Baker would not have told Cummings on December 1 that "I thought you fired [Tangy] two weeks ago."

Baker further claimed that on the morning of December 1 (before the lunchtime meeting in which Tangy campaigned for the Union), Baker and Cummings "talked about the library extension drawing to an end, as far as the rough-in stages of it," and they decided "that was the day to let [Tangy] loose, to let him go": yes, "Go ahead and fire him" (Tr. 226-228). Thus, according to this testimony, the decision to "let him go" was made that morning—not shortly before quitting time that afternoon as Cummings admitted. (The Union argues in its brief, at 37, that "Baker and Cummings could not even get their own stories straight.")

In fact, as the evidence developed, (a) the bill for installation of the security switch was not sent until December 16 (a month after Tangy installed the security switch on November 16 and over 2 weeks after Tangy's summary discharge), (b) Baker admitted that the Company was not notified of the refusal to pay until June 1994 (months after the discharge), and (c) on December 1 there was much remaining work to be done, both in the library and the library extension, as well as a shortage of electricians on the project (G.C. Exh. 17, pp. 21-24, G.C. Exh. 18; Tr. 33-36, 85-86, 241-251, 270-271, 278).

I note that although Baker testified that Cummings informed him it took Tangy 6 or 7 hours to install the security switch, the Company in December sent a bill that charged for "Labor: Foreman . . . 11 hours @ 38.50 ea . . . \$423.50," plus "Materials . . . \$65," totaling \$488.50 and rejected as a "ridiculous bill" (Tr. 255, 257-261, 270-271; G.C. Exh. 20). I also note that Cummings claimed that at the time of the incident, Baker screamed, "I can only bill an hour, hour and a half for that (security-switch) ticket" (Tr. 153).

Tangy credibly testified that the reason for the extra time required to install the door security switch in the completed area of the library was duct work in the way, above the door, concealed by the ceiling tile that was already in place. He had to knock out cinder block to reach the source of the circuit, and the cleanup took him over an hour. (Tr. 40–42.)

Despite the Company's claim that Baker wanted to get rid of Tangy when he installed the security switch, Tangy was not given any warning of discipline or discharge (Tr. 51–53). Cummings admitted (Tr. 153) that he did not "discuss with Mr. Tangy the performance relating to this item."

The only warning Tangy received during his employment at the Company was an oral one by Baker in early November, when Tangy decided—without prior clearance by Foreman Cummings—to place an outlet on a different circuit, with additional parts from the material storage area. After Cummings made the assignment, Tangy learned that the assigned circuit would be overloaded when a large toaster for high-volume school lunches was used in the kitchen. He made the change to comply with the electrical code. (Tr. 37–40, 51–53, 79.) I discredit Baker's claim that Tangy did not mention an overload and "the only thing that Mr. Tangy said is that he wandered all over the school looking for materials" (Tr. 223).

I also discredit Cummings' claim that Tangy stated at the December 1 lunchtime meeting that he was "thinking about" taking a union job that night (Tr. 141) and that when Cummings fired him later that afternoon in the parking lot, Tangy said, "Don't worry about it. I got a job" (Tr. 156–157). Cummings admitted that there is no mention in his pretrial affidavit about Tangy having taken a union job (Tr. 160) and Tangy credibly denied that anything was said about his having another job (Tr. 284).

By their demeanor on the stand, both Owner Baker and Foreman Cummings impressed me as being willing to give any testimony that might appear plausible to support the Company's cause.

After considering the grossly conflicting testimony of Baker and Cummings, Baker's pretrial affidavit, and all the evidence, I find that the Company fabricated the defense that it had already decided to discharge Tangy before the October 1 lunchtime meeting.

4. Concluding findings

The Company contends in its brief (at 54) that the evidence "overwhelmingly establishes" that it discharged Tangy for his "poor performance"—even though it is undisputed that Foreman Cummings made no mention of poor performance when summarily discharging Tangy (Tr. 50).

In making this contention, the Company disregards Tangy's credited testimony that Foreman Cummings admitted President Baker's discriminatory motivation in directing Cummings to discharge Tangy on December 1 for discussing the Union earlier that day at the lunchtime meeting. It ignores the gross conflicts in Baker's and Cummings' testimony, purporting to prove that the decision to discharge Tangy had already been made before the meeting. It also ignores Tangy's credited testimony about the problems that arose on the job. It relies instead on the less trustworthy versions given by Baker and Cummings.

Particularly in view of Foreman Cummings' admission of discriminatory motivation, I find that the General Counsel

has made a prima facie showing that Tangy's organizing for the Union at the December 1 lunchtime meeting was a motivating factor in the Company's decision to summarily discharge him at quitting time that same day. *Wright Line*, 251 NLRB 1083 (1980).

I further find that the Company has failed to meet its burden of proof that it would have discharged Tangy in the absence of his union support. Based on Tangy's credited testimony, I agree with the Union that Tangy was a "thorough and conscientious worker," who reacted in a reasonable fashion to problems on the job that required initiative to do the job right and within the requirements of the electrical code, and that "but for his union activity, Tangy never would have been fired."

I therefore find that the Company discriminatorily discharged Michael Tangy on December 1, 1993, for supporting the Union, in violation of Section 8(a)(3) and (1) of the Act.

B. Coercive Conduct

Two nonunion electricians, Earl Jewel and Russell St. Claire (Tr. 30–31), were present on December 1 when Foreman Cummings summarily discharged Tangy, telling him that President Baker had become furious when told that Tangy had talked about the Union earlier that day at the lunch break and had directed Cummings to discharge him. The admission of that discriminatory reason for discharging Tangy undoubtedly tended to coerce the two nonunion employees in the exercise their rights under Section 7 of the Act.

I therefore find, as alleged, that the Company coerced employees by informing them that Tangy was discharged because of his union-related activity, violating Section 8(a)(1).

Cummings admitted that later that day or the following day, when most of the employees did not want to talk about the Union or Tangy's firing, he asked employees if Tangy had talked to them about the Union. He also admitted that he told them "that they ought to think about it." (Tr. 138, 157.) I find it clear that this interrogation, in the context of the admitted discriminatory discharge of Tangy for supporting the Union, likewise tended to be coercive.

I therefore find, as alleged, that the Company coercively interrogated employees about whether they had been approached to join the Union, violating Section 8(a)(1).

C. Failure to Honor 8(f) Prehire Agreements

1. Commitment to become union contractor

Shortly after the Company discharged Michael Tangy on December 1, the Union discovered that Daniel L. Baker had previously committed himself in 8(f) prehire agreements to become a union contractor, but had failed to abide by the commitment.

Business Manager Cecil Satterfield had asked Organizer Graham (a business representative whose official title in the Union is assistant business manager/organizer) to go through the dormant files of about 300 inactive contractors. At the time, the Union had about 180 active contractors in its jurisdiction, which covers 27 counties in Virginia, the District of Columbia, 5 counties in Maryland, and 3 counties in West Virginia. (Tr. 180–182, 188, 190.)

As Graham began checking the inactive files, he came across the name of D. L. Baker. In Baker's file he found the

prehire agreements, a "Letter of Assent-A" and a "Benefit Fund Agreement," both signed on October 29, 1976 (Tr. 181; G.C. Exhs. 8, 9).

Beginning in 1965, Baker had worked as a nonmember of the Union until 1967, when he obtained his union membership. As he testified, "I worked for E. C. Ernst [Electric Co., a union contractor] for the period of 11 years during that time. In 1976 I went out on my own, where I am presently." (Tr. 217; R. Exh. 1.) He initially adopted the firm name of D. L. Baker Electrical Contractor, a sole proprietorship (G.C. Exh. 11).

On October 29, 1976, at the invitation of Wade Sheriff, who was then the business manager of the Local, Baker went with his wife Holly to Sheriff's office and agreed to be a union contractor. Baker said that his wife would be president of the company and take care of the books and he would do the work himself, because "he really didn't have that much work" at that time. Sheriff gave them a packet of material for review, discussed the NECA-Union agreement and referral procedure, and answered questions about the trust funds. When showing the letter of assent to them, he explained the termination provision, requiring notification of NECA and the local union 150 days prior to the current anniversary of the NECA-Union agreement. (Tr. 97-98, 100-102, 105.)

Baker asked in the October 29, 1976 meeting whether he could continue to participate (as a union member) in the health and welfare fund. Sheriff told him no, that once he hired someone, he could no longer participate in the funds "being as he was an employer"—except for a 9-month grace period. He could, however, get the International's benefits if he continued paying his union dues. (Tr. 105, 117-119.)

Neither a sole proprietor nor a corporation makes contributions to the benefit funds until "you have employees" (Tr. 106).

In this October 29, 1976 meeting, Baker misled Sheriff into believing that Baker's firm was still a sole proprietorship. When they exchanged business cards, Baker gave Sheriff a card bearing the initial firm name of D. L. Baker Electrical Contractor (Tr. 103; G.C. Exh. 11). In fact, however, his firm was no longer a sole proprietorship. The evidence shows that the business had been incorporated 3 months earlier, on July 29, 1976 (6 days after Baker's last day of work at Ernst Electric, R. Exh. 1), under the name of D. L. Baker, Incorporated. The articles of incorporation (G.C. Exh. 4) show that Holly Baker was then the president and Daniel L. Baker, the secretary-treasurer of the corporation.

I note that in an apparent effort to conceal Baker's misrepresentation that his firm was still a sole proprietorship, the Company goes outside the record in its brief (at 17). There the Company contends—without supporting evidence—that "Sheriff informed Dan Baker in October 1976 that he could no longer participate in the Union in an incorporated form of ownership" and that was the reason the letter of assent and benefit fund agreement were executed in the name of Baker's sole proprietorship. To the contrary, as found, Sheriff explained to Baker that even as a sole proprietorship, Baker could not continue participation in the Union's health and welfare plan, "being as he was an employer." Making no mention of whether Baker's firm was incorporated or not, Sheriff told Baker that he could as an individual get the International's benefits if he continued to pay his union dues. The Union did not learn until sometime after December 8,

1993, as discussed below, that Baker's firm had been incorporated.

2. Documents signed

The Company's president, Holly Baker, in Baker's presence (Tr. 99-100), signed the following two Section 8(f) prehire agreements. She signed as president, but under the firm name of D. L. Baker, Elec. Contractor—the name of the former sole proprietorship before the firm became a company named D. L. Baker, Incorporated.

The "Letter of Assent-A" (G.C. Exh. 8) authorizes the Washington, D.C. Chapter, National Electrical Contractors Association (NECA) as the employer's collective-bargaining representative for all matters pertaining to the current "Inside" labor agreement with IBEW Local 26. It specifically provides that this authorization, "in compliance with the current approved labor agreement," shall become effective October 29, 1976, and remain in effect "until terminated by the undersigned employer giving written notice" to NECA and the Local at least 150 days "prior to the then current anniversary date" of the labor agreement.

The "Benefit Fund Agreement" (G.C. Exh. 9) certifies that the "undersigned employer has examined a copy of the labor agreement" between NECA and the Local and has been furnished copies of the trust agreements of the Pension Trust Fund, the Health and Welfare Trust Fund, and the Joint Apprenticeship and Training Trust Fund. It provides that the employer "agrees to comply with and be bound by all of the terms and conditions of employment, wage and contribution rates . . . contained in or provided for" by the NECA-Union agreement and trust agreements "and all proper and approved amendments" insofar as "they are applicable under the terms" of the labor agreement. It further provides that this agreement shall be in effect from August 29, 1976 until August 31, 1978 and from "year to year until either party gives written notice to the other of a decision to terminate the agreement according to the provisions in the Letter of Assent."

Sheriff and Graham credibly testified, without objection at the trial, that NECA and the Union have negotiated successive collective-bargaining agreements from 1976 to the present. (Tr. 109, 186-188; G.C. Exhs. 10, 16.)

The current Inside Wireman Agreement between NECA and Local 26 (G.C. Exh. 16), a master agreement, provides in section 2.03 and 2.19 for exclusive recognition of the Union in an appropriate unit. It provides in section 1.01 and 1.02 that the agreement is effective from June 1, 1993 until May 31, 1997, is automatically renewed from year to year unless terminated or changed by the required notification in writing, and shall "remain in full force and effect until a conclusion is reached in the matter of proposed changes." It covers wages and working conditions and specifically provides in section 3.02 and 3.04 for the Union to be "the sole and exclusive source" of referrals, without discrimination "by reason of membership or nonmembership in the Union." It provides in articles 6-9 and 12 for contributions to the current benefit funds.

3. Promises to abide by commitment

Sheriff had at least two further conversations with Baker, the last one in January 1977. Baker said he still had not

hired anyone. Sheriff said that when Baker got ready to hire, to be sure and call him. *Baker promised that he would.* (Tr. 106–107, 130.)

It is undisputed, as Sheriff credibly testified (Tr. 130), that in the January 1977 conversation, Baker claimed that he was working as a sole proprietor. Despite this misleading claim, I find that when Baker in that conversation promised to seek referrals from the Union when he needed employees, he was making the promise on behalf of the firm, which was incorporated the year before as D. L. Baker, Inc.

I note that in Baker's January 27, 1994 pretrial affidavit, discussed below (G.C. Exh. 19 p. 4), he in effect admitted that in 1976, Holly Baker (then his wife) signed the letter of assent on behalf of the Company (without making any reference to the former sole proprietorship). He admitted: "My ex-wife, who was president of the company at the time, had signed the letter of assent A in 1976."

Meanwhile in the latter part of 1977, Baker stopped paying his union dues. The Union suspended him as a member on January 1, 1978, for failure to pay dues for 3 months. The Union notified him of the suspension and gave him an additional 3 months to pay the dues. Upon his continued failure to do so, the Union dropped his membership. (Tr. 126; R. Exh. 1.)

Neither Baker nor the Union ever terminated the letter of assent and benefit fund agreement by giving the required written notices at least 150 days "prior to the then current anniversary date" of the NECA–Union master agreement (Tr. 103, 107, 186–187).

The evidence does not reveal when Baker began hiring employees. Baker never told Sheriff (who served as business manager from 1976 to 1980 and from 1983 to 1989) that he had hired anyone, and it never came to Sheriff's attention in any way that Baker was hiring employees. Baker never asked the Union for referrals, never made contributions to the benefit funds, and never paid the union wages or applied the other terms of the NECA–Union agreement. (Tr. 12, 94, 106–108, 113–114, 185.)

The first time that Graham, who became the assistant business manager/organizer in July 1992, became familiar with Baker's firm and aware that it was hiring employees, was (as he credibly testified) around September 1993. Seeing an ad in the newspaper for electricians, Graham "called the ad." The phone was answered, "D. L. Baker." Graham then asked some unemployed union members if they were interested in seeking employment there for the purpose of organizing. They agreed, but he did not hear whether they were hired. (Tr. 173–174, 187–188.)

When Graham in December 1993 came across "D. L. Baker" in the inactive files and found the letter of assent and benefit fund agreement, he sent a letter dated December 8 to Baker at D. L. Baker Elec. Contractor (the sole proprietorship)—not knowing that 3 months before the agreements were signed in 1976, Baker had incorporated the firm. Graham attached copies of those agreements to his letter, requested compliance with the referral and trust fund provisions, and sought recognition for a "long and fruitful bargaining relationship." He received no response. He later corresponded with Baker at Baker Electric, the trading name of D. L. Baker, Inc. (G.C. Exhs. 13–15; Tr. 181–185).

4. Baker's additional false statements

President Baker made further false statements in his pretrial affidavit that he gave on January 27, 1994 (G.C. Exh. 19), in the presence of the company counsel. In addition to the above-cited false statements in the same affidavit concerning the discharge of Tangy, Baker claimed on page 4:

My ex-wife, who was president of the company at the time, had signed the letter of assent A in 1976. However, because of *some problems* that I had afterwards *getting good people from the union*, I went and talked to Wade Sheriff, the business agent back in early 1977. Based on our conversation and my complaint, I received a *letter of termination* from the IBEW in early 1977 and since 1977 I have had no union affiliation. Before I received the termination letter from the Union, I was adhering to the *union security clause*, I was doing the dues checkoff, and I was *making contributions to the benefit and pension plans*. Since 1977 I have made none of these contributions nor have I hired through the union hall. [Emphasis added.]

Baker did not repeat or support these false claims at the trial. The evidence is clear that (a) Baker did not complain to Sheriff about not getting good people (he never sought any referrals), (b) Baker did not get "a letter of termination from the IBEW in early 1977" (the letter in April 1978 merely dropped Baker's personal membership in the Union), and (c) Baker never honored the union-security clause, never made dues checkoffs, and never made contributions to the benefit and pension plans.

5. Controlling precedents

The principal issue is whether the 8(f) prehire letter of assent and benefit fund agreement are enforceable after the Company failed to honor them for a substantial number of years and hired employees without calling the Union for referrals as promised.

The General Counsel and the Union cite cases they consider controlling precedents.

In *Neosho Construction Co.*, 305 NLRB 100, 101 (1991), the employer failed for 14 years (from 1976 to 1990) to abide by its 1975 8(f) stipulation that it would honor the current master agreement and "all future master agreements for the duration of the stipulation." The employer had failed to terminate the stipulation by providing the required written notice "prior to the anniversary date." In April 1990 Assistant Business Agent Jim Fuller observed the employer's employees on a job. Then, much the same as in the present case:

When Fuller returned to the Union's office, he discovered the 1975 contract stipulation in the Union's files. Having concluded following a search of the Union's files that the stipulation had never been terminated, Fuller telephoned [Vice President Robert Becker] to request that the current master agreement be applied [to the project]. Becker told Fuller that he was unaware of the stipulation. . . .

On May 4 [1990] Becker wrote to Fuller explaining . . . that any agreement with the Union "was clearly an individual 8(f) agreement which has long expired."

After receiving Becker's letter, Fuller telephoned Becker and insisted that the [employer] was bound by the 1975 stipulation. Nevertheless, [the employer] denied that it is bound by the stipulation and has refused to apply the terms of the current master agreement.

The administrative law judge found, 305 NLRB at 103, that the employer violated Section 8(a)(1) and (5) by failing to abide by the terms of the collective-bargaining agreement and by withdrawing union recognition. The Board, 305 NLRB at 100 fn. 1, held:

In affirming the judge, we additionally rely on *Cedar Valley Corp.*, 302 NLRB 823 (1991). In *Cedar Valley* the Board adopted the judge's decision that the employer was bound to an 8(f) contract by virtue of automatic renewal clauses to which it had agreed with various unions, despite the fact that the employer had not complied with the subsequent agreements for a significant number of years.

Enforcing the Board's Decision and Order in *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1220 (8th Cir. 1992), the court held:

Cedar Valley argues that the lack of a continuous relationship between it and the complaining unions makes the [finding that Cedar Valley was bound to successive agreements between the association and the unions] tenuous. However, *we find no link between periods of inactivity among the parties and the enforceability of the agreements.* [Emphasis added.]

The Company in its brief ignores the court's decision and refers to the Board's decisions in *Neosho Construction* and *Cedar Valley* only in a footnote (at 26 fn. 56), arguing that they are inapposite. As discussed below, I do not find the argument persuasive.

I agree that these cases are controlling on the issue of whether successive 8(f) prehire agreements are enforceable despite the passage of time.

6. Multiple unfounded defenses

The Company asserts the following 10 defenses, which I find lacking in merit.

Defense 1. Violation of State Law. The Company contends in its brief (at 4–6) that the NECA-Union master agreement, providing that the Union is the exclusive collective-bargaining representative, violates Virginia's right-to-work statute, which prohibits a denial of work because of membership or nonmembership in a labor union. It cites no supporting authority and ignores the provision in the master agreement that referrals shall be made without discrimination "by reason of membership or nonmembership in the Union."

I reject the contention as frivolous.

Defense 2. All Documents Not in Evidence. After making no objection at the trial to the introduction of testimony regarding the successive master agreements and the introduction into evidence of two of the agreements (including the current one), the letter of assent, and the benefit trust agreement, the Company belatedly contends in its brief (at 7–10) that the complaint must be dismissed because all the documents are not in evidence.

To the contrary, I find that the issue is whether the October 29, 1976 8(f) prehire letter of assent and benefit fund agreement are binding on the Company, not the detailed terms of the successive master agreements and the various trust agreements provided for in those labor agreements. The current master agreement in evidence, effective from June 1, 1993 until May 31, 1997, details the current contractual benefits and the current negotiated contributions to the benefit funds.

I find that the record evidence suffices and that the documents are sufficiently identified for compliance with any order that may be issued.

Defense 3. No Board Jurisdiction. The Company contends (at 10–12) that the Board lacks jurisdiction in this case because (a) the General Counsel failed to present evidence that the Company's activities "affect" commerce and (b) the Company's admission in a questionnaire on commerce dated January 24, 1994, that in the last 12 months its direct inflow was \$50,000 and gross revenue equaled or exceeded a million dollars is insufficient.

I reject the contention as frivolous.

Defense 4. No Majority. The Company contends (at 13–14) that the General Counsel has not proved that the Union represents a majority of the employees and therefore the complaint must be dismissed. The complaint does not allege a majority which, of course, is not required for enforcement of a 8(f) prehire agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987).

I reject the contention as frivolous.

Defense 5. Wrong Respondent. As found, President Baker on October 29, 1976, misled Business Manager Sheriff into believing that Baker's firm was a sole proprietorship, when in fact the firm had been incorporated 3 months before under a different name. The Company in its brief (at 15–18) contends that the complaint must be dismissed because the letter of assent and benefit fund agreement were signed on behalf of the sole proprietorship, D. L. Baker Elec. Contractor, and not on behalf of the Company, D. L. Baker, Inc., a separate entity.

The Union did not learn the correct name of Baker's firm by the time Business Representative Graham wrote Baker on December 8, 1993, requesting compliance with the agreements. Graham sent the letter to Baker at D. L. Baker Elec. Contractor, the firm name that appears on the letter of assent and benefit fund agreement. Graham learned later that Baker's firm was trading as Baker Electric, where he sent other correspondence to Baker.

In the meantime, as further found, when Baker promised Sheriff in January 1977 to seek referrals from the Union when he needed employees, Baker made the promise on behalf of his firm, which had been incorporated on July 29, 1976. Baker misled Sheriff into believing that he was still working as a sole proprietor. Moreover, as found, Baker in effect admitted in his pretrial affidavit that the letter of assent was signed on behalf of the Company.

I find that the Company is a party to the letter of assent and benefit fund agreement.

Defense 6. Two-Year Organizing Campaign. As found, Assistant Business Manager/Organizer Graham credibly testified that the first time he became familiar with Baker's firm was in September 1993, when he called an ad in the newspaper for electricians and the phone was answered, "D. L. Baker."

As he remembered (Tr. 174), the names of volunteer organizers he sent to seek employment at the Company were John Lasley, Tommy Lynch, and Wayne Shifflet. He did not learn whether they were hired.

When a question was raised at the trial about whether these employees were hired by the Company, the parties' counsel apparently checked the employee personnel records in the courtroom, because the company counsel then stated for the record that Lasley and Shifflet were hired (Tr. 200–201).

Although the personnel records were available and not introduced, the Company has gone outside the record and attached to its brief purported copies of Lasley's and Shifflet's records. The Company argues in its brief (at 19–22) that the Union had been engaged in an extensive organizing campaign 2 years before September 1993, during which time the Union had recognized the Company as a nonunion contractor, "not bound by the alleged series of collective bargaining agreements." It bases its argument on the fact that the purported copy of Lasley's record shows that Lasley started work on September 25, 1991.

There is, of course, no evidence that Graham sent Lasley as a volunteer organizer to apply for employment in 1991. Graham did not become an organizer for the Union until July 1992, 10 months after Lasley was hired (Tr. 173, 182). Neither is there any evidence that Graham sent Shifflet as a volunteer organizer before September 1993. According to Shifflet's purported personnel record, he was hired on October 15, 1992—over a year after Lasley was hired. He was terminated January 5, 1993, about 8 months before Graham credibly testified that he asked unemployed union members if they wanted to seek employment at Baker's firm. There is no indication that the Union was engaging in "an extensive organizing campaign," or any organizing campaign, at the Company before September 1993.

I reject the Company's contention that the Union had engaged in a 2-year "extensive organizing campaign" at the Company.

(Contrary to the urging of the General Counsel and the Union, I find no necessity to strike the improperly filed attachment to the Company's brief.)

Defense 7. Inconsistent Conduct. The Company contends in its brief (at 19–20) that the Union's subsequent organizing efforts in 1994 and its reference to Baker Electric (R. Exh. 2) as a nonunion shop (after Baker failed to respond to Graham's December 8, 1993 letter seeking recognition and compliance with the 1976 letter of assent and benefit fund agreement), "are wholly inconsistent with the Union's allegation that [the Company] was already bound by a collective bargaining agreement."

I find, instead, that the Union's conduct merely reflects an understanding that Baker had been operating as a nonunion contractor, that Baker was refusing to honor his 1976 commitment to be a union contractor, and that it appeared appropriate under these circumstances to organize Baker's employees.

Defense 8. No Proof of Trust Agreements. The Company contends in its brief (at 27–28) that the Union and the General Counsel have failed to prove that the initial benefit fund agreements existed, what the terms of those benefit fund agreements were, and that properly approved amendments to them exist.

To the contrary, I find that the issue is whether the October 29, 1976 letter of assent and benefit fund agreement are binding on the Company, not the detailed terms of the past or present trust agreements. If the Company is found to be bound by the letter of assent and benefit fund agreement, any unresolved disputes over the terms of the current trust agreements could be resolved in a compliance proceeding.

Defense 9. No Proof of Binding Contracts. The Company contends in its brief (at 28–30) that the Union and General Counsel have failed to meet their burden of persuasion that the letter of assent and the series of collective-bargaining agreements are currently in effect and binding on Baker, Inc. I find that this is essentially a repeat of Defense 2, that all the documents must be placed in evidence. I do not agree.

In making this contention, the Company engages in an apparently deliberate distortion. In the brief (at 30) the Company makes the unequivocal statement: "Mr. Sheriff, serving as a Union business manager for almost 17 years, also testified on direct examination that it was a practice for contractors to sign more than one Letter of Assent." It cites lines 5–7 on page 112 of the transcript, ignoring the preceding question and answer and the three following questions and answers, which clearly show that the witness misunderstood the question (Tr. 111–112):

Q. If a contractor signs a Letter of Assent in 1976, is it necessary or is it your practice to have that contractor sign additional Letter of Assent as the years go on?

A. No, he does not, because that continues on after one agreement to the next agreement. It's not necessary to sign every time the agreement changes.

Q. And, in fact, is it your practice to request a contractor to sign more than the initial Letter of Assent?

A. Yes. [Emphasis added.]

Q. Let me make sure . . . you understand my question. In other words, is it your practice once the initial Letter of Assent is signed is that the only Letter of Assent you require?

A. Yes.

Q. Okay. So you don't ask them to sign additional ones?

A. Oh, no. Not—you mean, like year after year?

Q. Yes.

A. No, no, you sign the first one and then that binds you. It isn't necessary to sign any future ones.

Defense 10. No Compliance with Grievance Procedure. The Company contends in its brief (at 30–31) that the Union's failure to comply with the grievance procedure in the master agreement requires dismissal of the complaint. In view, however, of the Company's continued denial that it is bound by the agreement and its obvious unwillingness to recognize the Union and follow the grievance procedure, I reject the contention as unfounded.

7. Additional defenses

a. *The Union itself terminated the agreements*

The Company contends (at 22–24) that the Union was aware that the 1976 letter of assent and the benefit fund agreement were not being complied with in the years 1976

through early 1978 and that the Union first suspended and then terminated D. L. Baker Electrical Contractor's union status (terminating the agreements). I find this contention to be a complete distortion of the evidence.

The Union was not aware, contrary to the Company's contention in its brief (at 22-23), "that the Sole Proprietorship was openly not complying with the letter of assent." To the contrary, Baker told Sheriff in January 1977 that he still had not hired anyone. The Union was not aware of any employees having been hired.

The Company's contention in its brief (at 23) is also untrue, that the Union "first suspended and then terminated the Sole Proprietorship's union status." The Company's own exhibit (R. Exh. 1) is Baker's membership card, which shows that it was Baker's personal membership that was suspended on January 4, 1978, and dropped on April 1, 1978. The reverse side of the membership card shows that the Union referred Baker to "E. C. Ernst (NIH, Bldgs. 31 and 32)" on May 22, 1967 (Tr. 126), and that Baker last worked there on July 23, 1976, and was terminated July 26, 1976, to take another job. There is no reference anywhere on the membership card to D. L. Baker Electrical Contractor, the sole proprietorship.

The Company misrepresents the evidence by contending in its brief (at 23) that Sheriff "testified that he was aware that union contributions had not been made for the first three months in 1978, that the *Sole Proprietorship* was suspended from union membership and then dropped on April 1, 1978." (Emphasis added.) The Company cites page 126, lines 2-6 of the transcript. I find it obvious that Sheriff was not referring to the sole proprietorship's failure to make contributions to the Union's benefit funds, but to Baker's failure to pay his union dues:

THE WITNESS: Okay. Dan [Baker] was suspended. That means he hadn't paid his dues for three months in 1/4/78. So he was notified that he was suspended and given an additional three months and when he didn't pay them, he was dropped in 4/1/78. Now, this is a union record [referring to Baker's membership card, R. Exh. 1].

The Company further (at 23) misrepresents the evidence by contending that "Sheriff also testified that *termination letters* [emphasis added] were sent to the Sole Proprietorship regarding the failure to make union contributions." The Union did not send any termination letters to terminate the letter of assent and benefit fund agreement. Again, the Company is referring to the January 4, 1978 suspension letter that the Union sent to "Mr. Baker" and the April 1, 1978 letter to him, dropping his union membership.

To questions asked by the company counsel on cross-examination (revealing the counsel's understanding at the trial), Sheriff answered (Tr. 127):

Q. (By Mr. Sparrow): Now, Mr. Sheriff, you testified you're aware that letters were sent to Mr. Baker regarding the failure to pay dues?

A. Yeah.

Q. And those letters were subsequent to October of 1976; is that correct?

A. Well, it happened after he went into business. [Emphasis added.]

Of course, a new employer is not required to maintain his union membership to be a union contractor.

I note that in the next sentence in the brief (at 23-24), the Company contends that "This [purported testimony by Sheriff that termination letters were sent in 1978 for failure to make union contributions] is consistent with the statement in Mr. Baker's affidavit [G.C. Exh. 19] that he received letters terminating the union status in the *late 1970s* [emphasis added]." The Company is referring to Baker's statement, "I received a letter of termination from the IBEW in *early 1977* [emphasis added]" which, as found above, is one of the false statements made in the pretrial affidavit, given in the presence of the company counsel.

Based on these misrepresentations of the evidence, the Company reaches the obviously false conclusion in its brief (at 24) that

It was the Union which terminated and treated as repudiated the union status of the Sole Proprietorship under the letter of assent and benefit fund agreement. This repudiation by the Union was done clearly, openly and unmistakably in 1978 [emphasis added] as testified by Mr. Sheriff.

The accompanying footnote 48 further distorts the evidence. In it the Company contends that Sheriff's testimony that "the Sole Proprietorship failed to make required contributions" (to the benefit funds) contradicts his testimony that Baker, Inc. had no employees. First, as found, Sheriff did not testify that the sole proprietorship failed to make required contributions to the benefit funds, because he did not know that Baker had hired any employees and because he was testifying about Baker's failure to continue paying his union dues. Second, Sheriff had not been advised that "Baker, Inc." (D. L. Baker, Inc.) was the employer. The Company then reached the obviously false conclusion in the footnote that

the Union expected the Sole Proprietorship to make contributions and when it did not, terminated its union relationship with the Sole Proprietorship. It also suggests that the Union knew that the Sole Proprietorship had employees prior to and in early 1978.

To the contrary, Sheriff credibly testified that about December 1993, about 2 months after the agreements were signed, the trust funds sent Baker the benefit forms to fill out. Sheriff called Baker and asked him if he was ready to hire anybody, and Baker said he was not. Sheriff then informed the trust funds not to send any more paperwork to Baker until Sheriff notified them that Baker had hired employees. (Tr. 106.)

I infer that if Sheriff had known that Baker had begun hiring employees, the Union would have sought to enforce the agreements then, instead of waiting until now.

I note that the Company repeats in its brief this obviously false conclusion (that the Union itself terminated the prehire agreements) and its false argument about an extensive organizing campaign for 2 years before September 1993, as unpersuasive bases for distinguishing the Board decisions in *Cedar Valley* and *Neosho Construction* (found above to be controlling precedents). The Company contends (at 26, fn. 56):

The facts here are inapposite to those set forth in those decisions. For example, it is the Union which *terminated the union relationship* here; it is the Union that testified that it had *knowledge that Baker, Inc. was overtly and openly failing to make fund contributions in 1978*; it was the Union which sent *termination letters*; and it was the Union who has engaged in *extensive organizing activities of Baker, Inc. since September 1991*. None of these facts were present in the decisions cited.

I infer that these gross misrepresentations and distortions of evidence in the brief were deliberate, and I consider them an abuse of the Board processes. The brief was signed and submitted by the company counsel, J. Raymond Sparrow Jr. The Board may want to take appropriate action to discourage such an abuse.

b. *No binding agreements*

(1) Union knowledge

The Company disputes the denials by Wade Sheriff, the former business manager, and Charles Graham, the current assistant business manager/organizer, that they had any knowledge that President Baker's firm employed employees before September 1993. That was the date, as found, when Graham called a newspaper ad for electricians and heard the phone being answered, "D. L. Baker."

The Company, however, offered no direct evidence that the Union was aware before then that Baker had employed any employees.

On surrebuttal, after the parties had rested and all the witnesses had testified, the company counsel recalled Baker to the stand and asked (Tr. 286):

Q. (By Mr. Sparrow): Mr. Baker, had there been times in the past years as D. L. Baker, Incorporated where your company has been *reported to the Union as being a nonunion contractor working on a Union project?* [Emphasis added.]

Over vigorous protests by opposing counsel, I overruled the objections and permitted the question to be answered (Tr. 286–287, 289).

Baker then claimed there were three such instances. First, in later '70s or very early 1980, "Union representatives" were brought into the National Press Building where Walter Truland was the prime electrical contractor. Second, at the Washington Cheese Factory, there were "Union representatives" out there at the jobsite where Dyna Electric was the electrical contractor. Third, at Montgomery Mall, "Union representatives" were out there. (Tr. 288–289.)

As the evidence was developed on cross-examination, in none of these instances was it shown that the Union itself was aware that employees of D. L. Baker, Inc. were on the job.

At the National Press Building, the purported "Union representatives" were an unknown person who may have been the union contractor's union steward and who may not have known "what company [Baker] was working for" (Tr. 290–291, 299–300). At the Washington Cheese Factory, Baker claimed that his foreman told him that "they" (the union representatives) had been on the job. Even if this were true, there is no evidence that "they" knew that it was Baker's

firm that was the nonunion electrical contractor (Tr. 292–293).

At Montgomery Mall, in 1984 or 1985, the purported "Union representatives" turned out to be the union contractor's general superintendent, who recognized Baker and questioned the ability of his firm to be "in the switch gear." Baker first claimed that the general superintendent, who "was in charge of the renovation of the mall," was "representing the Union" and "presented himself" as a representative of IBEW Local 26. (Tr. 293–294.) Baker next claimed that the general superintendent said that he worked "for" Local 26 (Tr. 295). I infer that the union contractor's general superintendent was more likely a union member or supporter, rather than a union representative in any official capacity, whose knowledge of Baker's presence on the job would be imputed to the Union.

I therefore find that this evidence does not prove that in past years, the Company (in the words of the company counsel) "has been reported to the Union as being a nonunion contractor on a Union project."

As further proof that the Union had knowledge that it employed employees since October 1976, the Company misrepresents the evidence by contending in its brief (at 25) that

At the hearing, there was uncontroverted testimony that Baker, Inc. had been listed in *numerous* Dodge Reports, a service which reports on construction activities in the area. The uncontroverted testimony was that there have been *five major projects* for which Baker, Inc. was identified in the Dodge Reports in the past five years. [Emphasis added, footnotes omitted.]

To the contrary, there is no evidence that the Company was listed "numerous" times or that there have been "five major projects" on which the Company was identified. The "uncontroverted testimony" consists of the following (Tr. 235–236):

Q. Mr. Baker, has your company ever been identified in Dodge Reports with respect to a project?

A. Yes, sir.

Q. On what occasions?

A. We did a restaurant called the Cheesecake Factory, which is located on Wisconsin Avenue, and the four schools that we were awarded were all in the Dodge Reports. There *may* [emphasis added] have been other occasions, other than this, but I know that those five projects were in the Dodge Report. I saw them.

Q. Okay, and those are in the last two years, is that—those projects?

A. The Cheesecake Factory has been approximately three and a half to four years, the schools were in the last two years.

There is no evidence of the dollar volume of any of these five contract. Baker later testified (Tr. 288) that Dyna Electric was the union electrical contractor on one of them, the "Cheesecake Factory" restaurant job, leaving "tenant build-out" electrical work for Baker's company to perform (evidently not a "major project" for the Company). I infer that the Weyanoke Elementary School job (from which Tangy was discharged) was one of the four school jobs. There is no evidence that the Dodge Report on any of these four

schools was published longer than the 10(b) 6-month limitation period before the February 7, 1994 service of the charge.

The evidence does not indicate that anyone in the Union checking the Dodge Reports was aware of Baker's 1976 letter of assent in the dormant files of hundreds of inactive contractors when the Cheesecake Factory job was purportedly listed about 1990, 14 years later. Sheriff was no longer the business manager. His office in the Union expired in 1989.

The Union had relied on Baker's promises and commitment that he would call the Union for referrals when he needed employees. Not having heard anything from Baker after checking back with him two or more times since the signing of the October 29, 1976 prehire agreements, the Union had placed Baker's file among the files of the many other inactive contractors. As Sheriff testified, only about 50 percent of the union members who go out on their own, as Baker did, succeed in making "a go at it" (Tr. 111). There was no reason for Sheriff to suspect that Baker was renegeing on his promises and operating nonunion.

I credit the denials of Sheriff and Graham that they had any knowledge that President Baker's firm was employing employees. I have no reason to find from the evidence (Tr. 122-123, 210-215) that the Union would necessarily be aware that any Dodge Report, which identified the Company as D. L. Baker, Baker Electric, or however it may have been listed, involved one of the contractors in the inactive files.

(2) Applicable precedents

The evidence shows that on an undisclosed date, which clearly would be more than 6 months before the February 7, 1994 service of the charge, the Company began hiring employees without called the Union for referrals and otherwise honoring the 8(f) prehire agreements. This conduct, which is alleged to be an unlawful failure and refusal to bargain, would clearly be outside the 10(b) 6-month limitation period that began on August 7, 1993.

As held in *A & L Underground*, 302 NLRB 467, 469 (1991), however, "[T]he Board's long-settled rule [is] that the [10(b) 6-month limitation] period commences only when a party has clear and unequivocal notice of a violation of the Act" and that "the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent."

In the above-cited *Neosho Construction* case, 305 NLRB 100, 101-103 (1991), during the 14 years that the employer failed to abide by its 1975 8(f) stipulation to honor the current master agreement, the employer performed as prime contractor or subcontractor on 20 jobs in the union's contract area. Eighteen of the jobs ranged in size from \$100,000 to \$2328 million in volume. "Union Agent Jacobs, who held office during all but 3 of the 14-year period involved, denied that he ever became aware that [the employer] performed any work falling under the Union's jurisdiction" until Assistant Business Agent Fuller discovered the employer's employees on a job.

The judge concluded, 305 NLRB at 103, that "it appears highly questionable whether [the employer's] prior conduct or noncompliance was sufficiently 'bald' to put [the union] on notice of its intent to repudiate the 1975 stipulation" and found a violation of Section 8(a)(1) and (5). The Board affirmed the judge's decision.

8. Concluding findings

Daniel L. Baker had worked 11 years for a union contractor—2 years as a nonmember of the Union before he joined the Union in 1967.

As he testified, "In 1976 I went out on my own, where I am presently."

He last worked for the union contractor on July 23, 1976. After that, as found, he first worked as a sole proprietorship, using a firm name of D. L. Baker Electrical Contractor. On July 29, 1976, however, he incorporated the business under the name of D. L. Baker, Inc. and used the trading name of Baker Electric.

On October 29, 1976, when he was still the only electrician performing the work, he entered into 8(f) prehire agreements with the Union, promising to be a union contractor and to call the Union for referrals when he needed to hire electricians. When doing so, he misled the Union into believing that his firm was still a sole proprietorship. His wife, who was the president of D. L. Baker, Inc., signed the agreements as president of D. L. Baker, Elec. Contractor. As found, the Company is a party to the prehire agreements.

Assuming that Baker entered into the prehire agreements in good faith, intending to become a union contractor when he began hiring electricians (although he entered into the agreements as a sole proprietor, after the business had been incorporated 3 months), he later decided not to honor the prehire agreements. He began operating as a nonunion contractor on an undisclosed date, without giving the Union and NECA the required timely notices to terminate the prehire agreements.

Under their terms these agreements, the letter of assent and benefit fund agreement, remained in effect. NECA (authorized in the letter of assent to represent Baker) and the Union continued to negotiate successive agreements, which Baker was obligated to honor.

Baker succeeded in operating nonunion without discovery by the Union until September 1993, when Organizer Graham called Baker's newspaper ad for electricians and the phone was answered, "D. L. Baker." On December 8, after Organizer Graham found the name D. L. Baker in the files of inactive contractors, he wrote Baker seeking recognition and compliance with the prehire agreements. Baker did not respond to the letter, and there is no evidence that since then he has given the required timely notices to NECA and the Union for terminating the prehire agreements.

I find that the charge in this case was timely filed under Section 10(b) of the Act. Company has failed to sustain its burden of showing that the Union was on "clear and unequivocal notice" that the Company was operating nonunion, renegeing on its commitment that when it began hiring employees, it would call the Union for referrals and operate as a union contractor, abiding by the provisions of the master agreement. I also find that the Company's conduct and non-compliance with the 8(f) prehire agreements were not sufficiently "bald" to put the Union on notice of its intent to repudiate the agreements.

I therefore find, as alleged in the complaint, that since August 7, 1993 (6 months before service of the charge on February 7, 1994), the Company has failed and refused to adhere to the terms of the 1993-1997 NECA-Union Inside Wireman master agreement, violating Section 8(a)(5) and (1) of the Act.

I also find that since December 9, 1993, when the Company failed to respond to the Union's December 8, 1993 letter, the Company has refused to recognize the Union as bargaining representative of the employees in the contractual appropriate unit (G.C. Exh. 16, sec. 2.03, 2.19), violating Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By discriminatorily discharging Michael Tangy on December 1, 1993, for supporting the Union, the Company has 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 coercively interrogating employees and informing employees that it discharged Tangy because of his union-related activity, the Company violated Section 8(a)(1).

3. By failing and refusing since August 7, 1993, to adhere to the terms of the 1993-1997 NECA-Union Inside Wireman master agreement and to comply with the hiring hall provisions, the Company violated Section 8(a)(5) and (1).

4. By refusing since December 9, 1993, to recognize the Union as the representative of the employees in an appropriate bargaining unit, the Company violated Section 8(a)(5) and (1).

REMEDY

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

The Respondent having discriminatorily discharged employee Michael Tangy, it must be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, 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).

To remedy the 8(a)(5) and (1) violations, the Respondent must be ordered (1) to comply with the exclusive hiring hall provisions and the terms and conditions of employment in the current NECA-Union Inside Wireman master agreement and (2) to offer full and immediate employment to those individuals on the Union's out of work list who on and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994).

The Respondent must also be ordered for the period beginning August 7, 1993, (3) to make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to pay contractual wage rates and fringe benefits in the current master agreement, as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993), and *Williams Pipeline Co.*, 315 NLRB 630 (1994), (4) to reimburse these employees and individuals for any expenses ensuing from its failure to make the required contributions to the benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981), and (5) to make whole the appropriate fringe benefit trust funds

for losses suffered, by making contributions to the funds to the extent that contributions would have been made on behalf of these employees and individuals if it had complied with the current master agreement, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons*, above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, D. L. Baker, Inc., t/a Baker Electric, Vienna, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local Union No. 26, International Brotherhood of Electrical Workers, or any other union.

(b) Coercively interrogating any employee about union support or union activities, or informing any employee that an employee has been discharged because of his union support.

(c) Refusing to recognize the Union and comply with the hiring hall provisions and the terms and conditions of employment in the current NECA-Union Inside Wireman master agreement.

(d) 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) Offer Michael Tangy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Offer full and immediate employment to those individuals on the Union's out of work list who on and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions in the current NECA-Union Inside Wireman master agreement.

(d) For the period beginning August 7, 1993, make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to adhere to the master agreement; reimburse them for any expenses ensuing from its failure to make the required contributions to the benefit funds; and make whole the benefit trust funds for losses

²If 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.

suffered, in the manner set forth in the remedy section of the decision.

(e) 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.

(f) Post at its current jobsites and its place of business in Vienna, Virginia, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, 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.

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

³If 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.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local Union No. 26, International Brotherhood of Electrical Workers, or any other union.

WE WILL NOT coercively question you about your union support or activities, or inform you that an employee has been discharged for supporting the Union.

WE WILL NOT refuse to recognize the Union or comply with the hiring hall provisions and the terms and conditions of employment in the NECA-Union Inside Wireman master agreement.

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

WE WILL offer Michael Tangy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL offer full and immediate employment to any individuals who would have been hired through the Union's hiring hall since August 7, 1993, and make them and our other employees whole for any losses and expenses, resulting from our refusal to honor the current master agreement with the Union, including contributions to the trust funds, plus interest.

D. L. BAKER, INC., T/A BAKER ELECTRIC